

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS CR. APPLICATION NO E018 OF 2025**

**JOSEPH MUTISYA KILUVA.....**

**APPELLANT**

**VERSUS**

**REPUBLIC .....RESPOND**

**ENT**

**RULING**

1. The applicant has approached this Court by way of a Notice of Motion application seeking two orders: first, that this Court declares the sentence of life imprisonment unconstitutional; and second, that the Court proceed to resentence him accordingly. He further prays for any other relief the Court may deem just and fit to grant.
2. The application is anchored on Articles 49 and 50 of the Constitution, Sections 349 and 357 of the Criminal Procedure Code, and Rules 22 and 23 of the High Court (Organization and Administration) Rules. It is supported by the grounds set out on the face of the application and the applicant's supporting affidavit. The applicant contends that an indefinite life sentence infringes upon his constitutional rights under Articles 25(a), 28, and 29(f), particularly the rights to dignity

and freedom from cruel, inhuman, or degrading treatment or punishment.

3. The respondent opposed the application. They outlined the background of the matter and urged the Court to dismiss the application. In support of their position, they cited **Republic v Ayako, Petition E002 of 2024 (2025) KESC 20 (KLR)** and **Republic v Manyeso, Petition E013 of 2024 (2025) KESC 16 (KLR)**, decisions in which the courts affirmed that life imprisonment, being a sentence expressly provided for by statute, remains lawful and constitutional unless and until the relevant statutory provision is itself declared unconstitutional.
4. The respondent further submitted that the application is defective in form and substance. They argued that the draftsmanship does not meet the threshold for constitutional petitions as set out in the case of **Anarita Karimi Njeru v Attorney General (1979) KLR 154**, and reaffirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** which requires constitutional petition cite the specific provisions of the Constitution alleged to have been violated, provide a descriptive account of the nature of the violation, and demonstrate, how the alleged violations occurred.
5. On the issue of resentencing, the respondent contended that this Court lacks jurisdiction to resentence the applicant, particularly in circumstances

where the sentence imposed was lawful and has already been upheld on appeal.

### **Issue for Determination**

6. From the foregoing, the central issue for determination is whether the sentence of life imprisonment can be declared unconstitutional in the circumstances of this case.
7. The applicant was charged, convicted, and sentenced to life imprisonment for the offence of incest contrary to Section 20(1) of the Sexual Offences Act. Dissatisfied with both conviction and sentence, he lodged an appeal which was dismissed, affirming both the conviction and the sentence. He now seeks to reopen the matter by challenging the constitutionality of the life sentence.
8. Section 20(1) of the Sexual Offences Act expressly prescribes life imprisonment as the penalty for the offence of incest. Accordingly, the sentence imposed upon the applicant was one provided for by statute and therefore lawful.
9. This Court seeks guidance from the Supreme Court decision in **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae), Petition E018 of 2023 [2024] KESC 34 (KLR)**, where the Supreme Court upheld the constitutionality of sentences under the Sexual Offences Act. The Court emphasized that:

***“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”***

10. The Supreme Court clarified that where Parliament enacts legislation prescribing sentences, the role of the Judiciary is to adjudicate disputes within the framework of that law. Only in exceptional

circumstances, where a statutory provision is declared unconstitutional on sound principles, can the Judiciary depart from the legislative framework.

11. In the present case, the applicant has not mounted a substantive challenge to Section 20(1) of the Sexual Offences Act itself. He merely seeks to have the sentence of life imprisonment declared unconstitutional without demonstrating how the statutory provision contravenes the Constitution. In the absence of such a challenge, this Court cannot invalidate a sentence that is expressly provided for in law.
12. Moreover, the applicant's plea for resentencing is untenable. Resentencing jurisdiction arises in circumstances where a sentence has been declared unconstitutional or where appellate courts have directed resentencing. Neither of these conditions is satisfied here.
13. In light of the binding precedent of the Supreme Court, the express provisions of Section 20(1) of the Sexual Offences Act, and the applicant's failure to demonstrate the unconstitutionality of the statutory provision itself, this Court finds that the sentence of life imprisonment imposed upon the applicant was lawful and constitutional.
14. Consequently, the application is devoid of merit and is hereby dismissed.

Dated, signed and delivered at Machakos this 14<sup>th</sup> day of January 2026.

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

Accused

ODPP

Selina Court Assistant