



**Molokoto v Republic (Petition E005 of 2023)
[2024] KEHC 9957 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E005 OF 2023
RN NYAKUNDI, J
AUGUST 12, 2024**

**IN THE MATTER OF ORDERS IN PETITION NO. E017 OF 2021 AT MACHAKOS
OF PHILIP MUEKE MAINGI AND OTHERS VS ATTORNEY GENERAL**

AND

**IN THE MATTER OF ORDERS IN PETITION NO 57 OF
2021 AT MOMBASA OF EDWIN WACHIRA AND OTHERS**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
25(C), 26, 27(2), 28, 29, 50(2)(P)(Q) OF THE CONSTITUTION AND
SECTION 216, 327 OF THE CRIMINAL PROCEDURE CODE**

AND

**IN THE MATTER OF DEFILEMENT CONTARARY TO SECTION 8(1) AS
READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

BETWEEN

MAN/379/2022/LS KENEDY CHIMWANA MOLOKOTO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant is the accused person in the original Criminal Case No. 3855 of 2010 at Eldoret charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the [Sexual Offences Act](#) No 3 of 2006 and that he was convicted and sentenced to serve life imprisonment.
2. Vide undated chamber summons, the Petitioner/Applicant is seeking the following orders:



- a. That may this Honourable Court be pleased to hear my mitigation and resentence me. /
 - b. That may this Honourable Court be pleased to declare the sentence of life imprisonment unconstitutional.
3. The Application is based on the grounds on the face of it among others: that the mandatory minimum sentence under section 8(2) of the Sexual Offences Act does not meet the dictates of the Constitution and that the mandatory sentence under section 8(2) of the Sexual Offences Act deprives courts of legitimate power of discretion invested in them under section 216 and 329 of the CPC.
 4. The Application is supported by the undated annexed Affidavit sworn by Kennedy Chimwana Molokoto which provides some other grounds.
 5. The Applicant avers that he is the accused person in the original Criminal Case No. 3855 of 2010 at Eldoret charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No 3 of 2006 and that he was convicted and sentenced to serve life imprisonment.
 6. The Applicant also avers that during the sentence hearing, the trial Court did not consider his mitigation due to the mandatory nature of the sentence and that, failure for the trial court to consider his mitigation violated his rights to fair trial accrued to him by Article 25(c) and 50(2) of the Constitution of Kenya 2010.
 7. The Applicant further avers that the mandatory nature of the sentence of life imprisonment spelt by section 8(2) of the sexual Offences Act deprive the trial court of its legitimate power of discretion invested in them by section 216 and 329 of the Criminal Procedure Code.
 8. It is also the Applicant's averment that pursuant to the decision of this Court in Petition No. E017/2021 at Machakos of Phillip Mueke Maingi and Others Vs Attorney General and Petition No. 97 of 2021 at Mombasa of Edwin Wachira and Others Vs the Republic it was held that all those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentences are at liberty to petition to the High Court for orders of resentencing.
 9. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the Applicant as well as the submissions filed by the Director of Public Prosecutions.
 10. I note that the Director of Public Prosecutions has relied on the Supreme Court case of Muruatetu & Another v Republic (2017) eKLR in opposing this application. Indeed, the Muruatetu case reasoning does not apply herein, as it applied only to mandatory death sentences for those convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63).
 11. In deciding this application, I have perused and considered the judgment in decision of this Court in Petition No. E017/2021 at Machakos of Phillip Mueke Maingi and Others Vs Attorney General and Petition No. 97 of 2021 at Mombasa of Edwin Wachira and Others Vs the Republic.
 12. The applicant has approached the court on the basis of the decisional law in Philip Mueke Maingi & Others Vrs Rep, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. It stated;

There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to



impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.

13. In Edwin Wachira & Others Versus Republic; Mombasa High Court Petition No. 97 of 2021, the court held that "To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of the Constitution of Kenya, 2010."
14. I have considered this petition. There are 2 issues for determination herein:
 - a. Whether the court has the jurisdiction to entertain the present Petition
 - b. What is the constitutionality of the mandatory minimum sentences?

Analysis of Law

Whether the court has the jurisdiction to entertain the present Petition

15. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.
16. It bears repeating that, the High Court has the mandate under Article 165 (3) of the Constitution to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the constitution ,A further leapfrog development; under article 50(2)(p) of the Constitution:

50(2) Every accused person has the right to a fair trial, which includes the right—(p)to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
17. The applicant has approached the court on the basis of the decisional law in Philip Mueke Maingi & Others Vrs Rep, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. It stated;

There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.
18. A similar position was taken by the High Court, in Stephene Kimathi Mutunga v Republic [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the Constitution. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.
19. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas



Mwambu Wenyi v Republic [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Maharashtra at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

20. Article 50(6) of *the Constitution* of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.

From the foregoing legal provisions, it is thus clear that this Court has the jurisdiction to entertain the present Petition from the dictates of *the Constitution* of Kenya 2010.

SUBDIVISION - What is the constitutionality of the mandatory minimum sentences?

21. Notably, Section 10 of the *Sexual Offences Act* provides that:-“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”
22. The Trial Court therefore did not error in fact or law when it sentenced the Appellant to life imprisonment.
23. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.
24. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasized that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
25. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.
26. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.



27. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic (Criminal Appeal 134 of 2016)* [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
28. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Mainigi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
29. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic (Supra)* and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
30. The principle of sentencing was fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing were retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya had added community protection and denunciation as sentencing objectives. The objectives were not mutually exclusive and could overlap.
31. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to review the Appellant's sentence herein to a sentence that was lower than the life imprisonment that had been prescribed in Section 10 of the *Sexual Offences Act*.
32. There was now a global shift in not meting out life imprisonment on convicted persons as the same was deemed to be dehumanizing, degrading and violates the right to dignity.
33. In dealing with a matter where the appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, in the case of *Manyeso vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal rendered itself as follows:-

“...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”
34. Indeed, due to the hierarchical nature of our courts, this court was bound by the decisions of the Court of Appeal and Supreme Court of Kenya. In addition, as provided in Article 50 (p) of *the Constitution*



of Kenya, 2010, an accused person is entitled to the least severe punishment prescribed by the law. It states as follows:

“Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

35. Further, Article 50(q) of *the Constitution* of Kenya stipulates that:–“Every accused person has a right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

36. According to Article 27(1) of *the Constitution* of Kenya:–“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

37. The Court of Appeal decision was delivered way after the Petitioner/Applicant herein was convicted. He had a right to appeal to benefit from least severe punishment that was being meted out for the offence of defilement under Section 10 of the Sexual Offence Act that attracts the sentence of life imprisonment. He was entitled to equal benefit and protection of the law. Failure to accord him this benefit could amount to discrimination against him which is prohibited by Article 27(4) of *the Constitution* of Kenya that states that

“The State shall not discriminate directly or indirectly against any person on any ground (emphasis court), including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

38. Bearing in mind the cases of Dismas Wafula Kilwake vs Republic [2018] eKLR (Supra), GK vs Republic (Supra), Maingi & 5 others v Director of Public Prosecutions & Another (Supra), Manyeso vs Republic (Supra) and almost other cases cited hereinabove, this court took the view that it could exercise its discretion to sentence the Petitioner/Applicant herein to a lower sentence than the life imprisonment that has been prescribed in Section 10 of the *Sexual Offences Act*.

39. The Court of Appeal in the case of Evans Wanjala Wanyonyi vs Republic [2019] eKLR. held thus:

“24. On the enhanced 20-year term of imprisonment meted upon the appellant by the learned judge, we are of the view that the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in *Christopher Ochieng –v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011* and in Jared Koita Injiri –v- R, Kisumu Criminal Appeal No.93 of 2014 considered the legality of minimum mandatory sentences under the *Sexual Offences Act*. This Court noted that the Supreme Court in Francis Karioko *Muruatetu & Another –v- Republic SC Petition No. 16 of 2015* held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of *the Constitution*. Guided by the afore-stated Supreme Court decision, this Court in Christopher Ochieng –vs- R (supra) stated:In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this



provision, it too should be considered unconstitutional on the same basis... Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & Another –v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

40. Also the High Court case in *Wachira & 12 others v Republic & 2 others (Petition 97, 88, 90 & 57 of 2021)* (Consolidated)) [2022] KEHC 12795 (KLR) (31 August 2022) (Judgment) the court opined:

"...Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person of the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person of the full benefit of the law contrary to Article 27 as earlier discussed."

41. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused's balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system. This is what the court emphasis in the case of Justus Ndun'gu vs Republic and laid down the basic principle on life imprisonment and what it connotes as follows: "A life sentence is a sentence sui generis. In that, whereas it is philosophically supposedly imprisonment for a duration of time only, it is in actual sense imprisonment that is indeterminable, indefinite, incompletable, mathematically incalculable, and therefore quantifiable only for the convict's entire remainder of his lifetime.
42. Life sentence need not be imposed against an accused person who did not appear to present a continuing danger to the public. The court notes that there is no dispute that the sentence imposed on the Applicant comply substantively and procedurally with the *Sexual Offences Act*. However, the Court of Appeal in Kitsao case observed that the Applicant's claim non- the less discloses arbitrariness for essentially it is based on the non-discretionary nature of the sentence which is fixed buy law in respect of the offence. *The constitution* of Kenya in its pre-amble expresses that and acknowledges that we the people of Kenya are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. This is recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The right of the individual to life in Article 26 is protected and guaranteed except in exceptional circumstances in a statement of *the constitution* in sub section 3 of Article 26. This pursuit of the right to life is afforded to all by *the constitution* regardless of race, color, ethnical origin, sex, religion, creed, birth or social or economical status. A sentence of life without parole sometimes cannot be divorced from the violation of Art. 25(a) of *the Constitution* which states that: every citizen has a right to enjoy freedom from against torture, cruel, inhuman or degrading treatment or punishment. Applying this Article in connection with the life imprisonment sentence in any particular circumstance such incarceration with its punitive component constitutes a violation of the right which cannot be limited by the state. It suffices to say the issues herein which are properly addressed have also regard to the international jurisprudence which is part of our source of laws as provided for in Article 2 (5) & (6) of *the Constitution*. The question is, is the sentence of life imprisonment imposed upon the Applicant unconstitutional on the facts of the present case. Whatever the approach one takes in appraising the



facts of this case the mandatory life imprisonment which is being challenged by the petition cannot be allowed to stand. This is as a consequence of Article 5 (2) (p) & (q) as read with 50 (6) (a) & (b) of the same constitution. There is something disproportionate about it given the fact that following the Supreme Court dicta in Muruatetu case and subsequent decisions by the court of Appeal like the Kitsao case, any such sentence imposed without judicial discretion exercised is unconstitutional.

43. Guided by the above decision of the Court of Appeal, this court forms the view that the Applicant has satisfied this court to warrant a review of the sentence to have it substituted to 25 years custodial sentence with a credit period of 1 year under Section 333(2) of the C.P.C.

44. Orders Accordingly

DATED AND SIGNED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE

