



**Magolo v Republic (Criminal Revision E136 of 2024)
[2025] KEHC 3932 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E136 OF 2024
EN MAINA, J
MARCH 27, 2025**

BETWEEN

ALVIN KABAKA MAGOLO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein was charged with the offence of defilement Contrary to section 8 (1) as read together with Section 8(3) of the [Sexual Offences Act](#) at Mavoko Law courts in Sexual Offence case number 11 of 2015 wherein he was found guilty and sentenced to 20 years imprisonment.
2. Dissatisfied by this judgment, the Applicant appealed to the High Court vide Machakos Criminal Appeal no 45 of 2019 which appeal was heard and determined by Kemei J who found it unmerited and dismissed in a Judgment delivered on 13/05/2020.
3. The Petitioner lodged a second appeal in the Court of Appeal in Criminal Appeal number E108 of 2023. That appeal wherein the Petitioner's Appeal was heard by Kiage, Ali Aroni and Achode JJA who in a judgment delivered on 11/10/2024 dismissed the appeal and upheld the conviction and the sentence but directed that the sentence was to be computed from the date of the Petitioner's arrest as he had been in custody throughout the trial.
4. The Petitioner has now petitioned this court for orders as follows-
 - a. This court has jurisdiction to hear and determine this petition under Articles 23, 159 (1), 160 (1), 165 (2) (b) and (d)(ii) of [the Constitution](#)
 - a. A declaration that the trial court is not considering the petitioner's mitigation and sentencing him by virtue of the minimum mandatory sentences as provided for in



the *Sexual Offences Act* no 3 of 2006 violated the Petitioner's constitutional rights enshrined under Articles 50 (2) (p) and Article 25 & 28 of *the Constitution* of Kenya

- b. This Honourable court review the sentence pursuant to section 216 of the *Criminal Procedure Code* and the 2016 Judiciary sentencing guidelines
 - c. That this court has jurisdiction to order for a resentencing order pursuant to the High Court order no 2 vide petition no E017 of 2021 at Machakos High Court delivered on 17th May 2022 by Justice G.V Odunga and also be persuaded by findings of Justice Mativo sitting at Mombasa High court vide petition 97 of 2021
 - d. Any order that the court deems just under Article 23 of *the Constitution* or any other enabling laws bearing in mind the circumstances of the case.
5. The application is supported by an affidavit wherein the Applicant deposes that he has been in custody since 29/05/2015, that the trial court violated his right to fair trial for failing to consider his mitigation. He deposed that these same sentiments were echoed by the Court of Appeal in Eldoret Criminal Appeal number 312 of 2018 Evans Wanjala Wanyonyi vs Republic where that court stated-
- “on the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law.”
6. The Applicant contended that the High Court also considered the constitutionality and legality of minimum mandatory sentences for sexual offences in the cases of Christopher Ochieng vs R [2018] eKLR Kisumu Criminal Appeal no 202 of 20211 and in Jared Koita Injiri vs R , Kisumu Criminal Appeal no 93 of 2014 and found that the same were unconstitutional. He urged this court to impose a different sentence.
7. The Respondent opposed the application through grounds of opposition dated 10/3/2023 in which they raised two grounds, to wit, that-
- a. The application filed herein is bad in law, an abuse of the court process and frivolous.
 - b. This court has already pronounced itself on sentence and therefore it is functus officio.
8. At the hearing the Applicant reiterated the contents of his supporting affidavit and orally submitted that he has undergone training in prison which he urged the court to consider in reducing his sentence.
9. On her part Prosecution Counsel Ms Nyauncho opposed the application and reiterated that it is misconceived and not properly before the court. Counsel relied on the case of Francis Karioko Muruatetu & Anor -vs- Republic & Katiba Institute Amicus Curiae & others - KESC Pet. 15 & 16 of 2015 where the Supreme Court was emphatic that its decision was only applicable in murder cases. Counsel also contended that this court is functus officio since the issue of the sentence was dealt with by the High Court and the Court of Appeal.
10. In reply, the Petitioner stated that his reliance was on the Court of Appeal case of Christopher Ochieng vs Republic but not the Francis Muruatetu case.

Analysis and determination.

11. I have carefully considered the application, the supporting affidavit, the grounds of opposition, the submissions of the parties, the cases cited. Although the Applicant seems to deny it his application is simply seeking to determine the constitutionality of his sentence. What else would it be now that he



has been heard by this court differently constituted (Kemei- J) and by no less by the Court of Appeal and in both instances the sentence has been upheld?

12. The circumstances pertaining to the constitutionality of the minimum sentences for sexual offences have changed greatly since the decisions upon which the Applicant places reliance were pronounced. In addition to the pronouncements of the Supreme Court in Francis Karioko Muruatetu & Anor - vs- Republic & Katiba Institute Amicus Curiae & others - KESC Pet. 15 & 16 of 2015 [KLR] 6th July 2021 (directions) where it held that the holding in that case applied only in murder cases but not in any others, the Court has now settled the issue of the minimum sentences in the case Republic vs Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa & 3 others (amicus curiae) Petition NO E018 of 2023[2024] KESC 34 [KLR] (12TH July 2024) (JUDGMENT).
13. In the case of Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) (supra) the Supreme Court held:-

“

(56) Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

[57] In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

.....”

14. Following that decision the Court of Appeal has recently stated as follows in the case of Nyarigoti v Republic (Criminal Appeal 271 of 2019)[2025] KECA156(KLR)(7th February 2025);

“

[20] Turning to the second ground urged by the appellant, it is true that until recently our courts were developing a jurisprudential trajectory which impugned the constitutionality of the minimum sentences in the *Sexual Offences Act* on separation of powers grounds. However, that jurisprudential



trajectory was snuffed out by a recent binding decision of the Supreme Court in *Republic vs. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). In that case, the Supreme Court categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

.....”

15. Similarly, this court is bound by the decision of the Supreme Court and has no jurisdiction to interfere with the sentence imposed on the Applicant. It cannot also interfere with a sentence which even the Court of Appeal has affirmed. This application is therefore dismissed.

It is so ordered.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF MARCH, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Kaburu for the state

Applicant – online from Kamiti Prison

C/A: Wambua

