Mwangangi v Republic (Miscellaneous Criminal Application E023 of 2023) [2025] KEHC 7860 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7860 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2023

RC RUTTO, J

MAY 29, 2025

BETWEEN

MUTHUI MWANGANGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant filed a Chamber Summons Application on 15/05/2023 seeking.
    a. Spent
    b. That the Court be pleased to issue orders for special hearing of this application for re-sentencing pursuant to the decision in Philip Mueke Maingi and Others Vs Republic Petition No E-017 of 2021 at Machakos and Edwin Wachira and Others Petition No 97 of 2021 at Mombasa.
    c. That the court be pleased to issue any further orders it may deem fit and expedient in the circumstance of this application.
2. The Application is supported by an affidavit deponed by the Applicant. The Applicant states that he was found guilty and convicted of the offence of defilement contrary to section 8(1) as read together with 8(2) of the *Sexual Offences Act* in Mwingi SRM Criminal Case No 94 of 2009 and sentenced to life imprisonment.
3. Dissatisfied with the judgment of the trial court, he appealed to the Machakos High Court vide Criminal Appeal No. 120 of 2011 which appeal was dismissed on 5/10/2012. He then lodged a second Appeal to the Court of Appeal at Nairobi vide Criminal Appeal No 41 of 2013 which was equally dismissed on 17/05/2019.

4. The Appellant indicates that he makes the application as directed by the High Court in Philip Mueke Maingi and 5 others vs Republic Petition No E017 of 2021 at Machakos and Edwin Wachira and 5 other , Criminal Petition No 97 of 2021 at Mombasa where the court, guided by the ratio in the Supreme Court decision in Muruatetu 1, held that mandatory sentencing provision under the *Sexual Offences Act* are unconstitutional in so far as they deny trial courts the discretion to give regard to mitigating circumstances and other incidents before sentencing.

5. The court was also urged to consider the time the Applicant has spent in custody from 7/02/2009 as enough period and rehabilitation.

6. The Application was canvassed by way of written submissions. In submissions dated 29/04/2025, the Applicant prayed for revision of his sentence. He acknowledged exhausting all his appeal avenues and stated that the courts had okayed the re-sentencing process for all who had exhausted their appeals. He submitted that the Muruatetu 2 case was applicable to offences that carried the mandatory death sentence including sexual offences and having exhausted all his avenues of appeal, he has applied for re-sentencing by virtue of the directions in Philip Mueke Case Supra and Edwin Wachira Case (Supra). Further, while relying on the case of Leonard Kipkemoi vs R [2018] e KLR and James Kariuki Wagana vs R [2018] eKLR he urged that the Court has the jurisdiction to reduce the sentence.

7. The Respondent opposed the application on the grounds that the Court had no jurisdiction to determine the Application as it cannot sit in review of a decision by a court of concurrent jurisdiction, let alone that of a higher court. Reliance was placed on the cases of R vs Joshua Gichuki Mwangi, ISLA & 3 Others [2024] eKLR and Elishipa Muthoni vs R [2022] eKLR.

8. It was further submitted that the Applicant did not expressly challenge his sentence before either appellate court, but only faulted his conviction. In equal measure, that neither did the appellate court addressed itself to the severity or otherwise of the sentence and hence the sentence meted out by the trial court cannot be disturbed at this time.

9. Reliance was made to Supreme Court's decision in Petition No. E 009 of 2024, R v. Joshua Gichuki Mwani, ISILA & 3 Others (2024) eKLR where the Court reiterated that the Muruatetu case did not confer resentencing jurisdiction for offences obtaining from the *Sexual Offences Act* but is limited to murder convicts previously sentenced to the hitherto mandatory death sentence.

10. The Respondent submitted that the Court should down its tools for want of jurisdiction to re-sentence the Applicant as no jurisdiction has been conferred on it either by legislation or by virtue of stare decicis.

Analysis & Determination

11. I have considered the Application and the submissions of the parties and find that the issue for determination is whether this Court has jurisdiction to review the sentence of life imprisonment, meted out by the trial magistrate court and affirmed by both the High Court and the Court of Appeal.

12. The Applicant has brought this matter while placing heavy reliance on the cases of Philip Mueke Maingi and 5 others vs Republic Petition No E017 of 2021 at Machakos and Edwin Wachira and 5 other Criminal Petition no 97 of 2021 at Mombasa. The Court recognizes that at the time of the determination of these two cases, courts were proceeding on the basis that the Supreme Court decision in the case of Muruatetu 1 was applicable in all circumstance where mandatory sentences are provided for in statute.

13. However, subsequently, and more recently the Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) stated as follows;

> " Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.
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> 64. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against *the Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case.
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> 65. We also note that the Court of Appeal concluded its decision in this present matter by reducing the Respondent's sentence from the minimum of 20 years to 15 years. In doing so, the Court of Appeal did not clarify the considerations that went into its decision to reduce the sentence. The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.
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> 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

14. Consequently, guided by the above decision and to which I am bound to be guided by, I do find that the holdings in the case ofPhilip Mueke Maingi and 5 others vs Republic Petition no E017 of 2021 at Machakos and Edwin Wachira and 5 other, Criminal Petition no 97 of 2021 at Mombasa are inapplicable in the circumstance. The Applicant having been convicted for the offence of defilement under section 8(2) of the *Sexual Offences Act*, he was thus duly and legally sentenced to life imprisonment. That sentence remains the only legal sentence he can be sentenced to. On that ground alone, this application lacks merit.

15. Be that as it may, we hasten to add that the Applicant having gone all the way and appealed to the Court of Appeal, he cannot move to this High Court seeking that this Court interferes with a sentence affirmed and/or meted out by the Court of Appeal. See the case of Kenneth Kirimi v Republic [2021] eKLR where it was held, inter alia, that "I arrive at the conclusion that the Principal Magistrate had no jurisdiction to review the sentence confirmed by the Court of appeal and that similarly this court (High Court) lacks the jurisdiction to hear and determine this application."

16. In the end, the Application is found to be without merit and the same is dismissed.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF MAY, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Sam Court Assistant