



**Muthusi v Director of Public Prosecution (Criminal Petition
E049 of 2024) [2024] KEHC 15938 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL PETITION E049 OF 2024**

FR OLEL, J

DECEMBER 17, 2024

BETWEEN

JOSEPH MULWA MUTHUSI APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

A. Introduction

1. The petitioner was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual offences Act* No 3 of 2006 and after trial was sentenced to serve 20 years imprisonment. He appealed against the said conviction and sentence vide Machakos HCCR Appeal No 14 Of 2018 and the said appeal was dismissed.
2. The applicant did file this application/petition under provisions of Articles 22, 23, 27(1),(2), 52(2) (q), 159(2),(d), and 165 of *the constitution* of Kenya and sought that this Honorable court be pleased to reconsider the mandatory minimum sentence passed and further be pleased to resentence him to a lenient definite sentence, premised on rehabilitate sentence rather than retributive punishment. The application was lodged purely based on the legality of the mandatory nature of sentencing in line with the High court and Court of Appeal decisions in Machakos Petition No E017 Of 2021, Philip Mueke Maingi & Others Vrs Republic, evans Wanjala Wanyonyi Vr Republic; Cristorpher Ochieng Vrs Republic (2018) Eklr, Kisumu Cr Appeal N0 202 Of 2011 & Jared Koita Injiri Vrs Republic, Kisumu Cr Appeal No 93 Of 2014. where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.
3. The Applicant further submitted that in the Philip Mueke petition, (Justice G.V. Odunga) had also declared mandatory minimum sentence under section 8 of the sexual offenses Act, to be unconstitutional and further found that the High Court was at liberty to order for resentencing in appropriate cases. The petitioner further submitted that he has spent seven (7) years in custody and



during this period he had been able to appreciate the consequences of his action and vowed not to be of wayward misconduct again. The period served could also be deemed to be enough to rehabilitate him and he urged the court to release him unconditionally. Reliance was placed in Antony Mwema Mutisya, Machakos Misc Cr App No 60 of 2017, where (Justice G.V. Odunga) emphasized on rehabilitative sentence and the need for the court to call for the pre-sentencing report and victim impact statement before sentencing.

4. The state did not oppose this petition and stated that though re-sentencing was allowed, the court had to consider each case on its own merit and particularly look at the facts of the case before undertaking the said re-sentencing exercise.

C. Analysis of Law

Nature and scope of resentencing

Jurisdiction.

6. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the Constitution*. A further leapfrog development is found under Article 50(2)(p) of *the Constitution* 2010:

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(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

7. A similar position was taken by the High Court, in Stephen Kimathi Mutunga -v- Republic (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforce fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

8. In Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

9. Be that as it may, the Supreme Court recently in the case of Republic Vrs Joshua Gichuki Mwangi, Petition No E018 of 2023 (2024) KESE 34 (KLR) made a determination on the constitutionality of mandatory or minimum sentencing for sexual offenses and held that “Muruatetu case” did not invalidate mandatory sentences or minimum sentences in the Penal code, the Sexual offenses Act, or any other statute. Regarding the case before them, the Court of Appeal had wrongly dealt with the issue of the unconstitutionality of the minimum mandatory sentence, yet it was not an issue that had been raised by any of the parties before the said court and thus violated the principles of stare decisis.

10. The Court of Appeal had also failed to identify with precision the provisions of the sexual offenses Act, it was declaring unconstitutional, thereby leaving their declaration ambiguous, vague, and befret of specificity. The Supreme Court finally also held that though sentencing was an exercise of judicial discretion, it was parliament and not the judiciary that set the parameters of the sentencing of each crime in the statute. They proceeded to order the respondent to serve the initial sentence passed of 20 years.



D. Determination

11. In the circumstances of this case, though it is the Applicant's right to pursue the issue of re-sentencing, the finding of the Supreme Court in the case of Joshua Gichuki Mwangi (Supra) ties this court hands and the court has no option but to dismiss his Application for resentencing.
12. It is so ordered.

RULING WRITTEN, DATED, AND SIGNED AT MACHAKOS THIS 17TH DAY OF DECEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of December, 2024.

In the presence of;

Petitioner present from Kamiti Main Prison

Mang'are for Respondent

Susan/Sam - Court Assistants

