

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E149 OF 2025

IN THE MATTER OF ARTICLE 20(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 28,
29, 50, 53 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE PREAMBLE, ARTICLES 2, 3, 10 AND 165 OF THE
CONSTITUTION OF KENYA, 2010**

BETWEEN

JAMES MAINA MUNENE PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petition dated 18th March, 2025 challenges the Petitioner’s life sentence arising from Nairobi High Court Criminal Appeal No. 77 of 2017 and Court of

Appeal Criminal Case No. 10 of 2022. The Petitioner prays for a declaration of violation of Constitutional rights together with an order remitting the matter to the trial court for retrial on the sentence on the grounds that the Petitioner was denied an opportunity to mitigate.

2. The Petitioner was charged with the offence of defilement contrary to section 8 (1) and (2) of the Sexual Offences Act Cap 63A in Makadara Criminal Case No. 2300 of 2010. The judgement was delivered on 28th June 2017 and the Petitioner was sentenced to 21 years in prison.
3. The Petitioner then appealed to the High Court at Nairobi in Criminal Appeal No. 77 of 2017 which was dismissed on 26th June, 2019. The High Court in dismissing the appeal also enhanced his sentence to life imprisonment. Thereafter Petitioner filed an appeal at the Court of Appeal at Nairobi in Criminal Appeal No. 10 of 2022 which was also dismissed on 7th July, 2023. The Petitioner' is currently serving a life sentence at Kamiti Maximum Prison.
4. In his supporting affidavit sworn on 18th March, 2025 he faults the life sentence as harsh, inhumane and degrading. Further, he argues that a life sentence is indeterminate and does not serve a rehabilitative purpose. The Petitioner contends that the life sentence violates his right to human dignity and fair trial. He argues that the sentence disregards the provisions of if section 216 and 329 of the Criminal Procedure Code as read together with Article 50(2)(p).

PETITIONERS' SUBMISSIONS

5. The Petitioners filed written submissions dated 4th April 2025 in support of his Petition. The Petitioner identifies two legal issues for determination: whether the imposition of a life sentence violates his constitutional right to dignity and proportionality; and whether mitigating factors were adequately considered during sentencing.
6. First, he reiterates that a life sentence is inhumane and degrading treatment which violates Article 28 and 29 of the Constitution of Kenya. Further, he places reliance on ***Republic Vs Jagagi & Another (2001) eKLR and Edward Wachira & 12 Others Vs Republic & 2 Others (2022) eKLR*** to emphasize that sentencing ought to be rehabilitative and proportional.
7. Second, the Petitioner argues that section 316 and 329 of the Criminal Procedure Code provide for the convicted person to place before the court any evidence for a lenient sentence. The Petitioner contends that he was not given an opportunity to plead for a lenient sentence; thus, he pleads with this Court to reconsider the matter afresh. He places reliance on: ***Arthur Muya Muriuki Vs Republic (2015) eKLR, Vinter and Others Vs the United Kingdom (Applications nos. 66069/09, 130/ 10 and 3896/ 10) and S Vs Jansen 1999 (2) SACR 368 (c)*** to support his case for reviewed sentence.
8. The Respondent neither filed a response nor submissions on the Petition.
9. Having considered pleadings on record, the Court identifies the following issue for determination:

Whether the Court has jurisdiction to entertain the Petition.

ANALYSIS AND DETERMINATION

Whether this Court has jurisdiction to entertain this Petition

10. In the *Oweners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)*, the Court of Appeal stated: "Jurisdiction is everything. Without it, a court has no power to make one more step. "

11. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] KESC 8 KLR* emphasized that "a court's jurisdiction flows from either the Constitution or legislation or both "and that it "cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law."

12. The Petitioner invokes Article 165(3), which indeed allocates to the High Court jurisdiction to determine alleged violations of rights and to interpret the Constitution. That jurisdiction, however, operates within an architecture that includes Article 165(6) which restricts the High Court's supervisory jurisdiction to subordinate courts and specified bodies "but not over a superior court." The question is therefore not whether the High Court has Constitutional jurisdiction in the abstract, but whether the specific reliefs sought requires this Court to exercise a prohibited supervisory or appellate role over a superior court's concluded decision.

13. On the record before the Court, the Petitioner confirms that he appealed to the High Court and Court of Appeal but both were dismissed. The Petition then

asks this court to remit this case to the trial court for determination of an appropriate sentence. These prayers framed as constitutional remedies, operate in substance as a further challenge to a sentence already affirmed by the Court of Appeal and as an invitation to this Court to reopen the sentencing outcome outside the structured framework designed for such review.

14. Our Courts have repeatedly cautioned against employing constitutional process to bypass clear procedure for redress. In ***Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)***, the Court of Appeal held; ‘*where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*’ That principle is not a technicality; it is tied to the rule of law, institutional competence, and coherence of remedies.

15. The Court of Appeal in ***Independent Electoral and Boundaries Commission v Kial & 5 Others [2017] KECA 477 (KLR)*** reproduced section 7 of the Civil Procedure Act and underscored that res judicata had jurisdictional consequences, and that the statutory elements are conjunctive. The Supreme Court in ***John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] KESC 39 (KLR)*** stated “*that the doctrine or res judicata, in effect, allows a litigant only one bite at the cherry.*”

16. The Petition arises from a criminal trial and two criminal appeals. The Petitioner confirms that the appeals challenged sentencing, and that they were dismissed. The Petition then asks this Court to disturb the sentencing

outcome by remitting back to trial court for resentencing and a chance to put forward his plea on mitigation.

17.The Petitioner seeks another bite at a sentencing challenge, without demonstrating the kind of exceptional circumstances that could justify reopening through a properly framed and procedurally compliant resentencing application

18.The combination of two concluded appeals and a new constitutional petition seeking sentencing relief on the same sentence presents features of forum shopping that the doctrine of res judicata and abuse of process are designed to restrain.

CONCLUSION

19.It is clear from the foregoing that the Petition dated 18th March 2025 invites this Court to venture into constitutionally prohibited waters, namely, to inquire into the relative merits or demerits of the conduct and decisions of Nairobi High Court Criminal Appeal No. 77 of 2017 and Nairobi COA Criminal Appeal No. 10 of 2022, and to find that the two Courts violated the Petitioner's right to fair hearing by allegedly failing to accord him the opportunity to mitigate, and/or the committed some other error of law.

20.Article 165(6) of the Constitution bars this Court from purporting to sit in review of any other superior court. Furthermore, the decision of the High Court in Nairobi High Court Criminal Appeal No. 77 of 2017 with respect to the

Petitioner makes this matter res judicata, while it would also offend the doctrine of the hierarchy of courts for this Court to be invited to overturn a decision of the Court of Appeal as was made in Nairobi COA Criminal Appeal No. 10 of 2022 with respect to the Petitioner.

21.The Petitioner was tried, convicted, and sentenced by the subordinate court sitting as the trial court. He appealed to the High Court but his appeal was dismissed. He lodged a second appeal which was equally unsuccessful before the Court of Appeal. The Petitioner has been accorded all the avenues for redress available in law, and has been fully heard three times. This Petition cannot succeed.

22.For the foregoing reasons the Petition dated 18th March 2025 be and is hereby dismissed with no costs on the same. File closed accordingly.

DATED, SIGNED, AND DELIVERED ON THIS 19TH DAY OF MARCH, 2026.

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BAHATI MWAMUYE MBS

JUDGE

In the presence of:

Petitioner - Mr. James Maina Munene present at Kamiti Maximum Prison

Counsel for the Respondent- - Mr. Mulati

Court Assistant - Ms. Lwambia