Wanjala v Republic (Criminal Petition 58 of 2019)
[2025] KEHC 15513 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 58 OF 2019

JRA WANANDA, J

OCTOBER 31, 2025

BETWEEN

KELVIN WANJALA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged in Iten Senior Principal Magistrates Court Criminal Case (SO) No. 19 of 2015, with the offence of defilement contrary to Section 8(2) of the *Sexual Offences Act*, and sentenced to serve life imprisonment. He appealed against the decision in Eldoret High Court Criminal Appeal No. 5 of 2018, which was dismissed by the Judgement rendered by S. Githinji J on 05/12/2018. The Applicant has now returned to this Court seeking a sentence re-hearing.

2. In his undated Chamber Summons filed on 5/11/2019, the Applicant has premised his prayer as follows:

    i. That, may this Hon. Court be pleased to hear and determine the Petition pursuant to the Supreme Court's directives on sentencing vide Petition No. 15 of 2015 as prayed herein and withdraw the appellant's appeal and allow him petition the High Court for sentence re-hearing only.

3. In his Submissions dated 28/03/2025, in expounding on his Supporting Affidavit, the Applicant urged this Court to make declaration that life imprisonment is unconstitutional for fouling the rudimentary demands on the role of mitigation against offenders by fettering the discretion of Magistrates to impose proportionate and appropriate sentences against the offenders on grounds that: -

    (a) mandatory sentences infringe on fair trial guaranteed under Article 50 of *the Constitution*;

(b) he is prejudiced by being deprived the right to mitigation, and the right to a lesser severe sentence (unlike other offenders), which amounts to discrimination contrary to Article 27 of *the Constitution*;

(c) that the mandatory nature of life imprisonment under the said provision jettisons the discretion of the trial Court forcing it to impose a sentence which is pre-determined by the Legislature contrary' to the doctrine of separation of powers under Article 160(1) of *the Constitution* thus depriving Magistrates sentencing discretion;

(e) that the provision ignores the offender's personal circumstances; and,

(f) that sentencing is a legal issue which forms part of the principles of a fair trial under Article 25(c) of *the Constitution*. He cited the famous "Muruatetu" Supreme Court decision which, according to him, declared life sentence as unconstitutional, and he urged that the same principles ought to apply in the context of defilement under Section 8(2) of the *Sexual Offences Act*. He also urged that the period spent in remand custody pending determination of the trial Court case be taken into account.

4. In his brief Submissions, Prosecution Counsel Leonard Okaka submitted that Githiji J already upheld the Petitioner's life imprisonment. He then cited the Supreme Court decision in Petition No. E018 of 202 - Republic v Joseph Gichuki Mwangi which held, in his words, that Courts have no business deviating from lawful sentences statutorily provided in legislation unless amended by Parliament or declared unconstitutional. He also cited the case of Moses Walubengo v R, Eldoret HCCRPet E029 of 2018.

Determination

5. The issue that arises for determination herein are evidently the following:

i. Whether this Court should re-sentence the Applicant despite his Appeal having been dismissed by this same Court.

ii. Whether this Court should declare life imprisonment for the offence of defilement as unconstitutional.

6. It is evident that the Applicant already appealed to this same Court in Eldoret High Court Criminal Appeal No. 5 of 2018, against the decision of the Magistrate's Court. As aforesaid, the Appeal was heard on merits and dismissed. The Applicant has now returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrate's Court to be again reviewed. The Petitioner's recourse is to appeal to the Court of Appeal, not to come back to this same Court. This Court cannot sit on appeal on a decision of its own. Regarding sentence, Githinji J stated as follows:

> "A birth certificate was produced that doubtlessly shows by the time of the offence the complainant was aged 10 years. Ther sentence of life imprisonment was appropriate given the age ....."

7. I find persuasion in the case of Joseph Maburu alias Ayub v Republic [2019] eKLR where Kiare Waweru J held as follows:

> " Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. .....
>
> Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

8. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR, where, faced with a similar situation, she held as follows:

> " However, as I have noted, the Petitioner herein appealed the trial court's decision to this court. The court in dismissing the appeal against the sentence held that the trial court's sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (See Section 362-364 of the Criminal Procedure Code).
>
> Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail."

9. In view of the foregoing, it is evident that Petitioner's recourse was to move to the Court of Appeal, not to return to this Court to seek a review. What the Applicant is inviting this Court to do is to re-look at the decision of Githinji J, in which he already reviewed the Judgment of the lower Court, an action which is untenable in law. I therefore find that this Court, having already pronounced itself in the Appeal, is functus officio and bereft of the jurisdiction to again review the decision it had already dealt with.

10. 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."

11. 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.

12. 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).

13. 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.

14. 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*.

15. 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*."

16. 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 the sentence, I would not have had grounds to declare the life imprisonment sentence as unconstitutional, as prayed by the Applicant.

Final Orders

17. In the premises, the Applicant's undated Chamber Summons filed on 05/11/2019 is hereby dismissed.

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

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Appellant (present virtually from Kamiti Maximum Prison)

Ms. Mureithi for the State

Court Assistant: Brian Kimathi