



**Gitara v Republic (Criminal Miscellaneous Application E100 of 2023)  
[2024] KEHC 1714 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL MISCELLANEOUS APPLICATION E100 OF 2023  
HM NYAGA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JOHN GITAU GITARA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was arraigned before Nakuru Chief Magistrate’s Court on 10<sup>th</sup> January 2011, to answer two charges as hereunder;

Count 1: Defilement of a child contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006

The facts being that on the 7<sup>th</sup> day of January 2011 at Mutukanio Bahati in Nakuru North district of the Rift Valley Province, he unlawfully and intentionally committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of EMN a child aged 7 years old which caused penetration.

Alternative Charge

Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006

On the 7<sup>th</sup> day of January 2011 at Mutukanio Bahati in Nakuru North District of the Rift Valley Province, did an act with a child namely EMN a child aged 7 years by touching her private parts namely vagina.

2. The matter proceeded for full trial and at the conclusion, the accused was convicted and sentenced to life imprisonment.



3. The Applicant then filed High Court Criminal Appeal Number 47 of 2012 before this court. The said Appeal was dismissed and his sentence confirmed by the High Court.
4. Undeterred, the Applicant then preferred a further appeal to the Court of Appeal, being Criminal Appeal No. 197 of 2013. On 4<sup>th</sup> October 2019, the said appeal was also dismissed and both the conviction and sentence were upheld.
5. The Applicant has now returned to this court through his undated Application. The said Application is said to be brought under the provisions of the Constitution of Kenya and the Practice and Procedure Rules. The Applicant does not specify the provisions he relies upon but he seeks the following orders;-
  - a. That the Honourable Court be pleased to award him a lenient sentence as provided for under Article 50 (2) (p) & (q) of the Constitution.
  - b. That the Honourable Court be pleased to invoke the provisions of Section 333(2) of the Criminal Procedure Code and factor the period he spent in remand.
6. The Applicant filed what he termed as mitigating submissions. He reiterated the circumstances under which the offence was committed. He further submits that he has undergone rehabilitation in prison.
7. The state counsel did not object to the Application for re-sentencing.

### **Analysis and Determination**

8. The first question to be answered is whether this court is clothed with the jurisdiction to entertain this Application.
9. As was stated earlier, the Applicant has been to this court on appeal which was dismissed. His further appeal, on both conviction and sentence was also dismissed by the Court of Appeal on 4<sup>th</sup> October 2019.
10. It is well settled law that a court must act within its jurisdiction.
11. The jurisdiction of this court is set out under Article 165(3) of the Constitution which provides that;
12. Evidently, the Application is brought under the Francis Muruatetu vs Republic [2017] eKLR. The case has set in motion new jurisprudence on sentencing, especially in offences that carry mandatory sentences. One such case is Philip Mueke & Others vs Republic,
13. Is this court clothed with jurisdiction to handle this Application after the Applicant has been to the Court of Appeal and had his Appeal dismissed.
14. It is apparent that some superior courts have held that if an applicant has been to the Court of Appeal or had had an Appeal dismissed by the High court then this court, even as a Constitutional Court, has no jurisdiction to entertain such a Petition or Application.
15. On the other hand, there are superior courts that proceeded to re-sentence such Applicants.
16. It is thus not very clear on when, where and how an Applicant who has been to the said courts is to approach as suitable court for appropriate orders.
17. The decision in the appeal to the Court of Appeal was delivered on 4<sup>th</sup> October 2019, after the decision in Muruatetu (*supra*). It must be assumed that the Court was fully aware of the said case and it still proceeded to uphold both the conviction and sentence.



18. On that ground, I find that the Application is an attempt to overturn a decision of the Court of Appeal, made after the *Muruatetu Case*. This court lacks the jurisdiction to do so.
19. Of course, this court is not saying that it has powers to overturn a decision of the Court of Appeal made prior to *Muruatetu (supra)*. There are guidelines on how such cases are to be handled.
20. Even though I have a lot of sympathy for the Applicant, no amount of such sympathy cannot cloth this court with the jurisdiction to review the recent decision of the Court of Appeal.
21. For the reason that the decision in the Court of Appeal was made after the decision in *Muruatetu*, I find that this court lacks jurisdiction to entertain this Application. Doing so will litigate afresh issues already considered by the Court of Appeal
22. I find that this court lacks jurisdiction and I dismiss the Application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

C/A Oleperon

State counsel Okok

Applicant absent

