Muchina v Republic (Miscellaneous Criminal Application E423 of 2023)
[2025] KEHC 582 (KLR) (Crim) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E423 OF 2023

K KIMONDO, J

JANUARY 30, 2025

[FORMERLY VOI HIGH COURT PETITION NO. E097 OF 2023]

BETWEEN

SAMUEL NGARUIYA MUCHINA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant prays for resentencing. The history of the litigation is relevant and central to determination of this matter: On 31st August 2012, the applicant was convicted by the lower court in Githunguri Senior Resident Magistrates Criminal Case No. 896 of 2011 for defilement of a girl aged 8 years contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*. He was sentenced to life imprisonment.

2. He then filed a petition of appeal at the High Court being Nairobi Criminal Appeal 248 of 2012 challenging both the conviction and sentence. On 22nd July 2015 the entire appeal was dismissed.

3. He avers that he never lodged further appeals and has now returned to the High Court in this Miscellaneous Criminal Application seeking resentencing. The foundation of his plea is the decision in Edwin *Wachira & 9 others v Republic, High Court Mombasa Petition 97 of 2021* for the proposition that persons convicted for sexual offences and who received minimum sentences could approach the High Court for mitigation and re-sentencing.

4. That and other decisions such as Philip Mueke Maingi & 5 others v Republic, High Court Machakos Petition E017 of 2021 [2022] KEHC 13118 (KLR) had drawn their conclusions from the landmark decision of the Supreme Court of Kenya in Francis Karioko Muruatetu & another v Republic, Petition

No 15 of 2015 (consolidated with Petition 16 of 2015) [2017] eKLR, which held that the mandatory nature of the death sentence was unconstitutional. This opened a pathway for re-sentencing by the High Court.

5. The petition is fervently opposed by the Director of Public Prosecutions (hereafter the DPP) through grounds of opposition dated 26th March 2024. The pith of the objection is that the High Court is no longer seized of jurisdiction in the matter.

6. On 16th December 2024, I heard further arguments from the applicant and learned counsel for the respondent, Ms. Awino.

7. I take the following view of the matter. The entire application must fail in limine for the following main reasons. Firstly, and by dint of the principle of stare decisis, the High Court is bound by the decision and directions of the Supreme Court in Muruatetu's case [supra]. Article 163 (7) of *the Constitution* expressly provides that "all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court".

8. On 6th July 2021, the Supreme Court issued further directions on the Muruatetu Case [supra]. It is instructive that those directions were prompted by the disharmony and haphazard manner in which the lower and superior courts had proceeded with resentencing. I will cite in extenso paragraphs 11 of the directions-

> (11) The ratio decidendi in the decision was summarized as follows;
>
> > "69. Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.

9. The Supreme Court in paragraph 14 of the directions was emphatic that-

> It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court. [underlining added]

10. Secondly, the decisions by the High Court in Philip Mueke Maingi & 5 others v Republic [supra] and Edwin Wachira & 9 others v Republic [supra] are very persuasive. To these I would add Baragoi Rotiken v Republic, High Court, Narok, Criminal Application E014 of 2021 [2022] eKLR. But they are all decisions by courts of concurrent jurisdiction and thus not binding.

11. Thirdly, the Supreme Court has reiterated in Republic v Joshua Gichuki *Mwangi & others, Petition 018 of 2023*, that the Muruatetu decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act*, or any other statute. Furthermore, the court, and for other reasons (including assumption of original jurisdiction on constitutional matters not raised at the High Court), set aside the judgment of the Court of Appeal that had declared minimum sentences for sexual offences unconstitutional.

12. It then follows that the High Court is not seized of any further jurisdiction to resentence the applicant. Jurisdiction is everything; and without it, a court must lay down its tools. Motor Vessel Lilian "S" v Caltex oil [1989] KLR 1.

13. The upshot is that the entire petition be and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

Applicant.

Ms. Awino for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. Edwin Ombuna, Court Assistant.