Musyoka v Republic (Miscellaneous Criminal Application E123 of 2024) [2025] KEHC 9118 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9118 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E123 OF 2024

EN MAINA, J

JUNE 26, 2025

BETWEEN

DERRICK MUEMA MUSYOKA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein was sentenced to serve imprisonment for twenty (20) years for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. He was so convicted and sentenced on 8th February 2017.

2. In the current application which is by way of an undated Chamber Summons he seeks a review of that sentence downwards on the grounds that he was a first offender; that he was under age because he was seventeen years old, when he committed the offence; that he is remorseful and has reformed and further that his parents have suffered emotionally due to separation with their son of tender age. He also contends that leniency is a tenet of the *Constitution* as provided in Article 50(2) (p). He urges this court to invoke the principles of natural justice to grant the relief sought and has undertaken never to act foolishly as he did before.

3. The application is alleged to be made under Section 364 of the *Criminal Procedure Code* and article 165(3) (a) of the *Constitution*.

4. In opposition to the application the state/Respondent filed Grounds of Opposition dated 6th February 2025. According to the State/Respondent the application is not only misconceived but is bad in law as the sentence sought to be reviewed was confirmed by this court (differently constituted), in High Court Criminal Appeal No. 1 of 2019 and hence this court is *functus officio*.

5. The application was canvassed by way of written submissions. The applicant reiterated the grounds set out in his application and argued that this court has a wide discretion to grant the prayers sought.

To this end he cited Article 159 of the *Constitution*, The *Judiciary Bench Book* 2018, Gazette Notice No.2970 of 29th January 2016 on the sentencing policy guidelines and Section 12 and 35 of the *Penal Code*. He also placed reliance on the case of *Bethwel Kibor v Republic* (2009) (citation not supplied), the case of *Minister for Health & Others v Treatment Campaign and Others* (2002) 5LRC 216 p.29 and the case of *Stephen Githundi Mbugua v Republic* (Misc. Application No.E036 of 2022 (citation not supplied). He contended that in the latter case the High Court in Kajiado reviewed a sentence which had been awarded by the same court. He urged that this court makes an order that he serves the remainder of his term by way of a non-custodial sentence.

6. For the State/Respondent it was argued that the application has no merit and cannot be granted because in any event this court is functus officio as the issues raised were dealt with in HCCRA No. 1 of 2019 and in similar application in HCCRA 1 of 2019 which appeal and application were dismissed for lack of merit. In support of her submissions Prosecution Counsel Makena Kaburu placed reliance on the case of *Raila Odinga & 2 others v IEBC & 3 others* [2013]eKLR and the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550. Counsel contended that Section 364 of the *Criminal Procedure Code* vest supervisory power on the High Court over subordinate courts and that Article 165(6) effectively prevents this court from reviewing a sentence passed by a court of concurrent jurisdiction.

Issues for Determination

7. The issue for determination is whether this court can review/reduce the sentence imposed against the Applicant for the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* to a non-custodial sentence and on the grounds cited or whether this court is *functus officio*.

Analysis and Determination

8. I have considered the application, the affidavit in support, the grounds of opposition, the rival submissions, the cases cited and the law. In her submissions learned Counsel for the State/Respondent referred to a Criminal Appeal filed by the Applicant against the conviction and sentence of imprisonment for twenty years imposed upon him by the trial court. I have had opportunity to peruse the judgment delivered by Kemei J, on 10th July 2019 and noted that the judgment delved into the issue of the Applicant's age in detail and also considered the severity of the sentence imposed by the trial court. The judge stated:-

> " [18] I have perused the appellant's mitigation in the proceedings. All he said was that he was born in 1998 and wanted to continue with his education. The appellant was seventeen years in 2016, and is therefore presently 20 years old. Applying the principles from these authorities, I would see no reason to interfere with the appellant's sentence.
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> [19] Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find nothing to suggest that the learned magistrate was in error in convicting the appellant on the evidence available. I see no irregularity in the proceedings, save that the trial Magistrate ought to have pointed out the provisions of section 191(1)(g) and (l) of the *Children's Act*. The authorities herein cited persuade me to find that the appellant requires to undergo rehabilitation before joining the society. I find that no injustice has been occasioned to the appellant as the conviction was based on sound evidence. The trial magistrate duly considered the appellant's

mitigation and sentenced him to twenty years and pointed out that he requires rehabilitation. I have no reason to disturb the same.

[20] In the result it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The conviction and sentence is upheld."

9. In light of the above, this court cannot revisit the sentence on account of the age of the Applicant at the time he committed the offence. That would be tantamount to sitting on appeal again the judgment of a concurrent court and I do not have power or jurisdiction to do so. The power vested upon this court under Article 165 of the *Constitution* extends only to hearing appeals against the judgment of subordinate courts. So does Section 364 of the *Criminal Code*. Even the powers of revision are only in respect to the orders, findings or judgments of courts subordinate to this court but not those of superior courts. Indeed even Article 165(6) of the *Constitution* expressly states that a convicted person is entitled to a review of his case by a higher court. I cannot therefore exercise my discretion to upset the judgment of Kemei Judge.

10. As for the reduction of the sentence to a non-custodial sentence as is usually done under the Community Orders Act my view is that such exercise of discretion cannot extend to serious offences such as sexual offences because the same have minimum sentences. In the recent decision of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) the Supreme Court considered the constitutionality of the minimum offence under the *Sexual offences Act* and categorically and emphatically held that the same are constitution and the courts must impose he same unless and until they are declared unconstitutional. In the case of *Charles & Another v Republic* (Criminal Appeal 38 of 2019) [2024] (Judgment) [2024] KECA 1902 (KLR) the Court of Appeal ceded to the binding nature of the decisions of the Supreme Court and stated:

"(35) We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation.

36. All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the *Sexual Offences Act*. Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in *Republic v Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024). In that case, the Supreme Court 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 minimum statutory minimum sentences in sexual offences.

37. 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 recognized 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."

38. This decision is binding on us under the doctrine of *stare decisis*. In the present case, the appellants were convicted under section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court's binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances."

11. Similarly, the decisions of the Court of Appeal and the Supreme Court are binding on this court and in the premises the invitation to interfere with the sentence is declined and this application is dismissed.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF JUNE, 2025.

E. N. MAINA

JUDGE

In the presence of:-

Ms Kaburu for the State/Respondent

Applicant – online from Kitengela Prison.

Geoffrey - Court Assistant/Interpreter