



**Mbithi v Republic (Criminal Case E002 of 2024)
[2025] KEHC 7704 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE E002 OF 2024**

RC RUTTO, J

MAY 29, 2025

BETWEEN

JOSEPH MBITHI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of a Notice of Motion Application, the Applicant seeks that this Court be pleased to revise the sentence of 15 years imprisonment. The Application is supported by the grounds on the face of it and the Applicant’s supporting affidavit. The Applicant deposed that he is currently serving sentence upon resentencing orders issued by Odunga J (as he then was) on 19/05/2019; he has been in custody for over 7 years since his date of arrest on 24th October 2016; and that he has undergone enough retribution. He urged the court to give him a lenient sentence based on the fact that he is a first time offender, he is remorseful and regrets his actions.
2. The Application was opposed by a ground of opposition dated 03/03/2025 wherein the Respondent sought to have the application dismissed on the grounds that;
 - a. The application filed herein is not only misconceived but bad in law since the sentence sought to be reviewed was issued by this court, upon a resentencing application in Machakos HC Misc Criminal Application number 45 of 2020, rendering this court functus officio in the matter.
 - b. The current position of the law on minimum sentences under the *Sexual Offences Act* is that the same are lawful and constitutional. This is following the recent Supreme Court’s decision dated 12th July 2024 in Petition E018 of 2023- Republic v Mwangi ; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).
3. The Application was canvassed by way of both written and oral submissions.



4. The Applicant relied upon his written submissions to urge the Court to grant him a chance to interact with the society. He stated that he had done a certificate and diploma course in sports. He submitted that he was a first offender, he was remorseful and sought forgiveness.
5. On review of his sentence, the Applicant submitted that he had been in prison for 8 years 4 months and was left with 1 year 8 months before he completes his sentence. He urged the Court to be persuaded by the cases of Joseph Wambua Bahati, High Court Criminal Revision E40 of 2024 and Nicholas Mukila Ndeti v Republic [2019] eKLR and find that the time already spent was enough retribution and set him free.
6. The Respondent opposed the application and submitted that the court was functus officio and cannot review a decision of a judge of concurrent jurisdiction. It was also stated that the court had no jurisdiction to review a sentence under the *Sexual Offences Act* in line with the Supreme Court decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).
7. In rejoinder, the Applicant submitted that he has a right to be heard and indicated that he did not appeal against the 15 years sentence by the High Court.

Analysis & Determination

8. I have considered the Application and the rival submissions of the parties and find that the issue for determination is whether the sentence should be reviewed.
9. It is not disputed that the Applicant was first found guilty, convicted and sentenced to life imprisonment by the trial court in Kithimani Criminal SOA Case No 63 of 2016. Aggrieved by that decision, he appealed to the High Court in Machakos, in Criminal Appeal No 94 of 2027 on both conviction and sentence. In a judgment delivered on 13 /05/2019 the court held that the sentence of life imprisonment was not erroneous, the prosecution had proved its case beyond reasonable doubt. The appeal was dismissed for lack of merit.
10. Later, the Applicant moved court in Criminal Miscellaneous Application No 45 of 2020, whereby he sought re-sentencing. Consequently, by an order dated 19/05/2019 the Applicant's sentence of life imprisonment was set aside and he was re-sentenced to 15 years imprisonment.
11. The Applicant is seeking to have a review of the sentence meted upon him on grounds he is a first offender, he is remorseful, he has undertaken rehabilitative programs and that he has been in custody since the date of his arrest on 24th October 2016. I have considered the application, the supporting affidavit, as well as the parties' submissions.
12. This Court notes that the Applicant has had two opportunities to have his sentence reviewed by this Court. First, when he appealed to the Court and the court in exercising its appellate jurisdiction held that the prosecution proved its case beyond all reasonable doubt and that the sentence of life imprisonment was not erroneous. The Court then proceeded to dismiss the appeal for it lacked merit.
13. The secondly opportunity presented when the applicant moved court for re-sentencing following the Supreme Court decision in Francis Muruatetu Case 1. Based on this re-sentencing the Applicant's life sentence was reduced to a 15-years imprisonment term. The Applicant now seeks a third attempt to be released on the grounds already set out.
14. How many times can a man be lucky? I pose this question based on the fact that the Applicant was convicted to life imprisonment under the *Sexual Offences Act*. Following the Supreme Court decision in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)



[2021] eKLR he was resentenced to serve 15 years imprisonment. Later, the apex Court clarified that the jurisprudence in Francis Kariko Muruatetu v Republic [2017] eKLR only applied to murder cases under section 204 of the *Penal Code*. With this jurisprudence, it therefore follows that having been convicted of under the *Sexual Offences Act*, the Applicant ought to be sentenced to the legally provided sentence which is life imprisonment. Luckily, that issue is not before this Court in the present motion as neither the Respondent has raised it nor is there a notice of enhancement of sentence. Hence that issue rests!

15. This court also notes that the Applicant has not claimed any breach of law and or violation of any right but seeks that he be released on the basis the time spent in custody and that he is remorseful and has undertaken rehabilitative programs.
16. I do note that this Court has no jurisdiction to review a matter already determined by a Court of concurrent jurisdiction. The Court is functus officio in the matter. The Applicant's remedy, if at all, now lies with the superior court, the Court of Appeal. Alternatively, the Applicant may also petition the President under Article 133 of *the Constitution* as well as under the *Power of Mercy Act*. See the case of Sianyoy Atembe v Republic (Criminal Revision 194 of 2023) [2023] KEHC 26456 (KLR) 5th December 2023 Ruling.
17. The upshot is that the application is dismissed for lack of merit.
18. Orders accordingly.

Dated, signed and delivered at Machakos this 29th day of May, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Sam Court Assistant

