



**Kagai v Republic (Miscellaneous Criminal Application
E040 of 2023) [2025] KEHC 7204 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION E040 OF 2023**

EM MURIITHI, J

MAY 29, 2025

BETWEEN

OCTAVIOUS NDEGE KAGAI APPLICANT

AND

REPUBLIC PROSECUTION

RULING

1. The applicant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offence [*Act No. 3 of 2006*](#). The particulars of the offence are that on 7th June, 2017 at [Particulars Withheld] within Kirinyaga county, intentionally and unlawfully caused his penis to penetrate the vagina of JWN, a child aged 13 years who was to his knowledge his daughter. He was sentenced to life imprisonment on 31st August, 2017.
2. He lodged an appeal vide Criminal Appeal No. 61 of 2017 and his life sentence was substituted with 25 years' imprisonment.
3. The applicant has been in custody for 8 years. He seeks non-custodial sentence for the remainder of his period. The applicant submits that he has been rehabilitated while in prison. He has undertaken course in carpentry, tailoring and certificates in Bible studies.
4. The prosecution submits that the application for a sentence review should be consider the 8 years served in prison. moreover, objective of punishment is retribution.

Issue

5. Whether the applicant is entitled to review of sentence.



Analysis

6. The applicant was charged with the offence of incest contrary to section 20 (1) of the Sexual Offence [Act No. 3 of 2006](#). He is serving a 25 years' prison term after successfully appealing a life sentence.
7. The applicant seeks review of his 25 years' sentence downwards. He has been in prison for 8 years. He urges the court to consider that he is a first time offender and he has been rehabilitated while in prison.

Whether the petitioner is entitled to resentencing

Reduction of life sentence to imprisonment for a term of years

8. As explained in the Supreme Court's recent decision on the applicability of the Muruatetu Case in relation to mandatory and minimum sentences in sexual offences in Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment):
 52. In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case 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.
 53. In the Republic vs Mwangi Case, we explained as follows:
 - a. “(52) We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined 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](#). In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.”
 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.
 - b. Similarly in Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) the Supreme Court said:
 62. In the Muruatetu Directions, this Court pronounced itself on the application of the ratio in the Muruatetu case to other statutes prescribing mandatory sentences as follows:
 - “10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgement in this matter, or indeed the spirit of the Judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it.
 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."

14. 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." [Emphasis added]"

9. The Manyeso court was categorical at paragraphs 67 – 69 of the Judgment that:

"67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 (3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.

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, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption. As a Court we have invoked this remedy in various instances; in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) we suggested the consideration of reforms over the recourse parties have upon the declaration of trust by the courts and how to actualize the same, especially regarding the aspect of shareholding. In *Malcolm Bell v Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak* (Application 1 of 2013) [2013] KESC 23 (KLR) Hon. Justice



Kaplana Rawal, DCJ in her concurring opinion made recommendations to amend Section 16 of the *Supreme Court Act*. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) we urged CAK to set a timeline for the digital migration. In *National Bank of Kenya Limited v Anaj Warehousing Limited* (Petition No. 36 of 2014) [2015] KESC 4 (KLR) we suggested appropriate legislative action to be taken to address the gaps and inconsistencies apparent in the *Advocates Act*.

69. We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.””

10. In this case, the applicant has already benefitted from the reduction before the Supreme Court outlawed it by the above decisions of 11/4/2025. This Court cannot reset the sentence of life imprisonment, as this is not appellate court where the DPP may have cross-appealed and sought enhancement of sentence. The decision reducing the sentence from life imprisonment to imprisonment for 25 years was made by this Court (J. N. Mulwa, J.), the court has no jurisdiction to interfere with the sentence as doing so would be sitting on its own appeal.

Orders

11. Accordingly, for the reasons set out above, the petition for reduction of the sentence of 25 years imposed herein on the applicant is declined.

12. File Closed.

Order Accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP.

Applicant in person.

