



REPUBLIC OF KENYA



KENYA LAW
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**Kiok v Republic (Miscellaneous Criminal Petition E020 of 2021)
[2023] KEHC 21093 (KLR) (26 July 2023) (Revision)**

Neutral citation: [2023] KEHC 21093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL PETITION E020 OF 2021**

F GIKONYO, J

JULY 26, 2023

BETWEEN

AMOS MEMUSI KIOK PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence) in Narok
CMCR No.1644 of 2012 and Narok HCCRA No. 332 of 2013)*

REVISION

1. Before the court is an application dated 17/8/2021 seeking a review of sentence on the basis that mandatory sentence was declared by the Supreme Court to be unconstitutional. The application is premised on Section 8(1) (2) of the *Sexual Offences Act*, Articles 50(2), 27(1), 23(1), 165(b) and 59(c) of *the Constitution*.
2. The petitioner was convicted on a charge of defilement of a boy aged 8 years contrary to section 8(1) (b) of the *Sexual Offences Act*, and sentenced to serve life imprisonment. The particulars of the offence were that on 5th December 2012 in Narok South District, the appellant willfully and intentionally caused his penis to penetrate into the anus of K K a boy aged 8 years.
3. The petitioner was convicted on his own plea of guilt. He was sentenced to serve life imprisonment. He later preferred an appeal both to the high court and the court of appeal. Both appeals were dismissed entirely.
4. The petitioner having exhausted his appeals has now lodged the present petition challenging the mandatory nature of the sentence under section 8(2) of the *Sexual Offences Act*.

Petitioner's Submission



5. The petitioner submitted that this court has jurisdiction to hear and determine an application for redress on denial and violation of rights as provided under Article 23(1) and 165(b) of *the Constitution*.
6. The petitioner submitted that courts have exercised their discretion on sentencing depending on the circumstances of the case. The petitioner relied on the cases of *Samson Tobiko Sasile Vs Republic [2021]* eKLR, and *John Patim Vs Republic [2021]* eKLR.
7. The petitioner submitted that he was convicted on his own plea of guilt. He, therefore, does not challenge his conviction but prays for leniency and a review of his sentence.
8. The petitioner submitted that he has taken advantage of rehabilitation programs available in prison and is now a reformed person. He relied on the case of *Baragoi Rotiken V Republic [2022]* eKLR.

Prosecution's Submission

9. The respondent submitted on the mandatory sentences provided under section 8 of Sexual Offences Act and cited, Abdalla; Republic (respondent) (criminal appeal no. 44 of 2018) [2022] KECA (KLR) (7th October 2022) (judgment) *Francis Karioko Muruatetu & Another V Republic [2017]* eKLR, *Francis Karioko Muruatetu & Another V Republic katiba institute & 5 others (amicus Curiae) [2021]* eKLR.

Analysis and determination

Of mandatory sentence

10. This petition relates to section 8(2) of SOA which prescribes a mandatory life sentence. In light of the prevailing judicial precedent, the section suffers a twining of two ills. One; it has prescribed a life sentence; and two; the sentence is mandatory. In respect of the latter ill, courts have held that a provision of law which prescribes a mandatory sentence denies court discretion in sentencing, thus, is inconsistent with *the Constitution*. But, as section 8(2) of *SOA* is existing law, court prefer that; '... the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing' (Court of Appeal, *Dismas Wafula Kilwake vs. Republic [2018]* eKLR, section 7 of the Transitional Provisions of *the Constitution*). As for the former ill; the Court of Appeal has declared life sentence to be unconstitutional. (*Julius Kitsao Manyeso vs. R [2023]* eKLR).
11. In more specific terms and reasons; '...an indeterminate life sentence is... inhumane treatment and violates the right to dignity under Article 28'. In taking this view, the Court of Appeal was '...persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs 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' (ibid).
12. Notably, unlike some jurisdictions, Kenya has not prescribed in legislation the amount of time or years which constitute life sentence.
13. Accordingly, in the context of the Kenya legal regime, life sentence does not give the offender any prospects of release or an opportunity for rehabilitation and re-integration back into society to eke a living as a free man and become a productive citizen- a scenario that offends and violates article 27 on



Equality and Freedom from Discrimination, the right to human dignity under article 28 and freedom of the person under article 29 of *the Constitution*.

14. On review of life sentence, the Court of Appeal was categorical ‘... that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence’ (ibid).
15. On the basis that life sentence has been declared unconstitutional, it is axiomatic that no person should be sentenced or continue to serve a life. Accordingly, the court has discretion to interfere with, and sets aside the life sentence imposed on the petitioner.
16. In sentencing the petitioner, the court considers the offence of defilement to be serious. The victim was a child of tender age- he was 8 years old. The manner the offence was committed was brutal causing him injuries and infection. The child will also suffer post traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, these kind of offences are becoming quite prevalent in this area. Despite him being a first offender and remorseful, the aggravating factors justify a sentence that will act as a deterrent but also giving him an opportunity to be re-integrated back into society to eke a living a free man and become a productive citizen. Accordingly, the petitioner is hereby sentenced to 25 years’ imprisonment. The sentence to commence from the date of conviction. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF JULY, 2023.

F. GIKONYO M.

JUDGE

In the presence of:

PARA 1.

Ms. Mwaniki for DPP

PARA 2.

Applicant/Petitioner

PARA 3.

Muraguri - CA

