Mutugi v Republic (Criminal Petition E006 of 2023) [2025] KEHC 12011 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL PETITION E006 OF 2023

EM MURIITHI, J

AUGUST 14, 2025

BETWEEN

MARTIN MUGO MUTUGI .... PETITIONER

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Petitioner who is serving a life sentence for the offence of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* petitions the Court for a resentencing order to impose as determinate sentence relying on the state of the law at the time of filing the petition on 14/3/2023, and sets out the facts of his case in the petition as follows:

   " FACTS:

   1. That, the petitioner is a convicted prisoners and brings this petition on his behalf having been arrested on 20/1 0/20 17, charged, tried, convicted and sentenced to life imprisonment for the offence of defi lement c/s 8(1), (2) of the *sexual offences act* on 06/03/20 J 8 vide Org. Cr. Case S.O. No 8 of2017 at Wanguru Law courts.
   2. That, the petitioner having been aggrieved and dissatisfied with the law court's decision or verdict appealed to the high court Kerugoya vide H.C.CR. A no 15 of 2018 which was dismissed and the sentence affirmed.
   3. That, the petitioner never appealed to the court of appeal and therefore do not have any other pending matter within the republic of Kenya.

4. That, during the sentencing by the law court, the provisions of section 216 and 329 of the Criminal Procedure Code were 110t taken into account and even if they were, it could not have

    1. changed the circumstances of the law then which has already been changed.

5. That, the trial court did not also take into account the provisions of section 333(2) of the criminal procedure code as pertains to the time spent in remand custody.

6. That, the petitioner has found interest and favor in the court of appeal verdict Joshua Gichuki Mwangi Vs Rep in Cr. App No. 84 Of 2015 [2022] eKLR which touched on the Sexual Offences and the High Court decisions in Philip Mueke Maingi And Others in Const. PetitionNo E017 Of 2021 and Edwin Wachira And Others Vs DPP in Constitution Pet. No 97 of 2021 among others.

7. That, may this court invoke its powers and the provisions of article 50 (2) (p) of *the constitution* and mitigation in reviewing of the life sentence.

8. That, the petitioner has been of exemplary conduct and character whilst serving his sentence so far to the tune of over 6 years and has shown an affinity to reform, rehabilitation and

    1. complete attitudinal change and therefore qualifies for consideration.

9. That, the petitioner is remorseful and regrets his actions whilst he was relatively young and did not appreciate the full implications of my irresponsible action.

10. That, this honorable court is urged to review the life sentence imposed and tamper justice with leniency and mercy and invoke the provisions of section 216,329 and 333(2) of Criminal Procedure Code and article 50 (2) (p) of *the constitution* into the reviewed sentence.

Reliefs Sought:

a. may this court be pleased to consider the mitigation and period spent in remand custody and review the sentence to a determinate term as prayed.

b. may this court be pleased to order for the term served as sufficient punishment.

c. any other orders that this court may deem fit.

Dra Wn And Filed By;

Nyr/136/2022/life

Martin Mugo Mutugi".

2. The judgment in this case turns on the application of the Supreme Court decisions in Manyeso and Ayako delivered on the same day 11/4/2025, as well as Mwangi, the Court's decision on appeal from the Court of Appeal judgment relied on by the petitioner herein.

3. Republic v Manyeso was a case of defilement where, as set in the judgment facts:

> " 2. On January 28, 2013, the respondent, Julius Kitsao Manyeso, was arraigned before the Senior Principal Magistrates Court at Malindi and charged in Criminal Case No 64 of 2013 with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that, on January 24, 2013 at [Particulars Withheld] Village in Malindi District within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a girl aged 4 ½ years. The Respondent was further charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. On October 3, 2013, the trial court found the Respondent guilty as charged on the main count and sentenced him to life imprisonment. The conviction and sentence were upheld on the first appeal at the High Court but overturned by the Court of Appeal, prompting the present appeal at the instance of the Republic."

4. The facts of the case in Ayako were similar as set out in the Judgment were that

> " (2) The Respondent, Evans Nyamari Ayako, was arraigned before the Senior Principal Magistrate's Court at Ogembo on 18th July 2011 and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, Cap 63A of the Laws of Kenya. He was also charged with the alternative offence of committing an indecent act on a child contrary to Section 11(1) of the *Sexual Offences Act*. He pleaded not guilty to both offences. Upon hearing the prosecution's witnesses and weighing the evidence adduced, the trial Court found the Respondent guilty, convicted and sentenced him to serve life imprisonment in accordance with Section 8(2) of the *Sexual Offences Act*. The conviction and sentence were upheld on first appeal at the High Court but the sentence was later overturned by the Court of Appeal, and substituted with a sentence of 30 years imprisonment to run from 18th July 2011 which was the date he was arraigned in court."

5. Earlier, in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) SC Petition No E018 of 2023 [2024] KESC 34 (KLR) the Supreme Court last year considered the question of declaration of unconstitutionality of statute or parts thereof at the appellate stage without prior consideration at trial court, saying that unless a proper case is filed and the matter escalated to it, a declaration of unconstitutionality of a whole statute or sections of a statute cannot be made in the manner the Court of Appeal did in that case.

6. The three Supreme Court decisions have validated the sentence of imprisonment for life and outlawed the Court of Appeal's innovative crafting of imprisonment for a term of years as equivalent of the life sentence, 40 years in the case of Manyeso and 30 years in the Ayako case.

7. Obviously aware of the development in the law, the Petitioner by Submissions filed on 27/5/2025 has sought to obtain authority for resentencing in his case by reference to certain paragraphs of the Judgment in Manyeso as follows:

> " 1. SUBDIVISION - Introduction

1. May it please the Court, the Appellant submits this rebuttal against the recent legal developments in the Supreme Court's decision in Julius Kitsao Manyeso, Petition No. E013 of2024 (Coram: Mwilu, DCJ & VP; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ), delivered on April 11, 2025, in Nairobi.

    1. In its ruling, the Supreme Court found that:

        "The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*.

        The Appellant submits that this decision did not invalidate resentencing under the Penal Code or the *Sexual Offences Act* but rather reaffirmed the authority of the High Court and sentencing courts to review sentences where justice demands.....

        8.

        Relevant Paragraphs in the Judgment The Supreme Court's reasoning is evident in the following paragraphs of the judgment:
        Paragraph 47 - The Court acknowledges that sentencing courts have the discretion to review sentences where circumstances warrant.Paragraph 52 - The Court clarifies that its decision does not bar applicants from seeking resentencing under constitutional and statutory provisions.Paragraph 61 - The Court affirms that the High Court retains jurisdiction to hear resentencing applications

in cases where mandatory sentences may be excessive or disproportionate.Paragraph 62 - The Court reiterates that its decision in Muruatetu did not invalidate mandatory or minimum sentences in the Penal Code, the *Sexual Offences Act*, or any other statute. The Court emphasized that the Muruatetu ruling was confined to the mandatory death sentence for murder and should not be interpreted as abolishing all mandatory sentencing provisions.

9.

The Role of Sentencing Courts

The Appellant submits that the judgment empowers sentencing courts to assess individual cases and determine whether resentencing is appropriate. This approach aligns with the principles of judicial independence and fair trial rights, ensuring that sentences imposed are just and proportionate.

Moreover, the decision reinforces the High Court's role in reviewing sentences, particularly where applicants demonstrate that their circumstances warrant reconsideration. This interpretation is consistent with previous jurisprudence, where courts have exercised

discretion to modify sentences in cases involving juvenile offenders, mitigating circumstances, and disproportionate penalties.

10.

Conclusion

In light of the foregoing, the Appellant submits that the Supreme Court's decision in Julius Kitsao Manyeso, Petition No. E013 of 2024, did not invalidate resentencing but rather reinforced the authority of sentencing courts to review sentences in accordance with constitutional principles.

The High Court and subordinate courts remain empowered to consider resentencing applications where justice demands. The Appellant respectfully urges this Court to affirm that resentencing remains a valid judicial function and that applicants should not be barred from seeking sentence reviews where circumstances justify such reconsideration.

REASONS WHEREFORE:

It is my prayer that, may this review application be allowed, conviction quashed, sentence set aside and the appellant be set at liberty. Or;

The honorable court be pleased to re-evaluate the evidence and make an independent finding

on both conviction and proper sentence."

8. The DPP had by Submissions dated 30/4/2025 submitted that the court had discretion in sentencing but subsequently acknowledged that the Supreme Court has now validated the life sentence as constitutional.

9. The particular paragraphs of Manyeso referred to in the submissions by the petitioner are as follows:

> " 47. The *Appellate Jurisdiction Act*, cap 9 provides in its preamble that it is an Act of Parliament to confer on the Court of Appeal, jurisdiction to hear appeals from the High Court and for purposes incidental thereto. Section 3 specifically provides for the Court of Appeal's jurisdiction as follows:
>
> > "(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.
> >
> > determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court. In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."
>
> 52. The Court of Appeal in dismissing the respondent's first and second grounds of appeal, held that the right to information and the consideration of the right to legal representation under article 50 of *the Constitution* was not raised in the High Court. We have equally canvassed the record and found that the constitutionality of life imprisonment under the *Sexual Offences Act* was neither canvassed before the trial court nor the High Court. Further, section 361 (1) of the Criminal Procedure Code explicitly bars the Court of Appeal from considering issues of fact and elaborates that the severity of the sentence is a matter of fact and not of law. The provision provides as follows:
>
> "361. Second Appeals
>
> 1. A party to an appeal from a subordinate court may, subject to subsection (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
>   a. on a matter of fact, and severity of sentence is a matter of fact; or
>
>   b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

Emphasis Added]"

61. By express provision of *the Constitution* under article 163 (7), requiring courts below to abide by decisions of the Supreme Court,a constitutional duty is imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In Wanjohi v Kariuki & 2 others (Petition 2A of 2014) [2014] KESC 26 (KLR) Rawal, DCJ in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this court by a lower court must be based on well-reasoned distinction of the facts.

62. In the Muruatetu directions, this court pronounced itself on the application of the ratio in the Muruatetu case to other statutes prescribing mandatory sentences as follows:

> " 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgement in this matter, or indeed the spirit of the Judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offences that prescribe mandatory or minimum sentences. Far from it.
>
> 11. The ratio decidendi in the decision was summarized as follows:"69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> > We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."
>
> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court." [Emphasis added]

10. Obviously, the paragraphs of Manyeso relied on by the petitioner do not say what he submits they do.

11. As held in Manyeso, departure for the decisions of the Supreme Court must be justified by serious consideration of the facts of the case, as follows:

> " 61. By express provision of *the Constitution* under article 163 (7), requiring courts below to abide by decisions of the Supreme Court, a constitutional duty is

imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In Wanjohi v Kariuki & 2 others (Petition 2A of 2014) [2014] KESC 26 (KLR) Rawal, DCJ in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this court by a lower court must be based on well-reasoned distinction of the facts."

12. There is nothing in the facts of the present case to distinguish it from the facts in Manyeso and Ayako, which have held that the Court has no authority yet to substitute a term of years of imprisonment for the life sentence.

13. The Court cannot set a term of imprisonment to substitute or to be deemed as equivalent to the sentence of life imprisonment decreed by the Statute, as held by the Manyeso decision at paragraphs 67 and 68 as follows:

> " 67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165(3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.
>
> 68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption."

14. The sentencing court must observe fidelity to the penal statute relevant to the particular offence. The Court must, therefore, find that the sentence of life imprisonment in this case may not be changed to one of imprisonment for a term of years, and the petition must be declined.

15. The prayer for quashing the conviction and setting aside of sentence set out in the submissions is not properly before the Court as the appeal Kerugoya HCCRA No. 15 of 2018 had already been heard and determined by the High Court (Gitari, J.) on 3/12/2019.

Orders

16. Accordingly, for the reasons set out above, the Petition dated 14/3/2023 is declined.

17. Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF AUGUST 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP.

The Applicants in person.