



REPUBLIC OF KENYA



**Lumbasi v Republic (Criminal Petition E005 of 2024)  
[2025] KEHC 5403 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL PETITION E005 OF 2024**

**JN KAMAU, J**

**APRIL 28, 2025**

**BETWEEN**

**GEORGE MUCHIKA LUMBASI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* Cap 63 A (Laws of Kenya). He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to life imprisonment.
2. Being aggrieved by the said decision, he lodged an appeal in the High Court in Kakamega HCCRA No 17 of 2016 and a second appeal in the Court of Appeal Kisumu HCCRA No 135 of 2016 which were both dismissed.
3. On 16<sup>th</sup> February 2024, he filed Notice of Motion application dated 8<sup>th</sup> February 2024 seeking a review of his sentence. He urged this court to consider Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) while reviewing his sentence.
4. He pointed out that he had undergone various rehabilitation programs hence was ready to be re-integrated back to the society.
5. His Written Submissions were dated 20<sup>th</sup> September 2024 and filed on 27<sup>th</sup> September 2024 while those of the Respondent were dated 26<sup>th</sup> November 2024 and filed on 27<sup>th</sup> November 2024. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

6. The Petitioner submitted that the mandatory nature of a life sentence made it unconstitutional due to its indeterminate nature. He argued that it was only fair that the same be abolished, done away with and/or reviewed to a least severe form of punishment. He pointed out that the said sentence infringed one's dignity as the longer one lived, the longer it took away the hope of any future good by treating the offender as unresponsive to any rehabilitation measures.
7. He further contended that the said life sentence was discriminative in nature as it did not allow a convict to benefit the one-third (1/3) right to remission like other convicts who were serving determinate sentences and further that it did not place any value on the mitigating factors presented before the sentence. To buttress his point, he relied on the case of Julius Kitsao Manyeso *vs Republic Criminal Appeal No 12 of 2021* (eKLR citation not provided) where it was held that a sentence that rendered mitigation to be of no value was unjustifiably discriminative, unfair and repugnant to the principle of equity before the law under Article 27 of *the Constitution*. The court also added that an indeterminate life sentence was inhumane treatment and violated the right to dignity under Article 28 of *the Constitution*.
8. It was his case that his sentence of life imprisonment denied the Trial Court and the appellate courts their power to exercise discretion and was against the principle of proportionality as advocated for by Odunga J (as he then was) in Constitutional Petition No E017 of 2021 and Herron Kipkemoi Mutai vs Republic [2022]eKLR where the common thread was that a life sentence ran contrary to established principles of certainty and was therefore not efficacious.
9. He was emphatic that a sentence of life imprisonment was only retributive, punitive and deterrent but was against an important aim of conviction which was rehabilitation to be achieved by the applicant in the due course of serving his sentence. He urged the court to reduce his sentence to a least form of punishment. In that regard, he placed reliance on the case of *Kevin Mang'ondi vs Republic Criminal Appeal No 66 of 2019* (eKLR citation not given) where the mandatory life sentence was substituted with twenty (20) years imprisonment.
10. He pleaded with court to also consider him for Probation or Community Service Order (CSO) as the same would strengthen his relationship with the community and further give him a chance to provide for his family and pay fees for his siblings as he was the breadwinner of the family.
11. He said that he was remorseful for the events that led to him defiling a child of tender years. He sought for a second chance. He further pointed out that he had equally changed, had become a committed Christian, his family had forgiven him and had in fact been visiting him in prison advising him of a second chance as Samson prayed in the Bible, in Judges Chapter 16 Verse 28.
12. He pointed out that he attained Grade II and III in carpentry and was a spiritually nourished citizen who had undergone various Theological and Biblical training. He was emphatic that he had atoned for his crime, was socially re-adapted and was ready to be re-integrated back to society. He added that he possessed qualities of a good citizen and was no longer a threat to the public.
13. He submitted that it would therefore be unjust if his sentence was left fixed and unreviewable. He argued that in the end, courts had a duty to dispense justice not only to the complainant but also to the accused person as was held in the case of Dismas Wafula Kilwake vs Republic [2019]eKLR.
14. He also urged the court to consider the period that he spent in custody since his arrest on 27<sup>th</sup> March 2015 pursuant to Section 333(2) of the *Criminal Procedure Code* and direct that his sentence do run from the date of arrest. In this regard, he relied on the case of Ahamad Abolfathi Mohammed &



Another vs Republic [2018]eKLR where it was held that by dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period spent in custody before they were sentenced.

15. On its part, the Respondent submitted that age in defilement cases was crucial as it determined the sentences to be meted out by the court. It placed reliance to the case of Supreme Court Petition No E018 of 2023 Republic vs Joshua Gichuki Mwangi (eKLR citation not given) where it was held that Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question and proceeded to determine that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the Sexual Offences Act.
16. It further contended that while the Petitioner relied on the Muruatetu case, in the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Wanjema vs Republic (1971)E.A 493, the common thread was that sentencing was an exercise of the trial court and that for another court to interfere, it had to be shown that the court took into account an irrelevant factor or a wrong principle was applied or short of those the sentence was too harsh and excessive that an error in principle must be inferred.
17. It was emphatic that the Trial Court considered the facts of the case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors and the scar the incidence left in the life of the victim in meting the minimum prescribed sentence on the Petitioner. It pointed out that as the victim of defilement was aged seven (7) years old at the time of the offence, she was psychologically scarred for the better part of her life as her innocence was stolen by a person who ought to have protected her.
18. It was categorical that the sentence that was imposed on the Petitioner was proper in law and was not unconstitutional as claimed. It urged this court to uphold the same.
19. The Petitioner herein was sentenced under Section 8(2) of the Sexual Offences Act. The same provides as follows: -
  - “ A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
20. The Trial Court, the High Court and the Court of Appeal did not, therefore, err when it meted out the life imprisonment as the same was lawful.
21. In fact, in its decision in Lumbasi vs Republic (Criminal Appeal 135 of 2016) [2022] KECA 1097 (KLR) (7 October 2022), the Court of Appeal rendered itself as follows:-

“ Whilst the appellant says that he is remorseful and prays for leniency, we have no doubt in our minds that this is one instance when the minimum sentence is deserved. The victim was a girl of seven (7) years. The sexual assault left her with serious injuries including a torn hymen. She suffered an infection to her urinary tract. The appellant defiled the child on no less than three occasions. On one occasion, he forced a handkerchief into her mouth so as to muffle any noises of distress from her. In addition, he threatened her. This was a really heinous crime, callous in the extreme, and traumatic to the victim.

The sentence imposed was neither unlawful nor manifestly excessive. It is in fact deserved and we shall not interfere with it. We dismiss the appeal.”



22. Having said so, this court also noted that in the case of Manyeso *vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), another bench of the Court of Appeal, held that life imprisonment was unconstitutional. It replaced the term of life imprisonment with forty (40) years imprisonment.
23. Going further, in the case of Ayako *vs Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (8 December 2023),(Judgment), another Bench of the Court of Appeal held that life imprisonment translated to thirty (30) years' imprisonment.
24. Notably, Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) and Ayako vs Republic (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023),(Judgment) dealt with the constitutionality of the life sentence. This court had therefore been substituting life sentences with determinate sentences of thirty (30) years imprisonment, which is what in the case of Ayako vs Republic (Supra), the bench of the Court of Appeal determined to have constituted life imprisonment.
25. Bearing in mind that Lumbasi vs Republic (Criminal Appeal 135 of 2016) [2022] KECA 1097 (KLR) (7 October 2022) was delivered before the cases of Manyeso vs Republic (Supra) and Ayako vs Republic (Supra) that were delivered on 7<sup>th</sup> July 2023 and 8<sup>th</sup> December 2023 respectively, it was the considered opinion of this court that it would not have been revising the decision of the Court of Appeal in Lumbasi vs Republic (Supra) if it had substituted the life imprisonment that the Petitioner herein was serving as it would have been equating the life imprisonment with a determinate sentence as was determined by the cases of Manyeso vs Republic (Supra) and Ayako vs Republic (Supra) that were also delivered by separate benches of the Court of Appeal. Indeed, this court had been substituting life imprisonment with thirty (30) years imprisonment.
26. The above notwithstanding, this court noted that in its decision it delivered in Petition No E013 of 2024 Republic vs Julius Kitsao Manyeso on 11<sup>th</sup> April 2025, the Supreme Court of Kenya overturned the decision of the Court of Appeal in Manyeso vs Republic (Supra) and rendered itself as follows:-
  - “68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, and it is both proper and imperative for them to recommend such measures to be to the appropriate authorities for adoption....
  69. We therefore find no difficulty in finding that the Court of Appeal erred in substituting the life imprisonment with a 40- year sentence, thereby usurping the legislative power to define sentences....
  72. Consequently our final orders are as follows:-
    - a. The Petition of Appeal is hereby allowed.
    - b. The life imprisonment that was imposed by the trial court and affirmed by the High Court is hereby reinstated.



- c. The Respondent, Julius Kitsao Munyeso shall therefore complete the life imprisonment imposed by the trial court.”

27. Further in its decision in Petition No E002 of 2024 Republic vs Evans Nyamari Ayako that was also delivered on 11<sup>th</sup> April 2025, the Supreme Court also overturned the Court of Appeal decision in the case of Ayako v Republic (Supra). It pronounced itself as follows:-

“ 52. In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso vs Republic Case, where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate sentence.

53. In the Muruatetu II Case we reiterated that the rationale of the Muruatetu I was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence...

54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.

58. Consequently, and for the reasons aforesaid, we make the following orders:-

1. The Appeal dated 1<sup>st</sup> February 2024 is allowed.
2. The Judgment of the High Court is hereby reinstated.
3. For the avoidance of doubt, the Respondent shall serve life imprisonment as sentenced by the Magistrate’s Court...”

28. It was therefore abundantly clear that the Supreme Court had pronounced itself on the validity of the life sentence that had been prescribed for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

29. Given that this court was bound by the decisions of courts superior to it in the principle of stare decisis, this court had no option but to uphold the life imprisonment that was imposed by the Trial Court and upheld by both the High Court and the Court of Appeal.

30. In view of the fact that the sentence herein was indeterminate, this court could now not consider the provisions of Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) as the Petitioner herein had sought.

### **Disposition**

31. For the foregoing reasons, the upshot of this court’s decision was that the Petitioner’s Notice of Motion application dated 8<sup>th</sup> February 2024 and filed on 16<sup>th</sup> February 2024 was not merited and the same be and is hereby dismissed.

32. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 28<sup>TH</sup> DAY OF APRIL 2025**



**J. KAMAU**  
**JUDGE**

