



**Kemei v Republic (Miscellaneous Criminal Application E105 of 2022)
[2024] KEHC 16098 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E105 OF 2022**

**JM NANG'EA, J
DECEMBER 17, 2024**

BETWEEN

WESLEY KEMEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was tried and convicted of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 before the Magistrate’s Court at Molo in Criminal Case File No. 302 of 2015 and sentenced to 20 years imprisonment which is the minimum sentence prescribed for the offence. He lodged an appeal with this court through Appeal File No. 138 of 2016 which appeal was dismissed. He preferred a second appeal to the Court of Appeal at Nakuru vide File No. 94 of 2019 which was marked as withdrawn by order of the court issued on 27/11/2024.
2. The applicant is now seeking sentence rehearing, complaining that minimum mandatory sentence prescribed for the offence of which he was convicted is unconstitutional. Reliance is placed on Machakos High Court case, *Philp Mueke Maingi & Others vs Republic*, in which such minimum mandatory minimum sentences prescribed for offences such as the applicant was convicted of herein were declared unconstitutional.
3. The prosecution Counsel (Ms Sang) filed written submissions. in reply arguing that the court has no jurisdiction for the reason that the Court of Appeal which is superior to this court has already pronounced itself on the applicant’s sentence. Reference is made to the cases of *Daniel Otieno Oracha vs Republic* (2019) eKLR and *John Kagunda Kariuki vs Republic* (2019) eKLR which underscore the important principle of stare decisis that prohibits courts of lower jurisdiction to set aside decisions of superior courts or even courts of the same status. By dint of this principle, therefore, this court is bereft of jurisdiction to resentence the applicant as desired or at all.



4. The Constitutional and Human Rights Court's decision in consolidated Petitions Nos. 5 and 6 of 2022 (*Ramadhan & 8 Others vs Attorney-General and Another* 2024 KEHC 1173 (KLR) (6 February 2024) (Judgement) also reached the same conclusion as in the *Philip Mueke Mainigi & Others supra* that minimum and/or mandatory sentences are unconstitutional fo fettering the court's discretion to determine an appropriate sentence based on the peculiar facts and circumstances of each case. A similar oipinion was expressed in this court's decision in *William Okungu Kittiny vs Republic* (2018) eKLR.
5. The Supreme Court in the famous Muruatetu 2 decision has, however, clarified that its earlier judgement in the Muruatetu 1 case declaring the mandatory nature of the death sentence for the offence of murder as unconstitutional only applied to murder cases. The apex court's more recent decision in Constitutional Petition No. 018 of 2023 (*Republic vs Joshua Gichuki Mwangi & Others* reiterates the position and exhorts litigants wishing to challenge laws prescribing mandatory and/or minimum sentences for offences other than murder to mount the challenge from the High Court, and if necessary escalate the dispute to the Court of Appeal and on to the Supreme Court, for a final decision to be made.. The Supreme Court's decision in the Muruatetu 1 case does not therefore apply defilement cases for the reasons given.
6. Before I pen off, it is noted that sometimes the applicant seems to argue this application as a constitutional petition challenging minimum and/or mandatory sentences in defilement cases. If this was the intention, a substantive constitutional petition ought to have been instituted. As it is, this is a Miscellaneous Criminal Application seeking review of the sentence meted out against the applicant.
7. The upshot is that the application is dismissed.

J. M. NANG'EA, JUDGE.

RULING DELIVERED THIS 17TH DAY OF DECEMBER, 2024 IN THE PRESENCE OF:

The state, Ms Sang

The Applicant, present

The Court Assistant, Lepikas

J. M. NANG'EA, JUDGE.

