Mungai v Republic (Criminal Revision E013 of 2025)
[2026] KEHC 1828 (KLR) (20 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1828 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E013 OF 2025

E OMINDE, J

FEBRUARY 20, 2026

BETWEEN

SOLOMON MACHARIA MUNGAI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By a Notice of Motion dated 10th March 2025, the Applicant seeks orders that:
    1. Spent.
    2. That the Court reviews the judgment in Eldoret CM Sexual Offences Case No. E156 of 2023; Republic V Solomon Macharia Mungai delivered on 11th February 2025 to the extent that;
        a. That the trial Court relied on witness statement and testimony of the victim who was coached, duressed and/or coerced into giving curated and falsified testimony against the Applicant.
        b. That the entire investigations and prosecution of this case was inherently flawed to the extent that the entire trial became a mistrial.
        c. That the Prosecution did not prove beyond reasonable peradventure their case against the Applicant.
    3. That the Court be pleased to make any further revisionary orders as it may deem fit and just under the circumstances.
    4. That the Court makes no orders as to costs of this Application.
2. The application is expressed to be brought under Article 47(1), 48, 50(2)(h), (k), (q), 159(2), (d), (e) of *the Constitution* of Kenya 2010, Section 364 of the Criminal Procedure Code and all the enabling

provisions of the law. It premised on the grounds on its face and further supported by the Affidavit sworn by Lucy Njeri Macharia on 20th February 2025.

3. She deposed that she was the complainant in the case before the trial court and the Accused, Mr. Solomon Macharia Mungai is her biological father. That the Applicant was charged, convicted and sentenced to 25 years' imprisonment. That her mother, Mercy Wanjiku, filed the complaint herein against her father in the year 2023 when she was still a child over defilement and incest allegations against the complainant.

4. That her father did not defile her and that now that she is of age, she can speak of her own conscience and asserts that the charges that were levelled against her father were cooked and curated by her mother, her grandmother, Leah Wanjiku, a police officer by the name Esther Ndindi and her then teacher, Ascar Lelei of Sosiani Secondary School.

5. She maintained that she was coached, coerced and unduly influenced by the above persons to record a statement at the Police and further to testify against her father in court. That the script had it that her father defiled her in the year 2019 when she was 14 years old and that her father was subsequently arrested and arraigned in court in the year 2023 over accusations that she knows nothing about beyond herself being used to settle a score that her mother and grandmother had against her father.

6. She deposed further that prior to the hearing of this case, she was coached and taken through questions that the prosecution was going to ask her and she was instructed on how to respond to each question. That after the hearing, she was dissociated from the case as she was intentionally kept in the dark and that it is only until the 11th February 2025 when the matter was coming up for judgment that she learnt that her father had been convicted and sentenced.

7. She added that she was constantly kept in the house by her mother and her movements outside were heavily scrutinized and that it is only until the 20th December 2024 that she managed to escape from the custody of her mother and she now lives with a friend.

8. She maintained that she is aware that her father was found culpable of the offences, convicted and subsequently sentenced largely on account of her testimony that she now wishes to recant, now that she is of age. That after she made her intentions of recanting her statement known to her kin and the police, she has received numerous calls and threats that caution her against speaking up on the issue.

9. She deposed further that when she escaped from her mother's house on 20th December 2024, she was closely monitored by her mother and so intense was the scrutiny that her aunt threatened that they would send police officers to arrest her. She added that since escaping from her mother's house, she has visited her father in remand on three occasions, that is, 25th January 2025, 6th February 2025 and 9th February 2025.

10. That she consulted with her grandfather on what to do and it is his counsel that he asked her to find a lawyer for legal counsel instead of approaching the media and that it is on account of this counsel that she has instructed the firm of JK Kaptich & Associates Advocates to prepare and file the instant application, in the interest of justice for her incarcerated father.

11. She deposed further that on 24th January 2024, she conceived a child with one Christopher Muyesu and she is informed that the DNA tests that were conducted over the suspicion that the same was sired by her father turned to be negative. That she sincerely apologizes to the court for making those statements and making false testimony in court and she was a child but now she is an adult with her own conscience and thought.

12. She urged that she is willing to take the stands again and have her testimony retaken by the court, that in view of the above it would be prudent and justiciable that the judgment entered against her father be relooked again, that being the victim, she deposed that her father did not defile nor perform an unnatural sexual act against her and that she believes that her father is innocent and should not have been jailed on account of her testimony. That she therefore wishes to recant her earlier statements at the police as well as her testimony in court since the same was not of her own free will.

13. The Prosecution did not file any Affidavit in response to the Application but filed submissions only

Submissions

14. The Application was canvassed by way of written submissions. The Applicant through Messrs J.K Kaptich & Associates Advocates filed Submissions dated 23rd June 2025 while the Respondent through State Counsel S.G Thuo filed Submissions dated 27th June 2025.

Applicant's Submissions

15. Counsel for the Applicant cited the provisions of Section 362 and 364(1) of the Criminal Procedure Code and submitted that this Court has unfettered Supervisory Jurisdiction to review the judgment and correct any error or miscarriage of justice.

16. Counsel urged that in the case of Joseph Ndungu Kagiri v Republic [2016] eKLR, the court emphasized the High Court's power to review and set aside judgments that are erroneous or unjust. He also relied on the holding in Republic v James Kiarie Mutunge [2018] eKLR, where the court stated that revision may be granted where an appeal would not serve the ends of justice, and where new and material evidence has come to light.

17. Regarding the issue of recantation of the complainant's testimony, Counsel restated the facts deposed in the Supporting Affidavit of the complainant and submitted that Kenyan courts have recognized that where the sole or principal evidence in a criminal conviction is recanted and there is no corroboration, the conviction cannot stand. He relied on the case of Republic v G.G.K alias G.G [2020] eKLR where the High Court acquitted the accused where the complainant recanted her statement alleging she was coached and coerced into giving false evidence. He also cited the case of Mohamed Sani Ibrahim v Republic [2021] eKLR in that regard.

18. Counsel urged that the right to a fair trial is entrenched under Article 50(2) of *the Constitution* and includes the right to challenge the evidence, to be presumed innocent, and to have the benefit of any doubt resolved in favour of the accused. Further, Counsel urged that Article 159(2)(d) obliges this Honourable Court to administer justice without undue regard to technicalities. Courts must intervene where it is clear that a conviction was procured through manipulation or abuse of the judicial process.

19. Counsel submitted that the complainant's affidavit reveals that she was isolated, confined, coached and compelled to testify falsely and that her affidavit is detailed, consistent, and supported by screen captures of threatening messages, her visit records to the Applicant in prison.

20. Counsel argued that the Applicant has now spent nearly five months in prison based on testimony that the complainant disowns and wishes to recant under oath. Counsel observed that prior to that, the Applicant has been in custody since he was arrested in September 2023 and that the longer he remains incarcerated, the deeper the injustice.

21. Counsel further submitted that the entire trial proceedings in Eldoret CM Sexual Offences Case No. E156 of 2023 were fundamentally flawed and vitiated by irregularities so grave as to amount to a

mistrial. Counsel urged that a mistrial refers to proceedings that are so irregular, unjust, or tainted by impropriety that the trial process cannot be said to have accorded the accused a fair opportunity to be heard and that such circumstances warrant the intervention of the High Court to either quash the conviction or order a retrial to secure the ends of justice.

22. In the present case, Counsel submitted that the following facts point conclusively to a mistrial; that the primary prosecution witness, who was a minor as at the time the alleged offence is said to have occurred, has now recanted her testimony on oath, asserting that her evidence was not freely given but the product of coercion, coaching, and manipulation by her mother, grandmother, a police officer, and a teacher; that the complainant had no independent recollection or knowledge of the alleged incident and was used as a tool in a family vendetta and that she was kept in the dark during the trial, not even aware of the judgment date, and was heavily surveilled by her mother up to the point of escaping from the house in December 2024.

23. Counsel maintained that these events demonstrate not only a violation of Article 50(2) on the right to a fair trial, but also a total breakdown in the integrity of the trial process. According to Counsel, the proceedings were reduced to a scripted drama built upon falsified evidence, deliberate misrepresentation, and manipulation of a minor. He relied on the case of Republic v George Njuguna Ng'ang'a [2021] eKLR where the court held that: "Where the trial process is compromised by procedural irregularities or manipulation, the resulting conviction is unsafe. The High Court is bound to intervene in such cases to prevent injustice. He also relied on the case of Republic v G.G.K alias G.G [2020] eKLR.

24. Counsel urged that recantation by the complainant clearly render the proceedings in the lower court irregular, improper and wholly unreliable and that it cannot be said that the Applicant was afforded a fair opportunity to confront and challenge the case against him, given that the key evidence was a product of duress and falsehoods.

25. Counsel submitted that this Honourable Court, in exercise of its supervisory and revisionary jurisdiction under Section 362 and 364 of the Criminal Procedure Code, and guided by Article 165(6) and (7) of *the Constitution*, is therefore invited to declare that the trial amounted to a mistrial and to either quash the conviction and direct the unconditional release of the Applicant; or order a retrial before a competent court, if deemed just and appropriate. He relied on the case of Pius Mukaba Mulewa & Another v Republic [2014] Eklr where the Court of Appeal emphasized that where key prosecution evidence is discredited, the conviction cannot stand. He also cited the case of Republic v A.M.O. [2022] eKLR.

26. In conclusion, Counsel submitted that in light of the complainant's credible recantation and the overwhelming proof of coercion, it is clear that the conviction was unsafe, irregular and a miscarriage of justice and that interests of justice demand that this Court intervene to prevent further unlawful incarceration of an innocent man.

27. Counsel thus urged the Court to review, set aside and quash the conviction and sentence in Eldoret CM Sexual Offences Case No. E156 of 2023, order the immediate release of the Applicant from custody unless otherwise lawfully held and/or make such other or further orders as the Court may deem fit and just in the circumstances.

Respondent's Submissions

28. Counsel for the State submitted that the Appellant was arraigned in Court on 14th September 2023 where he was charged with the offence of the Incest contrary to Section 20(1) of the *Sexual Offences*

Act and sentenced to 25 years' imprisonment which sentence the state seeks to have enhanced to life imprisonment.

29. Counsel urged that the application for review of this 25-year sentence is basically premised on some unproven fallacy that the Victim herein "has now seen the light and wishes to recant her viva voce evidence on allegations that she was coerced into giving false evidence against her biological father" as housed in the applicants Notice of Motion dated 10th march 2025 accompanied by a Supporting Affidavit of one Lucy Njeri Macharia dated 20th February 2025.

30. Counsel pointed out that of interest are the purported "screen shot" annexures marked "LNM-1" that offend all the rules under Section 106B of the *Evidence Act* CAP 80 Laws of Kenya and therefore should have been expunged at the date of filing or even much earlier. Counsel urged that being a Court of Record such a Notice of Motion application should be treated with the contempt it deserves and be struck off suo moto.

31. Counsel submitted that in support of their case, Prosecution called 4 witnesses who proved the elements of defilement.

32. In regard to the issue of age, Counsel submitted that the victim testified on the 26th of 2023 and informed court that she had just turned 18 years that year in April and that she was the first born child of the Applicant having been born on 11th April 2005. Counsel argued that this evidence was never shaken even under the intense cross-examination by the Defence Counsel and therefore as rightfully put at all material times during the commission of the offence the victim was below the age of 18 years.

33. In regard to the issue of identification, Counsel submitted that it is not in dispute that the Applicant was the biological father to the Victim as she refers to the Applicant throughout the proceedings as "my father'. Even on cross-examination by the Prosecutor on the 25th March 2024 the Applicant unwittingly admitted that the victim was his first child born the 11th April 2005.

34. On the issue of penetration, Counsel submitted that the victim was clear in her mind that the Applicant penetrated her sexually on diverse dates from the year 2020 and that on the first time he had carnal knowledge of her she bled for 5 days straight. Counsel argued that she admitted on cross-examination that her father breached her virginity and that she has never had carnal knowledge with any other man apart from her father and that she received beatings whenever she refused to have sex with him prompting her to develop scars, which point Counsel urged cannot be overemphasized.

35. Counsel further submitted that all the essential elements that both the minors had been defiled have been proved beyond reasonable doubt from the facts as stated above, which facts were neither contradicted upon cross examination or at the Defence stage.

36. On the issues raised of DNA raised by the Applicant on defence, Counsel relied on the thinking of the Learned Judge in Kamau v Republic (Criminal Appeal E003 of 2024), while upholding a Defilement conviction:

> "It is trite that defilement can be proved not only by medical evidence but also by way of oral and circumstantial evidence. In AML v Republic [2012] eKLR (Mombasa), this Court upheld the view that: "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

37. Regarding the sentence, Counsel submitted that noting the ages of the complainants, Section 20(1) of the *Sexual Offences Act* prescribes the penalty for incest of a female person below the age of 18 years

to be life imprisonment. Counsel cited the Supreme Court in Petition No E018 of 2023 in validating mandatory sentences in the *Sexual Offences Act* held that: "

> "Sterner sentences ensure the prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences....
>
> We must also re-affirm that although sentencing is an exercise of Judicial discretion, it is Parliament and not the Judiciary that sets tie parameters of sentencing for each crime in statute. As such, striking down such a sentence provided for in statute must be based not only in evidence and sound legal principles but on an in-depth consideration of public interest that informed the making of the specific law. A judicial decision of cannot be based on private opinion, sentiments, sympathy or benevolence, It ought not to be arbitrary, whimsical or capricious, unless declared unconstitutional."

38. Counsel urged that the Judiciary Sentencing Policy Guidelines emphasizes on the principles underpinning the sentencing process as that of proportionality, accountability, inclusiveness and totality of the sentence, as well as asking Courts to consider the character of the offender, the permanent scars of the Victim and the frequency/beatings she endured from her own dad before re-sentencing.

39. Counsel urged that the person before court does not deserve any mercy having shown no mercy to his own daughter and that the State opines that the Appellant's sentence ought to be enhanced for a number of aggravating factors; the Appellant is a person who ought to serve a life sentence to serve as punishment and a deterrent, in the eyes of the victims or other parents, a man like this does not deserve of a 25-year sentence where the law says that he could be imprisoned for life and the sentence imposed by the Lower Court was much too lenient, the Appellant occasioned a great injustice to the victims with his tactics to delay the matter and that he was never remorseful while mitigating and has shown no remorse to date.

40. In the end, Counsel urged that the present application as it stands is an utter waste of the Court's precious Judicial time and humbly asks that this Honorable Court upholds the conviction and instead use its judicial discretion to enhance the sentence to the lawful sentences within the meaning of the *Sexual Offences Act*.

Determination

41. Having considered the Application and the attendant submissions, it is my considered opinion that the issue for determination herein is;

Whether the Application by the Applicant merits an order for revision.

42. This Application is premised on Article 47(1), 48, 50(2)(h), (k), (q), 159(2), (d), (e) of *the Constitution* of Kenya 2010 and Section 364 of the Criminal Procedure Code. The jurisdiction of the High Court with regard to the powers of Revision is supervisory and is provided under *the Constitution* in Article 165 (6) and (7) in the following terms:

> " 6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred

to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

43. Section 362 of the Criminal Procedure Code, then provides as follows:

" Revision

362. Power of High Court to call for records

The High Court may call for and examine the 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."

44. Section 364 of the Criminal Procedure Code does provide as follows:

"

"(1). in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2). No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3). Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4). Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5). When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

In consideration of applications for revision, the operative phrase is "correctness, legality or propriety" of any finding, sentence or order made by the trial court. and also on the regularity of any proceedings of any such subordinate court."

45. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR in which he observed as follows:

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

46. On his part, Nyakundi J, in Prosecutor vs Stephen Lesinko [2018] eKLR outlined the principles that should guide a Court in exercising its revisionary jurisdiction as follows:

(a) where the decision is grossly erroneous;

(b) where there is no compliance with the provisions of the law;

(c) where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

(d) where the material evidence on the parties is not considered; and

(e) where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence

47. However, it is important to note that great care must be taken to prevent situations in which parties submit appeals under false pretenses of criminal revision applications. In the case of Joseph Nduvi Mbuvi v Republic [2019] eKLR the Court made the following observation;

> "In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in Public Prosecutor vs Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:
>
> "The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial

discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

48. The following provisions of *the constitution* upon which this Application is premised provide as follows;

Article 50(2) Every accused person has the right to a fair trial, which includes the right: -

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(k) to adduce and challenge evidence;

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

49. Whereas it is correct that the High Court does have the power to review as herein summarized, in my view, this power is to be exercised based on what already is in the record of the trial court. It is this record that the court is called upon to consider and determine whether the decision of the trial court based on the same is correct, legal and/or proper. None of these provisions that grants the court the supervisory jurisdiction provides for a scenario where a witness changes their mind on the testimony that they gave at the trial upon which the trial court predicated its determination.

50. Of special significance is the fact that the decision of the trial court based on the evidence on record has not at all been impugned by the Applicant on its correctness, legality or propriety. For this reason, the court will not belabor itself with the determination of the trial court as reached based on the evidence on record. Further to the above, the court in considering the Article of *the Constitution* cited by the Applicant as herein above summarized is unable to discern their relevance to the application.

51. Article 159(2)(d) of *the Constitution* which provides that justice shall be administered without undue regard to technicalities and Article 159(2)(e) which mandates courts to promote and protect the purpose and principles of this Constitution that have also been cited by the Applicant. However, their relevance to this Application has not been elucidated upon and also, it is not alleged that these provisions were breached in anyway by the trial court in reaching its determination.

52. As the court has already pointed out, the Applicant has not at all challenged the conviction and sentence meted out by the trial court based on its merits. This being the case then, the Application by the State seeking that the sentence of 20 years' imprisonment be enhanced to life imprisonment is misplaced in my view for reasons that the said sentence has not been challenged. The court shall therefore make no finding on the same.

53. The upshot of my above conclusions is that the Application as brought under the revision jurisdiction of the court is misconceived and lacks merit. The same is accordingly dismissed in its entirety.

54. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 20TH FEBRUARY 2026

E. OMINDE

JUDGE