



**Mutua v Republic (Criminal Revision E122 of 2024)
[2025] KEHC 14816 (KLR) (22 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E122 OF 2024
NIO ADAGI, J
OCTOBER 22, 2025**

BETWEEN

KENNEDY WAMBUA MUTUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Factual Background

1. The Applicant was charged in Criminal Case No. 433 of 2015 with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
3. The Applicant pleaded not guilty to both charges and the case was set down for hearing.
4. The prosecution called six (6) witnesses to prove the guilty of the Applicant while the Applicant gave sworn evidence in his defence. In the end after considering the evidence presented before the trial court, the Applicant was convicted and sentenced to 20 years imprisonment on 4th February 2016.
5. Being dissatisfied with the conviction and sentence, the Applicant filed a 1st Appeal to the High Court at Machakos in Criminal Appeal No. 21 of 2016. The high court being a court of 1st appeal, evaluated the evidence and thereafter dismissed the appeal on 3rd October 2019 in its entirety as the said appeal lacked merit.
6. There is nothing to show that the Applicant filed a 2nd Appeal to the court of appeal, likely the Applicant was satisfied with the upholding by the high court of the trial court's decision.



7. The Applicant has again moved to this court being a high court vide an undated Notice of Motion application seeking for orders that:-
- i. this court has jurisdiction to hear and determine this Petition.
 - ii. the court finds and orders that the Petitioner is entitled to a Resentencing order pursuant to the High Court decision by Justice G.V Odunga & order No.2 at Machakos High Court vide Petition No. E017 of 2021 drawn by Philip Mueke Maingi & others and also pursuant to Petition No.97 of 2021 delivered by Justice Mativo at Mombasa High Court as petitioned by Edward Wachira & 9 others also drawn petitioning on the constitutionality of the Minimum mandatory sentencing on Sexual offences.
 - iii. the court finds and declares that the petitioners' rights as indicated in *the Constitution* of Kenya under Articles 25,28 & 50(2)(p) have been violated as pertains the right to a fair trial and mitigation vis a vis the minimum mandatory sentences as provided for in the *Sexual Offences Act* No.3 of 2006.
 - iv. the court finds and orders that the petitioner has a right to benefit from the least severe sentence as provided for under Article 50 (2) (p) of *the Constitution*.
8. The Applicant contends that his application is seeking a review of the sentence downward, a non-custodial sentence on the remaining bit of the sentence since he has served a substantive part of the sentence to a tune of ten (10) years having been arrested on 13th March 2015 up to date and now remaining with three (3) years to complete serving the sentence and hence he qualifies for the non-custodial sentence.
9. The Applicant submits that he seeks sentence review pursuant to Sections 357,362,364 and 382 of the Criminal Procedure Code and as construed under Article 50(2)(p) and (q) as conjunctively read with Article 50(6) (a) and (b) of *the Constitution*.
10. The Applicant requests this court to allow him make amendments to the grounds that he had initially laid and or make additional mitigation grounds because it is true that he was tried, convicted and sentenced as per the provisions section 8(I) as read with 8(3) and thereupon being found guilty he was awarded a year jail term.
11. The Applicant set out the objectives of sentencing according to the judiciary's sentencing policy guidelines 2023 and submits that a review may be granted whenever the court considers that it is necessary correct apparent error or omission on the part of the court. The error or omission must be self explanatory and should not require an elaborate argument to be established.
12. The Applicant submits that he has fully rehabilitated and reformed as he has never been charged offence in prison and he gets along well with his fellow inmates, hence plead for reintegration as he is not likely to pose any danger in the community.
13. The Applicant further refers to guideline 7.19 of the sentencing policy guide criminal on history of the offender, character of the community in deciding whether or not to grant non-custodial sentence herein, is of good character, he is a first offender and h in any criminal activity owing to the fact that he has spent long time has wasted all his youth and constructive energy that he would have used better and hence he has learnt a lesson. The Applicant placed reliance on the case of *Opoya vs Uganda* 119671 EA 752 at page 754 vs-here Sir Clement De Lestano V.P. picked up the conversation inter alia thus:

“It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty



which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

14. The Applicant invites this court to be pleased to hold the mitigation presented herein above to be reasonably enough to have the court persuaded and allow the prayers sought by the Applicant hereof and grant the Appellant the opportunity to reintegrate back to the society or any other order this court may deem fit.
15. The application is opposed by the Respondent who contends that the high court fully analysed the evidence of the Prosecutor's case in criminal case 443 of 2015 and rightfully concluded that the Prosecution proved its case beyond reasonable doubt proving all the ingredients of defilement.
16. The Respondent submits that the High Court in Machakos in the Criminal Appeal No. 21 of 2016 and this honourable court are of the same jurisdiction and that this honourable court does not locus standi/jurisdiction to overturn the judgment and findings of the court of similar jurisdiction.
17. Further, the Respondent submits that the Applicant is not entitled to an application of sentence review as he had not exhausted all his avenues of appeal in the matter.
18. The Respondent observed that the Appellant relies on Machakos High Court Petition No. E017 of 2021 Philip Mueke Maingi & others vs Republic and Mombasa High Court Petition No 97 of 2021 Edward Wachira & Others vs Republic in support of his assertions on the constitutionality of the minimum mandatory sentences on sexual offences in total disregard to the decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) in which the Supreme Court has pronounced itself as to the constitutionality of the minimum mandatory sentences in the sexual offences as provided for in the Sexual Offences Act No.3 of 2006.
19. That the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) held that the minimum sentences in the Sexual Offences Act remain constitutional.
20. The Respondent also cited the case of William Mwangale Ongoma v Republic [2020] KEHC 1446 (KLR) where it was held that:-

"....A court in revision is not concerned with the merits of the decision of the court but rather on the impropriety, mistake, illegality of the order, sentence or judgment..... This court's powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under Article 165(6) of the Constitution the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous, without jurisdiction and constitutes gross violation of the fair administration of justice....."
21. The Respondent submits that the sentence imposed on the Applicant was proper and within the law under the circumstances. The Decision of the court was not improper, not a mistake neither was it illegal.
22. It is the Respondent's positions that this court has no jurisdiction to entertain the application of review of the sentence herein for the reasons mentioned above.



23. As regards whether the Appellant’s rights under Article 25, 28 and 50(2)(p) of *the constitution* have been violated, the Respondent urged the court to rely on the Supreme courts finding in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) that:

“Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.”

24. The Respondent invited this court to dismiss this application in its entirety for lack of merit.

25. I have considered the undated Notice of Motion application filed by the Applicant and the respective submissions of the Parties on the application. I find the application to be an abuse of court process. The offence for which the Applicant was charged is defilement. The *Sexual Offences Act* No.3 of 2006 provide for mandatory minimum sentences which are to be strictly imposed. The Supreme Court has pronounced itself as to the Constitutionality of the minimum mandatory sentences in the sexual offences as provided for in the *Sexual Offences Act* No.3 of 2006. See Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR).

26. There is no residual jurisdiction left to this court to review the Applicant’s sentence in the circumstances of this case.

27. The Applicant’s undated application for resentencing to non-custodial sentence is dismissed.

28. This file is closed.

29. I so order.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 22ND OCTOBER 2025.

NOEL I. ADAGI

JUDGE

DELIVERED IN OPEN COURT AT MACHAKOS THIS 22ND OCTOBER 2025.

In the presence of :

In person..... for Appellant

Ms. Agatha..... for Respondent

Milly Grace..... Court Assistant

