



REPUBLIC OF KENYA



**Warui v Republic (Criminal Revision E088 of 2023)
[2024] KEHC 16862 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 16862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL REVISION E088 OF 2023**

J WAKIAGA, J

MAY 28, 2024

BETWEEN

PETER KIMANI WARUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was convicted and sentenced to ten (10) years for the offence of rape Contrary to Section 3(1) of the [Sexual Offences Act](#) No 3 of 2006.
2. On the 8th day of February 2023 the same took out a Notice of Motion under Section 362 of the [Criminal Procedure Code](#) for the review of the proceedings before the lower Court as to its correctness and or procedural requirement on the basis that before his conviction he tried to reconcile with the complainant and therefore ought to benefit from an option of probation sentence.
3. Of note for the purposes of this Ruling, on 10th June 2022 the Applicant in Misc. Application no E002 of 2022 filed an application for leave to appeal against the lower Court's judgement herein out of time which application was on 24th January 2023 allowed by this Court (Prof. Sifuna J) and the Applicant directed to file the said appeal within 14 days from the date thereof.
4. It is apparent from the reading of the application herein, that the Applicant opted to file for revision of the sentence in place of the intended appeal.
5. The Applicant filed written submissions in which he contended that in passing the sentenced herein, the trial Court relied on the jurisprudence which had since been upset by both the High Court and the Court of Appeal on the Mandatory maximum and minimum sentences as per the decisions in Philip Mueke Maingi & 5 others v R and *Edwin Wachira & 9 others v R* following the Supreme Court clarification of the [Muruatetu](#) decision on the mandatory sentences as confirmed by the Court of appeal in *Joshua Gichuki Mwangi v Republic*.



6. The Applicant further contended that the trial Court did not call for a presentencing report and therefore violated the principles set out in the Sentencing Policy Guidelines as confirmed by this Court in *Kamau v Republic* wherein the Court ordered for a presentence report.
7. It was finally contended that the Applicant had been fully rehabilitated and was remorseful having found Christ while in prison.
8. The application was opposed by the state on the ground that the sentenced was lawful.

Determination

9. The place of mandatory sentences in Kenya is still in a confused state and the sooner the Supreme Court settle it once and for all the better it will be. The confused state arose out of the reading of *Muruatetu 1* and the Supreme Court attempt at settling the same in *Muruatetu 2*, from which the Superior Courts have stated that all the mandatory maximum and minimum sentences are unconstitutional as they fetter the Courts discretion in passing appropriate sentences based on the circumstances of each case.
10. The Court of appeal added confusion on the matter in its decision in *Dismas Wafula Lilwake v R [2019] eKLR* where it stated that in appropriate cases the Court freely exercising its discretion in sentencing should be able to impose any sentence prescribed if the circumstances of the case demand and may not be constrained by Section 8 of the Act to impose the provided sentence if the circumstances do not demand it.
11. It is on the strength of the said decisions of the superior Courts that this application is premised. I have looked at the Applicant's submissions and the evidenced tendered before the trial Court and noted that the complainant and the Applicant were friends though not of asexual nature and the Applicant took advantage of the fact that she was a tailor and wanted her to make for him clothes only for him to turn against her with a knife and forcefully remove her clothes and raped her. I have also considered what she told her father the next day that she had spent the night in the Applicant's house, while she had earlier been seen standing 200 meters from the Applicant's house. I have also considered the evidence of PW3 Dr Donah Maithima.
12. Based on the emerging jurisprudence from the superior Courts I am satisfied that the trial Court was too mechanical in passing the sentence herein by failing to consider the Applicants mitigation and the evidence tendered in support of the case and therefore the same was irregular.
13. I therefore allow the application and substitute the trial Courts sentence with a sentence of six years from 9th April 2020 subject to remission thereon and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 28th DAY OF MAY 2024

J. WAKIAGA

JUDGE

In the presence of :

Mr. Mwangi for State

Applicant – Present

Jackline – Court Assistant

