



Mutua v Republic; Mutua (Petitioner); ODPP Makueni & another (Respondent) (Constitutional Petition 4AA of 2023) [2024] KEHC 1781 (KLR) (28 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION 4AA OF 2023**

TM MATHEKA, J

FEBRUARY 28, 2024

**IN THE MATTER OF ARTICLES 22, 23,24, 25, 51, 52,
165, 258, 259 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF SECTION 3&4 OF THE PROBATION OF OFFENDERS ACT
AND**

IN THE MATTER OF HCCRA NO 146 OF 2014 AT MACHAKOS HIGH COURT

BETWEEN

PAUL MUSEMBI MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

AND

PAUL MUSEMBI MUTUA PETITIONER

AND

ODPP MAKUENI RESPONDENT

PROBATION & AFTER CARE SERVICE RESPONDENT

JUDGMENT

1. What is before me is titled as a petition but a perusal of the prayers sought demonstrates that it is an application for revision of sentence.
2. The petitioner’s position is that he has served a substantial part of his sentence and ought to be accorded a non custodial sentence under the [Probation of Offenders Act](#)



3. This clearly comes out in the supporting affidavit where he depones that his is a humble request for this court to request for a POR to enable him serve a non-custodial sentence for the remainder of his sentence.
4. He has annexed his committal warrant which shows that he was committed to GK Prison on the 18th July 2014 to serve a life imprisonment for the offence of defilement c/s 8(1) as read with 8(2) of the [Sexual Offences Act](#)
5. There is also a letter from the OIC Makueni Main Prison stating that the appellant was arrested on 25th September 2013 and remanded for a period of 9 months. That on 18th July 2014 he was sentenced to 20 years' imprisonment. He now seeks that the period of 9 months be deducted from the remainder of his sentence.
6. By 12th May 2023 he had served 8 years 9 months. He has obtained skills supported by exhibited certificates.
7. I sought a Probation Officer's Report. It indicated that the petitioner was a person who could be rehabilitated through a non-custodial sentence. The report reveals that the victim of the offence was an 8-year-old girl who has mental challenges. That she is 18 years old now but the effects of the defilement are still with her psychologically.
8. The petitioner has not produced any evidence to show that he was indeed sentenced to 20 years' imprisonment. What I have before me is the committal warrant showing that he was sentenced to life imprisonment. The letter from the Officer in Charge contradicts the committal warrant which clearly shows that the Petitioner was sentenced to life imprisonment on 18th July 2014.
9. I have searched KenyaLaw and found that the Petitioner filed an appeal in Machakos now reported as Paul Musembi Mutua v Republic [2015] eKLR. The Judge observed that "The Appellant pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to life imprisonment' after considering the appeal in a judgment dated 11th November 2015 the judge stated

"I accordingly uphold and affirm the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (2) of the [Sexual Offences Act](#), Act No. 3 of 2006, and the sentence for this conviction is legal and is also affirmed."

10. So where did the Officer in Charge Prison get the 20 years' term that he put in the later dated 17th April 2023 ref MKN/P/2/3/VOL.III/490.

I will require the Deputy Registrar to follow up this matter and to confirm with the officer in charge Makueni Main Prison the actual records of this Petitioner, including the authenticity of the letter.

11. That same Petitioner filed HC. Misc. Criminal. Application No. 68 OF 2019 reported as [Paul Musembi Mutua v Republic](#) [2022] eKLR which I reproduce here for the record

1. The applicant has come to this court through an application under Article 22 and 258 (2)(c) of [the Constitution](#) filed on 19th December 2019 seeking the following orders –
 - 1) That the court be pleased to apply the provisions of section 333 (2) of the [Criminal Procedure Code](#) that the time served by the applicant in remand be factored (in his sentence).
 - 2) That the court be pleased to find the time served by the applicant as sufficient sentence and acquit the applicant.



- 3) That in the interest of justice the court do exercise its inherent powers to do justice to the applicant taking into account the period spent in custody.
 - 4) Such other or further orders as this humble court may (find) fit to grant.
2. The application was canvassed through filing of written submissions, and I have perused and considered the submissions filed by the applicant and those filed by the Director of Public Prosecution. Both sides have relied on decided court cases. The applicant also filed a letter of recommendation from the Prisons Department dated 07/02/2022.
 3. This is a request for review of sentence mainly based on the reasoning in the Supreme Court decision in *Francis Karioko Muruatetu –vs- Republic* – Petition No. 15 of 2015; and also the provisions of section 333(2) of the *Criminal Procedure Code* (cap. 75).
 4. In the present case, the applicant was convicted by the magistrates’ court at Makindu for defilement. His appeal Machakos HCCRA 146 of 2014 against conviction was dismissed by the High Court on 11th November 2015.
 5. Though the applicant relies on the Muruatetu case for his request for review of sentence this court cannot review his sentence on that basis as the Supreme Court on 6th July 2021 clarified through its directions issued in the said case that the decision therein only covered cases relating to the mandatory death sentence in murder cases and not in any other cases.
 6. With regard to section 333(2) of the *Criminal Procedure Code* (cap.75). I note that the applicant did not challenge his sentence on appeal, which has been determined by the High Court as above. I further note that he was sentenced to life imprisonment for defiling a young girl of 8 years.
 7. Again, section 333(2) of the *Criminal Procedure Code* cannot help the applicant as the statutory mandatory sentence is life imprisonment. In this regard, the sentence section provides as follows –
 - 8(2) 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.
 8. Thus following from the above, neither the trial court nor this court has the jurisdiction to consider the period in custody during trial in sentencing the applicant.
 9. In the result, this application for review of sentence is for dismissal. The application herein is thus dismissed.
12. In a ruling dated 9th March 2022, the application was dismissed
 13. It is evident that this Petition is there for an abuse of the court process. It seeks the same prayers that were denied in the above application. It is based on a lie manufactured in the Prison that he is serving a 20 years’ imprisonment sentence. It is founded on the deliberate non-disclosure of material information. That is unacceptable. It a waste of judicial time, and the time of others in the criminal Justice system. That conduct ought to have a penalty.
 14. On the other hand, it is proof of the need for paralegals within the Prison to ensure that such persons whose desire is to leave the confines of the Prison, where they are legally held to not swamp the court system with applications that are dead on arrival. The Petitioner knows this, a knows that his hope lies in the Court of Appeal. He has the right to go there. He may have slept on that right but let him find his way. By his numerous Petitions he may have closed the door to this court.



15. The Petition is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH FEBRUARY 2024

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MUMBUA T MATHEKA

JUDGE

CA Nelima

Petitioner

Mr. Tanui for State

