



**Kipngetich v Republic (Criminal Miscellaneous Application
E037 of 2021) [2025] KEHC 11875 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL MISCELLANEOUS APPLICATION E037 OF 2021**

CM KARIUKI, J

JULY 31, 2025

**IN THE MATTER OF: ARTICLES 2, 3(A), 19(2), 20(1), 22(1), 23(1), 25(C), 26(1), 27(1)
(4), 28, 50(2)(P)(Q), 159(2), AND 165(3)(B) OF THE CONSTITUTION OF KENYA,
2010 AND THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2010 AND
SECTIONS 216, 329, AND 333(2) OF THE CRIMINAL PROCEDURE CODE (CAP. 75) AND
SECTION 8(1) AS READ WITH 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

BETWEEN

NICHOLAS KIRUI KIPNGETICH APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application arising from HCCRA No. 222 of 2016 at
Naivasha, which arose from Narok CM Criminal Case No. 1345 of 2013)*

RULING

Introduction

1. The Applicant, Nicholas Kirui Kipngetich, moved this Court vide chamber summons dated 8th December 2021 supported by his own affidavit, seeking a rehearing on sentence. He was convicted by the Chief Magistrate's Court at Narok for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, and sentenced to life imprisonment. His appeal in HCCRA No. 222 of 2016 at Naivasha High Court was dismissed. He now seeks a review of his sentence.
2. The application is grounded on several constitutional provisions, particularly Articles 50(2)(p)(q) of the *Constitution*, and is anchored on recent jurisprudence from superior courts declaring the mandatory nature of certain sentences unconstitutional where mitigation is not taken into account.



Applicant's Grounds and Submissions

3. The Applicant contends:
 - i. That the sentence of life imprisonment imposed upon him was a mandatory minimum sentence under section 8(2) of the [Sexual Offences Act](#), which denied the trial court discretion in sentencing.
 - ii. That his right to fair trial under Article 50(2)(q) of the [Constitution](#) was violated since he was not afforded an opportunity for meaningful mitigation.
 - iii. That he was 18 years old at the time of conviction and is a first offender.
 - iv. That he has undergone significant rehabilitative programmes in prison, has acquired certificates in spiritual and personal development, and has shown remorse and capacity for reform.
 - v. That the principles of sentencing as developed in [Francis Karioko Muruatetu & Another v Republic](#) [2017] and [Dismas Wafula Kilwake v Republic](#) [2018] eKLR should apply to his case.
 - vi. That section 333(2) of the [Criminal Procedure Code](#) requires that the period spent in custody be taken into account in sentencing.
4. He prays for a definite and reduced sentence or a finding that the time served is sufficient.
5. The Applicant cited the following case law and policy instruments in support of his application for resentencing:
 - a. [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR– The Supreme Court held that the mandatory nature of the death sentence under section 204 of the Penal Code was unconstitutional to the extent that it deprived courts of discretion in sentencing.
 - b. [Dismas Wafula Kilwake v Republic](#) [2018] eKLR– The Court of Appeal held that provisions of section 8 of the [Sexual Offences Act](#) must be interpreted to allow judicial discretion in sentencing, and that mitigation must be considered before sentencing.
 - c. [Christopher Ochieng v Republic](#) [2018] eKLR– The Court of Appeal interfered with a mandatory minimum sentence under the [Sexual Offences Act](#) and imposed a lesser sentence after considering mitigation.
 - d. [Jared Koita Injiri v Republic](#) [Kisumu Criminal Appeal No. 93 of 2014]– The Court of Appeal held that courts should not be bound by mandatory minimum sentences where circumstances allow for a more proportionate sentence.
 - e. [Evans Wanjala Wanyonyi v Republic](#) [Criminal Appeal No. 174 of 2015; Criminal Appeal No. 312 of 2018]– The Court reduced a mandatory 20-year sentence for defilement to 10 years upon review of the mitigating circumstances.
 - f. [Paul Ngei v Republic](#) [2019] eKLR– The Court of Appeal reduced a mandatory 20-year sentence to 12 years, noting that mitigation was present and ought to have been considered.
 - g. [Dennis Kibaara v Republic](#) [2019] eKLR– The High Court set aside a 20-year sentence and substituted it with a 5-year sentence after considering the accused's age, mitigation, and the complainant's role.



- h. [*Peter Saikipor Naiyioma v Republic*](#) [2019] eKLR– The High Court imposed a one-year sentence in a defilement case upon considering the offender’s age, mitigation, and the relationship between the parties.
- i. [*Geoffrey Mutai v Republic*](#) [2018] eKLR– The High Court reduced a sentence of 20 years to 7 years, holding that courts are not bound by statutory minimums when justice demands otherwise.
- j. [*Guyo Jarso Guyo v Republic*](#) [Petition No. 6 of 2018 – High Court at Marsabit]– The High Court substituted a life sentence for defilement with a 20-year sentence, emphasizing discretion and individualized sentencing.
- k. [*Paul Odhiambo Mbola v Republic*](#) [2020] eKLR– The High Court at Kisumu substituted a life sentence with a 10-year sentence after considering the period already served and rehabilitative efforts.
- l. [*Ahamad Abolfathi Mohammed & Another v Republic*](#) [2018] eKLR– The Court of Appeal held that section 333(2) of the [*Criminal Procedure Code*](#) requires courts to account for time spent in custody when imposing sentence.
- m. South African Case Law: *S v Mchunu & Another* (AR24/11) [2012] ZAKZPHC 56, *S v Scott-Crossley* 2008 (1) SACR 223 (SCA), *S v Toms* 1990 (2) SA 802 (A), *S v Mofokeng* 1999 (1) SACR 502 (W), *S v Jansen* 1999 (2) SACR 368 (W)– These cases illustrate judicial disapproval of mandatory sentencing regimes and highlight the importance of individualized justice, rehabilitation, and proportionality in sentencing.
- n. [*Kenya Judiciary Sentencing Policy Guidelines*](#) (2015)– Particularly, Policy Direction 4.1, which emphasizes that one of the objectives of sentencing is rehabilitation and that courts should have discretion to impose just and proportionate sentences.

Respondent’s Position

- 6. The Respondent, represented by the Office of the Director of Public Prosecutions, opposed the application. Reliance was placed on Supreme Court Petition No. 2 of 2024 – [*Republic v Evans Ayako*](#), where the Supreme Court clarified that while Muruatetu set aside the mandatory nature of the death penalty under section 204 of the Penal Code, the reasoning does not automatically apply to other offences unless so declared. It was argued that the High Court is not seized with jurisdiction to review a mandatory minimum sentence under section 8(2) of the [*Sexual Offences Act*](#), unless and until the Supreme Court or Parliament makes a determination to that effect.

Analysis And Determination.

- 7. Issues for Determination
- 8. The following issues arise for determination:
 - i. Whether this Court has jurisdiction to re-sentence the Applicant notwithstanding section 8(2) of the [*Sexual Offences Act*](#).
 - ii. Whether the sentence of life imprisonment imposed on the Applicant was unconstitutional for failure to consider mitigation.
 - iii. Whether the Applicant’s circumstances warrant a reduced sentence.



Jurisdiction and Applicability of Muruatetu and Kilwake

9. The Supreme Court in *Francis Karioko Muruatetu* declared the mandatory nature of the death penalty under section 204 of the Penal Code unconstitutional to the extent that it deprived courts of the discretion to consider mitigating factors. However, in its directions dated 6 July 2021, the Supreme Court expressly limited the application of Muruatetu to the offence of murder. The Court held that the reasoning therein would not apply to other offences with mandatory minimum sentences unless so specifically determined.
10. Subsequently, in *Republic v Evans Ayako* [Petition No. 2 of 2024], the Supreme Court affirmed this position, stating that High Courts are not at liberty to strike down or vary statutory minimum sentences in sexual offences unless the same are challenged by a constitutional petition or legislative amendment.
11. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal held that the mandatory nature of the sentence under section 8(2) of the *Sexual Offences Act* is not absolute and that trial courts retain discretion in appropriate circumstances. However, this position must now be read with caution given the binding nature of the Supreme Court's directions in Evans Ayako.
12. Therefore, absent a declaration of unconstitutionality specific to section 8(2) of the *Sexual Offences Act*, this Court is bound by the existing statutory framework and cannot vary the sentence imposed unless it was illegal, irregular, or unlawful.

Mitigation, Rehabilitation, and Section 333(2) CPC

13. Notwithstanding the above, the Applicant has presented persuasive evidence of personal reform and rehabilitation while serving his sentence. He has enrolled in and completed various rehabilitative programmes. While these are commendable, they cannot, of themselves, override the law where this Court lacks jurisdiction to substitute a statutorily mandated life sentence.
14. As regards section 333(2) of the *Criminal Procedure Code*, the trial court was obligated to take into account the period spent in custody before sentencing. There is no indication in the record that this was not done. The same is a legal requirement and not discretionary.

Disposition

15. In light of the foregoing, this Court makes the following orders:
 - i. The application for re-sentencing in respect of the mandatory life sentence under section 8(2) of the *Sexual Offences Act* is declined for want of jurisdiction as clarified in *Republic v Evans Ayako* [2024] and *Muruatetu (Directions)* [2021].
 - ii. However, pursuant to section 333(2) of the *Criminal Procedure Code*, it is hereby ordered that the life sentence imposed shall be deemed to have commenced on the date the Applicant was first placed in lawful custody pending trial, being the date of his arrest. However, in life sentence, the period is not quantifiable to enable sentence to be scaled down to the extent of period spent in remand prior to sentence.
 - iii. Thus, the court rejects the application and affirms the sentence imposed.
16. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 31ST DAY OF JULY, 2025



.....
CHARLES KARIUKI
JUDGE

