



REPUBLIC OF KENYA



KENYA LAW
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**Margeti v Republic (Miscellaneous Criminal Application E317 of 2022)
[2023] KEHC 18446 (KLR) (Crim) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E317 OF 2022**

PM MULWA, J

MAY 26, 2023

BETWEEN

KAAKA MASARA MARGETI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant is a prisoner currently serving a 20-year sentence at Kamiti Maximum Security Prison. The Applicant filed several pleadings all undated. He filed a Certificate of urgency, a Chamber Summon Application, a pleading titled 'Application' and an unsworn Supporting Affidavit. A perusal of the pleading dubbed 'Application' mimics a Constitutional Petition since the term Applicant is used interchangeably with the term Petitioner and further to this the Applicant contends that his constitutional rights have been violated. These pleadings were filed in court on November 1, 2022. The Constitution under Article 159 (2) (d) states that justice shall be administered without undue regard to technicalities. Taking into consideration that the Applicant is in Kamiti Maximum Prison and is not in a position to employ the services of counsel, I will disregard the faulty pleadings as filed and get to the crux of what the Applicant is actually pleading and praying from the court.
2. The background is that the Applicant was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. His case was heard and determined in the Chief Magistrate's Court at Kibera under Criminal Case No 905 of 2008. On October 29, 2009, The Applicant was convicted of the offence and sentenced to 25 years in prison.
3. Aggrieved with the Judgment of the Lower Court, the Applicant preferred an Appeal to the High Court under Criminal Appeal No 517 of 2009. On May 30, 2018, the Court delivered its Judgment upholding the conviction. The sentence was however varied and the Applicant was sentenced to serve 20 years imprisonment.



4. The Applicant seeks resentencing pursuant to the decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic (2017) eKLR* and the High Court decision in *Philip Mueke Maingi vs Republic (2021) eKLR*. As mitigation, the Applicant averred that he was a first offender and that during his time in Prison, he has engaged in rehabilitation programs.

Analysis and Determination

5. In the case of *Philip Mueke Maingi & 5 others vs Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022 - Judgment)*, Mativo J (as he then was) determined the following issues: firstly, what was the import of Francis Karioko Muruatetu & another vs Republic [2017] eKLR and the directions issued thereunder as pertains to the constitutionality of mandatory minimum and mandatory maximum sentences imposed in Kenya's penal legislative provisions without the discretion of the trial court and secondly, whether the prescribed mandatory minimum sentences under the *Sexual Offences Act* with no discretion left for the trial court to determine the appropriate sentence to impose, was unconstitutional and a violation of the right to dignity of the accused persons.
6. Mativo J (as he then was) stated that the ratio decidendi of the Muratetu case was that failing to allow a curt discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, and subjecting them to the sentence wholly disproportionate to the accused's criminal culpability, violated their right to dignity.
7. The offences under the *Sexual Offences Act* prescribed minimum mandatory sentences in several sections. The Applicant was sentenced under Section 8(3) of the *Sexual Offences Act*. The provision reads as follows:-

' A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.'
8. In this case, the particulars of the offence are that the victim of defilement was a fifteen-year-old girl. While sentencing, the learned trial magistrate held as follows: -

' He is charged under Section 8(3) of the *Sexual Offences Act*. The minimum sentence in this case is 20 years imprisonment. The court cannot sentence him to any lesser period than this. However for the reason I have stated above, I find that the accused deserves to be added some more years to his minimum term...I therefore sentence the accused to 25 years imprisonment.'
9. On Appeal, the Judge varied the trial court sentence and stated as follows: -

' On sentence, the appellant was sentenced to serve 25 years imprisonment while the sentence set out by the law is a minimum of 20 years imprisonment. Whilst the sentence is not inherently illegal, I take into account that it is intended to serve as a deterrent rather than hardened offender. I agree with the trial magistrate that the aggravating factor, being that the appellant was a law enforcer necessitated the enhancement of the sentence but I feel that 20 years shall be sufficient sentence that will deter him from re-offending. I do accordingly set aside the 25 years imprisonment and order that the Appellant shall serve 20 years imprisonment.'



10. From the foregoing, the Applicant was sentenced to the minimum mandatory sentence. The main reason was because the Applicant was a policeman/law enforcer and therefore, his role was to protect the society. He took advantage of his position in the society and committed a heinous crime.
11. In the Philip Mueke Maingi Case (supra) the court stated that during sentencing, Article 27 of the Constitution ought to be taken into account. Mativo J further held that even without the application of the ratio decidendi in the Muratetu Case, whereas the sentences prescribed under the Sexual Offences Act were not unconstitutional by the mere fact of such prescription and the trial courts were at liberty to impose them, the imposition of the same as the minimum mandatory sentences did not meet the constitutional threshold particularly Article 28 of the Constitution.
12. In my view, when the Applicant's Sentence was varied on Appeal the court was not deprived of its discretion as it was not bound by the mandatory minimum nature of Section 8(3) of the Sexual Offences Act. In exercising her discretion, the court consideration the peculiar circumstances of the case and it was of the view that a 20 year sentence was fit for the crime, not because it was the mandatory minimum sentence but because the Applicant used his position as a law enforcer to commit a crime that betrayed the Police Force and further betrayed the trust and esteem of the community in which he swore to protect. The court's discretion when sentencing the Applicant did not fetter the constitutional dictates and the sentence was appropriate and fit for the crime committed.
13. That being said, it is important to appreciate the objectives of sentencing as per the Kenya Judiciary Sentencing Policy Guidelines which is to: punish the offender for the crime committed; deter the offender from committing a similar offence; to enable the offender reform from his criminal disposition; for restorative justice; for community protection; and to communicate the community's condemnation of the criminal conduct.
14. Further to this, Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that: -

' The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be reformation and social rehabilitation.'
15. The Applicant has been imprisoned since 2009. That is approximately 14 years imprisonment. In my view, the objectives of his sentence have been met. Section 46(1) of the Prisons Act provides that all convicted criminal prisoners, are entitled to be credited with the full amount of remission to which they would be entitled at the end of their sentence. The said remission is earned by industry and good conduct and is for one third of their sentence. The provision stipulates as follows: -

' Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.'
16. The upshot is that I find that the Applicant is entitled to benefit from remission, unless lawfully excluded by operation of Section 43(2) and (3) of the Prison's Act.

It is ordered.

DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 26TH DAY OF MAY, 2023

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P. M. MULWA



JUDGE

In the presence of:

Ms. Karwitha – Court Assistant

Ms. Chege – for the state

Applicant – present/absent

