

RULING
HCCRCMISC E009 OF 2025



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRCMISC E009 OF 2025

BETWEEN
DAVID MAKORI ORINA.....
APPLICANT
AND
IRECTOR OF PUBLIC PROSECUTIONS.....
RESPONDENT

RULING

1. Before the Court is an undated Notice of Motion, supported by the Supporting Affidavit sworn on 17th September 2024, in which the Applicant seeks to be placed on probation for the remaining portion of his custodial sentence.
2. From the affidavit and the record, it is not in dispute that the Applicant was convicted by the subordinate court of the offence of incest contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006, and sentenced to ten (10) years' imprisonment, being the minimum sentence prescribed by law.
3. The Applicant does not challenge the conviction, nor does he allege that the sentence imposed was illegal, irregular, or founded on an error of principle. His plea is grounded on the period already served and his alleged rehabilitation while in

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custody, and he urges the Court to substitute the remaining custodial sentence with probation.

4. The Respondent opposes the application on the ground that the sentence imposed was lawful and that the relief sought is not available to the Applicant in law.

Issue for Determination

5. The issue for determination is whether this Court has jurisdiction to grant probation for the remaining term of a custodial sentence, particularly where the sentence imposed is a statutory minimum sentence.

Analysis

6. A request to be placed on probation is, in substance and in law, a request for resentencing. Probation is a sentencing option exercised at the point of sentence under the Probation of Offenders Act, and its grant entails the court re-opening and re-exercising sentencing discretion.
7. The jurisdiction of this Court to interfere with sentence is circumscribed. Where a sentence is lawful and imposed in accordance with statute, the Court has no general power to re-sentence an offender merely because circumstances have changed or rehabilitation is alleged.
8. The legal position following the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic;**

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Katiba Institute & 5 others (Amicus Curiae) [2021]

eKLR, delivered on 06th July 2021, is now settled. The Supreme Court clarified that its decision applied only to the mandatory death sentence under section 204 of the Penal Code, and did not extend to other statutory sentencing regimes. The Court expressly cautioned courts against extending the *Muruatetu* reasoning to offences carrying mandatory or minimum sentences under other statutes in the absence of a proper constitutional challenge.

9. That position was subsequently reinforced by the Supreme Court in **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)**, where the Court emphasized the lawfulness of mandatory sentences prescribed by statute and underscored that courts are bound to give effect to legislative sentencing frameworks unless the same are successfully impugned on constitutional grounds.

10. In the present case, the Applicant was sentenced to the minimum sentence prescribed by section 20(1) of the Sexual Offences Act. The constitutionality of that provision has not been challenged, and no illegality or impropriety has been demonstrated.

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11. The prayer seeking probation for the remaining term therefore invites this Court to undertake a resentencing exercise which the law does not permit in the circumstances of this case.

Determination

12. The Court finds that the application seeks relief that is jurisdictionally unavailable, and is therefore incompetent. The undated Notice of Motion is herewith dismissed.

DELIVERED AT NYAMIRA THIS 22nd DAY OF
January 2026



WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Hilda

Applicant - Present in person

For the DPP - Mr. Chirchir (SADPP)
