



**Guantai v Director of Public Prosecutions (Petition E029 of 2022)
[2023] KEHC 20822 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E029 OF 2022**

**LW GITARI, J
JULY 27, 2023**

BETWEEN

MICHAEL KAMURU GUANTAI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

1. The petitioner has filed this petition which is seeking an order of resentencing. The background of the petition is as follows-;
 - 1) That I the petitioner was arrested in the year 2009 and charged for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* at Tigania Law Court in *Sexual offences Act* case No 1350 of 2009. After full trial he was found guilty convicted and sentenced to serve a mandatory life imprisonment. He exercised his right of appeal and lodged an appeal in the High court of Meru Vide appeal No 114 of 2015 which was heard and dismissed. Thereafter filed a second appeal at the court of appeal at Nyeri vide KCA No 9 of 2017, which was subsequently heard and dismissed.
 - 2) Having exhausted all his appeal options, H now approach this Honourable. Court following the directive of the Supreme Court in the second Muruatetu case decision that all other offences which carry mandatory sentences including offences under the *Sexual Offences Act*, intending parties should file petitions to the High court to seek similar declaration as the one in the Muruatetu case.
 - 3) It is on this background that the petitioner approach this Honorable Court seeking to challenge the constitutionality of Section 8 (2) of the *Sexual Offences Act* No 3 of 2006 on the following grounds-;



- (1) That Section 8(2) of the *Sexual offences Act* which provides for a mandatory life imprisonment sentences to accused persons convicted of defilement and fails to conform to the tenets of fair trial that accrue to accused persons under Article 25(3) of *the Constitution* which is an absolute right.
- (2) That Section 8(2) of the *Sexual Offences Act* deprives the court the use of judicial discretion in a matter concerning the life of an individual. That the mandatory nature of the life imprisonment sentence deprives the courts of their legitimate jurisdiction to exercise discretion under the provisions of Section 216 and Section 329 of the *Criminal Procedure code* not to impose a life imprisonment sentence in appropriate cases.
- (3) That mandatory minimum – maximum sentences are unjust and unfair as they deprives judges and magistrates the power to exercise judicial discretion and award appropriate sentences after receiving such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed under the provisions of section 216 and Section 329 of the Criminal Procedure Code.
- (4) That the petitioner having been convicted and sentenced under the provisions of Section 8(2) of the *Sexual offences Act* respectively, was entitled to a fair trial under Article 25 © of *the constitution*. Failure to take into consideration their mitigating factors and appropriate sentence awarded is against their right to equal protection and equal benefit of the law under Article 27 (1) of *the constitution*.
- (5) That the Honourable court has the judicial power under Article 23 (1) of *the constitution* in accordance to Article 165(3)(b) of *the constitution* to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
- (6) That this Honourable court has judicial powers under Article 165(d)(i)(ii) of *the constitution* to hear and determined the question whether any law is inconsistent with or in contravention of *the constitution* and the question whether anything said to be done under the authority of *the constitution* or of any law is inconsistent with, or in contravention of *the constitution*.
- (7) That, this being a matter of public interest all parties to this petition shall bare their own costs.
- (8) That, I pray for this petition to succeed in its entirety.

Based on these grounds the petitioner seeks orders that-;

- (1) That, a declaration be made under the provisions of Article 27, 23(3) (d) of *the constitution* that section 8(2) of the *Sexual Offences Act* are unconstitutional to the extent that they provide for the mandatory life imprisonment sentence to accuse persons convicted of defilement which infringes the inherent right of every accused person to a fair trial as envisaged under Article 25(c) of *the constitution*.
- (2) That this Honorable court be pleased to issue a declaration that the minimum-maximum sentence provisions under the *sexual offences Act* are unconstitutional in so far as they infringe on the inherent right of every accused person to have his/her mitigating factors considered as envisaged under Article



50(2) of *the constitution* as read with section 216 and section 329 of the *criminal Procedure Code*.

- (3) That a declaration be made subject to prayer No 1, 2 and 3 that I the petitioner herein be remitted back to the trial court for re-hearing on sentence only so that my mitigating factors can be considered and appropriate sentence awarded.
2. The petition is supported by the affidavit of the petitioner where he has restated the above grounds. The petitioner further relies on the Supreme Court decision in the case of *Francis Kirioko Muruatetu & another V. Republic Philip Mueke Maingi & 5 other v DPP* Petition No Eo17/2021 at Machakos High Court *Edwin Wachira & 12 others v DPP* Mombasa High court petition No 47/21 Petition 87, 90, 88.
3. The petition was canvassed by way of written submissions. I have considered the submissions. The facts are not in dispute. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act*. It was alleged that on June 22, 2017 at around 5.00 p.m in [Particulars Withheld] Village, Ruiga location within Meru County committed an act which caused penetration with his genital organ into the genital organ of WK a child aged four years. The appellant was taken through the due process of the trial and in a judgment passed by learned trial magistrate he was convicted of the charge of defilement and sentenced to serve life imprisonment.
4. The appellant now challenges the constitutionality of life imprisonment. The sentence imposed on the petitioner was the mandatory minimum sentence. The trial magistrate had no option than to impose the minimum mandatory sentence. To that extent that the *Sexual Offences Act* prescribes a minimum mandatory sentence with no discretion to the trial court to determine the appropriate sentence to impose, fall foul of Article 28 of *the Constitution* which provides that

“Every person has inherent dignity and right to have that dignity respected and protected”.
5. In a recent decision by the Court of Appeal sitting at Mombasa, the Court of Appeal declared life imprisonment as unconstitutional stating that it is unconstitutional for a person to be behind bars until they die. This was in the case of *Julius Kitsao Manyeso v Republic* Cr Appeal No 12/2021. The court stated that:-

“The reason in Francis Karioko Muruatetu & another v Republic (2017) eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such sentence denies a convict the opportunity to be heard in mitigation. This is unjustifiable discrimination, unfair and repugnant to the principle of equality before the law and Article 27 of *the constitution*. In addition an indeterminate life sentence is in our view also in-human and violates the right to dignity under Article 28 and we are in this respect by the reasoning of the European Court of Human Rights in Vinter and others V- the United Kingdom (application Nos. 66069/09, 133-/10 and 3896/10 (2016) 111 ECHR 317 9th 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 of an international law that all prisoners, including those serving live sentence be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”
6. The court set aside the sentence of life imprisonment and sentenced the appellant to serve forty years imprisonment. From the foregoing, it is now well settled that a sentence of life imprisonment is unconstitutional. The petition has merits. The petitioner ought to serve a determinate sentence.



7. I therefore set aside the sentence of life imprisonment imposed on the petitioner, the appellant was charged with defilement of a, minor child of tender years who was seven years old. The child was traumatized and will suffer emotional and psychological trauma for the rest of her life.
8. Persons who commit such offences should be subjected to a punishment which is deterrent and send a strong message that such offenders will suffer full force of the law.
9. In the circumstances I sentence the petitioner to serve forty years imprisonment. The sentence to run from the date when the sentence of life imprisonment was imposed.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY, 2023.

Hon. Lady Justice L. Gitari

High Court - Judge

