



**Terer v Republic (Miscellaneous Criminal Application  
E045 of 2022) [2023] KEHC 20444 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20444 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS CRIMINAL APPLICATION E045 OF 2022**

**RL KORIR, J  
JUNE 29, 2023**

**BETWEEN**

**TERER KIPKORIR TERER ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged with the offence of defilement contrary to Section 8(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on April 22, 2017 at around 6 p.m. in Konoin sub-county within Bomet County, he intentionally caused his penis to penetrate the vagina of DC, a child aged 12 years.
2. He was convicted and sentenced to serve 20 years in prison.
3. The Applicant applied for re-sentencing and relied on the following paraphrased grounds:-
  - I. That his mitigation, evidence and circumstances of the case were not considered when the trial court arrived at the sentence of 20 years thereby causing him prejudice.
  - II. That the mandatory minimum sentence prescribed in Section 8(3) of the [Sexual Offences Act](#) was unconstitutional and breached Articles 2(1), (3), (4), 25 and 28 of the [Constitution](#) of Kenya.
  - III. That his constitutional right was violated as he was denied access to justice and a right to a fair trial contrary to Articles 48, 50 (2) (P) and 25 of the [Constitution](#) of Kenya.
  - IV. That he relied on the case of [Francis Karioko Muruatetu and another vs Republic](#) (Supreme Court Petition No 15 of 2015) that declared the mandatory minimum sentence unconstitutional.



4. The Applicant filed written submissions and stated that he was remorseful and regretted what he did. He urged this court to allow him be reintegrated back to the society by giving him a second chance in life.
5. In mitigation, the Applicant stated that he was a first offender and promised not to reoffend. That he was now crusading for good morals in life and was a law abiding citizen.
6. In his oral submissions before court, the Applicant stated that he had been sick while in prison and that he had been using traditional medicine which was not available or allowed in jail. He asked this court to reduce his sentence as he is now reformed.
7. The Prosecution counsel, Mr Waweru submitted that the Application relied on the Muruatetu case which now applies to murder cases only. That the Applicant was given the mandatory minimum Sentence.

### **Analysis and Determination**

8. The Applicant contended that the Sentence as prescribed by Section 8(3) of the *Sexual Offences Act* was unconstitutional and relied on *Francis Karioko Muruatetu and another vs Republic* (Supreme Court Petition No 15 of 2015). It was on that basis that his Application for resentencing was premised.
9. In a clarification regarding the validity and constitutionality of mandatory minimum sentences, the Supreme Court in the case of *Muruatetu & another vs Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) (2021) KESC 31 (KLR) (6 July 2021) (Directions) stated that:-

[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

“[48] Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.

- (11) The ratio decidendi in the decision was summarized as follows;

“69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides



for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.” (Emphasis Added)

10. I note that the Appellant appealed against the Judgment dated October 13, 2017 where he was convicted of the offence of defilement and sentenced to 20 years in prison. In the Judgment dated June 4, 2019, this court (Muya J) upheld the conviction and sentence of the trial court.

11. This court has no further jurisdiction to review the Sentence as a court of equal jurisdiction had already pronounced itself and upheld the Sentence. If the Appellant was dissatisfied with the Judgment of this court, his next step would be to appeal to the Court of Appeal and not this court. The Supreme Court in the case of *R vs Karisa Chengo* (2017) eKLR, held that:-

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

12. Further, in *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others* (2012) eKLR, the Supreme Court held that:-

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

13. In the final analysis, it is my finding that this Court’s jurisdiction ended with the judgment dated June 4, 2019 and the Applicant’s recourse lies with the court of appeal.

14. The Application for reduction of the Sentence has no merit and is dismissed.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 29TH DAY OF JUNE, 2023.**

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**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of the Applicant acting in person, Mr. Waweru holding brief for Mr. Njeru for the Respondent and Siele (Court Assistant)

