NKK v Republic (Miscellaneous Criminal Application E122 of 2024) [2025] KEHC 11622 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E122 OF 2024

EN MAINA, J

JULY 31, 2025

BETWEEN

NKK ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this court is the Applicant's Notice of Motion dated 23rd October, 2024 brought under a certificate of urgency of even date.

2. The application which is expressed to be made under Articles 165(6) and 50(2) (p) of the *Constitution* and Section 26(2) of the *Penal Code* seeks revision of the Applicants life sentence for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*.

3. The grounds for the application are that the Applicant was sentenced to life imprisonment on 14th August 2013 and has been in jail since then; that his appeal to the High court to wit HCCRA No.183 of 2013 was dismissed and his application for resentencing vide Misc. Criminal Application No. 116 of 2019 was also dismissed. Further that he was arrested on 18th May, 2010 and has therefore been behind bars for 14 years and further that whereas he had filed an appeal to the Court of Appeal he withdrew the same in favour of this application.

4. The application is supported by an affidavit sworn by the Applicant on 23rd October, 2024 in which he basically reiterates the grounds on the face of the application.

5. The application is opposed through the Grounds of Opposition dated 6th February 2025. In the said Ground of Opposition it is contended that this court is functus officio in light of the ruling delivered in the Appeal No. 183 of 2013 and the Miscellaneous Application No. 116 of 2019 and hence this application is not merited and should be dismissed.

6. Parties consented to canvass the application by way of written submissions and on his part the Applicant filed mitigation submissions dated 27th February 2025 while the Respondent filed submissions dated 27th March 2025.

7. I have carefully considered the application, the grounds thereof, the Grounds of Opposition, the submissions by both sides, the cases cited and the law.

8. The Applicant was sentenced to life imprisonment for the offence of incest contrary to Section 30(1) of the *Sexual Offences Act*. That is the sentence prescribed by the law for that offence and is therefore a lawful sentence. The decision of the Court of Appeal in the case of Odago v Republic [2025] KECA 1018 (KLR) lends support to this finding. In that case the Appellant was charged with the offence of defilement of a child aged 1½ years contrary to Section 8(1) as read with Section 8(2) of *Sexual Offences Act*. He was sentenced to life imprisonment. His appeal against the conviction and sentence was dismissed and the sentence was upheld. He appealed to the Court of Appeal and yet again the appeal against the conviction was dismissed. In regard to the sentence the Court of Appeal stated:-

> "(36) On the constitutionality of the mandatory minimum sentence of life imprisonment imposed, the appellant, citing the Supreme Court decision in Francis Muruatetu & Another v Republic [2017] eKLR considered the mandatory nature of the life sentence imprisonment imposed on him unconsti-tutional. He, therefore, invited us to reconsider the sentence based on this precedent and his reformation since 2012.
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> (37) The constitutionality of mandatory sentences has been a significant topic in Kenyan jurisprudence, particularly following the landmark decision in Francis Karioko Muruatetu & another v Republic (supra) by the Supreme Court of Kenya that declared the mandatory nature of the death sentence under section 204 of the *Penal Code* unconstitutional. The court emphasized that mandatory sentences deprive judges of the discretion to consider mitigating factors and the individual circumstances of each case.
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> (38) However, the Supreme Court in Francis Karioko Muruatetu & Another v Republic, Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR clarified that its decision in the earlier Muruatetu case applied only in respect to sentences under sections 203 as read with section 204 of the *Penal Code*, and did not invalidate other mandatory or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.
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> (39) In the context of defilement cases, this Court has addressed the applicability of the Muruatetu decision. In Simiyu v Republic [2025] KECA 153 (KLR), the appellant argued that the mandatory minimum sentences for defilement under the *Sexual Offences Act* were unconstitutional based on the Muruatetu decision. This Court, differently constituted (Okwengu, Omondi & Joel Ngugi, JJ.A), however, upheld the mandatory minimum sentences, stating that the Muruatetu decision did not apply to defilement cases and that the constitutionality of mandatory sentences for sexual offences must be specifically challenged and determined on a case-by-case basis.
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> (40) In conclusion, while the Muruatetu case set a precedent for the unconstitutionality of mandatory death sentences, its applicability to defilement cases and other offences has subsequently been dealt a deathblow by

the Supreme Court. The appellant's argument that the sentence imposed was unconstitutional or illegal is unfounded and must be therefore be dismissed. Additionally, the Court lacks the jurisdiction to reduce the mandatory life sentence, as this is the statutory minimum prescribed under section 8(2) of the *Sexual Offences Act*, which the trial court was obligated to impose.

(41) In conclusion, justice must at all times be upheld and the statutory framework respected, ensuring the protection of society's most vulnerable. Accordingly, this appeal is without merit and is hereby dismissed in its entirety."

9. Although the offence in that case was distinctly different from that in this case, the circumstances are similar in that the Applicant was also charged with a sexual offence with a minimum sentence. The same ratio decidendi in the case of Dago v Republic (supra), also applies to this case as the decisions of the court of Appeal and the Supreme Court are binding on this court.

10. Moreover, the Applicant having lost his appeal and application for re-sentencing in this very court, though differently constituted, cannot come for review in this court. This is because this court has no jurisdiction to sit on appeal over the decisions of a court of concurrent jurisdiction. The Applicant's recourse lies in appealing or seeking review in a higher court or to proceed as recommended by the Supreme Court in the case of Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment).

11. Placing the Applicant on probation for the remainder of the term would be tantamount to interfering with the minimum sentence, which action the Supreme Court frowns upon. Further, as a similar application was heard and dismissed by Kemei, J on 13th October, 2020, this application is an abuse of the court process which cannot be countenanced by this court.

12. The upshot is that this application lacks merit and it is dismissed.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

Applicant online from Naivasha prison

Geoffrey- Court Assistant/Interpreter