

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION NO. 69 OF 2020

TITUS KIPRUTO KIRUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged in **Eldoret CMCRC No. 2968 of 2013** and convicted of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He was then sentenced to serve life imprisonment. Aggrieved with the decision, he filed an appeal to this Court in **Eldoret High Court Criminal Appeal No. 206 of 2014**, which Appeal was however dismissed by way of the Judgment rendered by **C.W. Githua J** on 10/05/2017, which upheld the life imprisonment sentence. Undeterred, he further appealed to the Court of Appeal by way of **Criminal Appeal No. 63 of 2018**, which, too, was dismissed on 25/09/2020. The Applicant has now, by his undated Notice of Motion filed on 23/10/2020, returned to this Court seeking review of the same sentence.
2. In his Submissions, in expounding on the Supporting Affidavit, the Applicant urged that he seeks leniency under the provisions of **Articles 50(2)(p) and (q)** of the **Constitution**, and the Court of Appeal case of **Dismas Wafula Kilwake v Republic [2018] eKLR**, which had declared the mandatory nature of sentencing unconstitutional when given without considering the Appellant's mitigation. He cited several other cases. He also cited the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR**, and urged that the period spent in custody since the date of arrest be also considered. He cited **Section 333(2)** of the Criminal Procedure Code. He also submitted that he had undergone rehabilitation and had also undergone and acquired a Certificate in Motor Vehicle Mechanics, Diploma in International School of Ministry, and Certificate of Faith Gospel Ministry. He urged further that he is now 30 years old and was convicted at the age of 20 years, he was a first offender, and is remorseful.
3. On his part, Prosecution Counsel informed the Court that he would be relying entirely on the Court of Appeal decision in **Criminal Appeal No. 63 of 2018**, in which, as aforesaid, the Applicant's second Appeal was dismissed.

Determination

4. The issue that arises for determination herein is “**whether this Court should review the sentence imposed on the Applicant by the trial Court despite this Court, and the Court of Appeal, having both already dismissed his Appeals.**”
5. As aforesaid, the Applicant appealed to this Court in **Eldoret High Court Criminal Appeal No. 206 of 2014**, which was dismissed on 10/05/2017 and the sentence of life imprisonment upheld. His further appeal to the Court of Appeal in **Criminal Appeal No. 63 of 2018** was similarly dismissed on 25/09/2020.
6. In her Judgment in the High Court, **C.W. Githua J** stated the following:

“15. On sentence, the Appellant was sentenced to life imprisonment which is the only sentence prescribed by the law for the offence of defilement where the victim is eleven years of age and below. The sentence imposed on the Appellant was therefore lawful and it is hereby upheld.”

7. The Court of Appeal, on its part (**Karanja, Musinga, & Murgor JJA**), stated that:

“19. On sentence, the Appellant was sentenced to life imprisonment which is the only sentence prescribed by the law for the offence of defilement where the victim is eleven years of age and below. The sentence imposed on the Appellant was therefore lawful and it is hereby upheld.”

8. The Applicants’ appeals having already been determined by this same Court, and also by the Court of Appeal, it follows that this Court does not now have jurisdiction to entertain the Applicant again due to the principle of hierarchy of Courts set out in **Articles 164(3) (a)** as read with **Article 165 (6)** of the **Constitution**. As stipulated therein, the Court of Appeal has jurisdiction to hear appeals from the High Court and any other Court, or tribunal, as prescribed by a statute, while the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions, **but not over superior Courts**. Due to the aforesaid hierarchy, it is clear that the Applicant who had proceeded with his appeal up to the Court of Appeal, cannot now come back to this Court seeking review of the same sentence already upheld as aforesaid. This Court is clearly now ***functus officio***.
9. In regard to principle, the Court of Appeal, in the case of **Raila Odinga & 2 Others Vs. Independent Electoral and Boundaries Commission & 3 Others [2013]**, held that:

“A court is functus when it has performed all its duties in a particular case.

The purpose of the doctrine is to provide finality. Once proceedings are finally
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concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

10. In view of the foregoing, it is clear that this Court, having already pronounced itself in the Appeal, is now *functus officio* and bereft of the jurisdiction to again review the decision it had already dealt with, and which was later upheld by the Court of Appeal.

11. In any event, regarding sentence, **Section 8(2)** of the **Sexual Offences Act** provides that:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

12. **Section 8(2)** therefore prescribes only one mandatory sentence – life imprisonment. The sentence imposed by the trial Court, although the maximum stipulated, was thus within the statute. Nonetheless, it is also true that it is now generally agreed that strict adherence to mandatory or minimum sentences should be discouraged, and that Courts should retain the discretion to depart from mandatory sentences, where justified. This was stated in the Supreme Court case of **Francis Karioko Muruatetu and Another v Republic [2017] eKLR**.

13. On the strength of the **Muruatetu** reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of **Dismas Wafula Kilwake v Republic [2018] eKLR**, the case of **GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR)**, and also the case of **Joshua Gichuki Mwangi v Republic [2022] eKLR**. I may also mention the often cited decision of **Odunga J (as he then was)**, in the case of **Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR)**.

14. However, by clarification made by the Supreme Court in its subsequent directions given in **Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)**, the Supreme Court made it clear that **Muruatetu** only applied to murder cases, and not to any other type of case, not even sexual offences. The Supreme Court reiterated these directions when dealing with an Appeal emanating under the **Sexual Offence Act**. This was in the case of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)**, in which the Supreme Court set aside the decision of the Court of Appeal

which had applied **Muruatetu** in setting aside a mandatory minimum sentence of 20 years imprisonment.

15. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will therefore be acting *ultra vires* were it to set aside the sentence of life imprisonment on the sole basis that the same, being a mandatory sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, **Muruatetu** is not applicable to cases to the **Sexual Offences Act**.

16. In respect to the sentence of life imprisonment, there has also been emerging jurisprudence questioning its constitutionality. I cite, for instance, the Court of Appeal case of **Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) 7 July 2023 (Judgment)**, which dealt with a case of a sentence of life imprisonment imposed on an Appellant for the defilement of a 4 years old child. Upon setting aside the sentence, the Court of Appeal substituted the same with a prison sentence of 40 years. However, on further appeal in **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR)**, the Supreme Court faulted the Court of Appeal for usurping the role of the Legislature by purporting to declare the life sentence as unconstitutional, and thus reinstated the sentence. The Supreme Court held as follows:

“70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial Court and affirmed by the first appellate Court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the Sexual Offences Act.”

17. In view thereof, it is clear that the sentence of life imprisonment, was within the law. Therefore, even assuming that I had jurisdiction to revisit sentence, I would not have had grounds to declare the life imprisonment sentence as unconstitutional, as prayed by the Applicant.

Final Orders

18. In the premises, the Applicant’s undated Chamber Summons filed on 23/10/2019 is hereby dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBERR 2025

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant (virtually from Naivasha Maximum Prison)

Ms. Muriithi for the State

Court Assistant: Brian Kimathi