Chemei v Republic (Criminal Petition E005 of 2023)
[2025] KEHC 9105 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9105 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL PETITION E005 OF 2023

JN KAMAU, J

JUNE 25, 2025

BETWEEN

GILBERT CHEMEI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

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 63A (Laws of Kenya). He was also charged with an alternative charge of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to life imprisonment.

2. Being aggrieved by the said decision, he lodged a first appeal at the High Court in Kakamega HCCRA No 137 of 2011 whereby the court dismissed it in its entirety.

3. Being aggrieved by the said decision, he filed a second appeal at the Court of Appeal in Kisumu, Criminal Appeal No 51 of 2014, whereby the court also dismissed it in its entirety.

4. On 9th June 2023, he filed Notice of Motion application dated 19th May 2023 seeking sentence review pursuant to Articles 50 (2)(p) and 165(3) of *the Constitution* of Kenya, 2010.

5. He placed reliance on the case of Maingi & 5 Others v DPP & Another, Petition No E017 of 2021 [2022] KEHC (13118) KLR which addressed the issue of the mandatory nature of the sentence as violating Article 27 of *the Constitution* of Kenya. He averred that his life sentence was arbitrary, discriminatory and inhuman.

6. His Written Submissions were dated 19th May 2023 and filed on 9th June 2023 while those of the Respondent were dated 30th January 2025 and filed on 31st January 2025. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

7. In his Written Submissions, the Petitioner reiterated that mandatory sentences were discriminatory in nature and violated Article 27 of *the Constitution* of Kenya as was held in the case of Mombasa Criminal Petition Consolidated No 97, 88, 90 and 57 of 2021 Edwin Wachira & 9 Others v Republic (eKLR citation not given).

8. He contended that he was arrested at the age of fifty-eight (58) years and having served his sentence for fourteen (14) years, he was presently seventy-two (72) years old. He invited the court to consider the age factor and human life expectancy. He asserted that the long incarceration would make him suffer due to the unconducive environment and with regard to his deteriorating health status. He pointed out that he had chronic ulcers.

9. He further contended that his family was overwhelmed with the heavy burden of fending for the family for their daily basic needs. He pleaded with court to grant him a second chance on grounds that his family was ready to facilitate his resettlement and rehabilitation. He was remorseful of having committed the offence.

10. He pointed out that he had been pleasant and exemplary in behaviour among his fellow inmates and had undergone Biblical studies and had attained a Certificate of Diploma in completion (sic) among other ongoing courses. He added that he was on the verge of reconciling with the concerned parties and promised to shy away from criminal activities.

11. On its part, the Respondent submitted that the sentence that was meted out on him was lawful considering the nature of the case. It placed reliance on the case of Republic v Jagani & Another [2001] KLR 590 where it was held that the purpose of the sentence was usually deterrence and rehabilitation of the offender and reparation for harm done to victims in particular and to society in general.

12. It pointed out that this court lacked the jurisdiction to review the sentence imposed upon the Petitioner as he had already appealed to this court and the Court of Appeal. It invoked Article 165(3) and Article 165(6) and argued that this court could not supervise superior courts. To buttress its point, it relied on the case of John Kagunda Kariuki v Republic [2019]eKLR where it was held that the applicant could not return to the High Court for review of his sentence as the High Court had already determined his case on appeal and that he was at liberty to approach the Court of Appeal. It urged the court to dismiss the Applicant's application for lack of merit.

13. The Petitioner herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The said Section 8(2) 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."

14. This court could not fault the Trial Court for having sentenced the Petitioner to life imprisonment as that was lawful. Previously, courts were meting out lesser sentences than was prescribed in the *Sexual Offences Act* as there jurisprudence whereat courts exercised their discretion in meting out the sentences that were lower than what was prescribed in the *Sexual Offences Act*.

15. Notably, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case of Joshua Gichuki Mwangi v Republic [2022] eKLR where the Court of Appeal had reiterated the reasoning in the case of Dismas Wafula Kilwake v Republic [2018] eKLR to the effect that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the

legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence. The Supreme Court held that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence.

16. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce sentences for sexual offenders. In any event, it could not review the decision of the Court of Appeal on an issue that it had already determined.

Disposition

17. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated 19th May 2023 and filed on 9th June 2023 was not merited and the same be and is hereby dismissed.

18. It so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JUNE 2025.

J. KAMAU

JUDGE