



**Kaburucho v Republic (Criminal Petition E052 of 2022)  
[2023] KEHC 26063 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26063 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL PETITION E052 OF 2022  
RM MWONGO, J  
NOVEMBER 27, 2023**

**BETWEEN**

**BIDAN GICHOBI KABURUCHO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. The petitioner was charged before the Resident Magistrate at Gichugu with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The offence was perpetrated against one HWW, a girl aged 16 1/2 years old
2. The petitioner was convicted and sentenced to serve a term of fifteen (15) years imprisonment. The provisions of section 8(4) of the *SOA*, provide for imprisonment for a term of not less than fifteen (15) years imprisonment
3. Aggrieved by the judgment of G.K Odhiambo (RM) at Gichugu, the petitioner filed an appeal vide Criminal Appeal No.5 of 2019 at Kerugoya High Court. seeking to have the conviction quashed and the sentence set aside The appeal was dismissed and the mandatory minimum sentence of 15 years as imposed by the trial court under Section 8(1)(4) of the *Sexual Offences Act*, was upheld by Gitari,J.
4. By a petition dated 8<sup>th</sup> December, 2022, the Petitioner seeks orders that:
  - a) This Honourable Court be pleased to issue a declaration that section 8(4) of the *Sexual Offences Act* insofar as it imposes a mandatory minimum sentence of fifteen (15) years is unconstitutional and infringes on the inherent right of the petitioner to a fair trial as envisaged under Article 25 (c) of *the Constitution*.



- b) This court be pleased to review the mandatory minimum sentence of fifteen years imposed on the petitioner.

## **Petitioner's submissions**

### **On sentencing**

5. The Petitioner challenges the mandatory minimum sentence of fifteen years imposed on him. He submits that sentencing should be a judicial function and not a legislative function. He cited the case of *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022)* (Judgment) where it was held:

“In arriving at its decision, the Court was similarly guided by the decision of the Constitutional Court of Uganda in *Susan Kigula & 417 Others v Attorney General*, Const. App. No. 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function”

The Court concluded that:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with *the Constitution*.”

### **Petitioner's Mitigation**

6. The Petitioner stated that he has advanced his theological studies and is now a respectable pastor in the prison. The prison authorities are satisfied that he has reformed and he has been very helpful in preaching and counselling the other convicts and even the prison authorities. The petitioner has also been facing health problems and has been in and out of surgery.
7. The Petitioner also has three children one in university and two in secondary school, a wife and an elderly mother who is now 80 years old, who are all dependent on him and his continued incarceration has really made them suffer.
8. His businesses have also received a big hit due to his imprisonment and this has made his employees and their families also suffer. Before his imprisonment he was very philanthropic and was known in his community for this and many really miss him.

## **Respondent's submissions**

### **Jurisdiction**

9. The respondent submits that Article 165(3) of *the Constitution* outlines the scope of the jurisdiction of the High Court.
10. Article 165(3)(b) grants this Court. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been violated; infringed or threatened. Jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of:
- a) The question whether any law is inconsistent with or in contravention of *the Constitution*.



- b) The question whether anything said to have be done under the authority of the Constitution or if any law is inconsistent with; or in contravention of the Constitution.
11. The respondent concedes that the Petition raises a constitutional question whose effect is to properly invoke the Jurisdiction of this Court under Articles 22(1) and 23(1) of the Constitution.

### **Substitution of the mandatory sentence**

12. It is the respondent’s submission that this Court, being duly vested with the requisite jurisdiction, should consider the extenuating circumstances that surrounded the Petitioner’s case. The aggravating features including the brutality of the crime, whether the Petitioner is remorseful regarding the offence he committed and the pain that the victim's family is feeling in determining the sentence.
13. Further, the respondent urges the Court to consider whether the petitioner has since been rehabilitated with proof of good conduct and industry while in custody.

### **Issues for Determination**

14. The only issues for determination are whether the petitioner merits resentencing and whether the mandatory nature of section 8(4) is unconstitutional.

### **Analysis and Determination**

15. The petitioner was charged and convicted with the offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act. He was sentenced to serve fifteen years in prison.
16. Under Section 8(1)(4) of the Sexual Offences Act, it is provided as follows:

“(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

17. The Petitioner is opposed to the mandatory minimum sentence of fifteen years imposed on him. He states that the sentence is harsh and unjustifiable.
18. The provisions of section 8(1)(4) of the Sexual Offences Act are couched in mandatory terms in respect of the minimum sentence. The petitioner relied on the decision in Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where it was stated by the court:

“In arriving at its decision the Court was similarly guided by the decision of the Constitutional Court of Uganda in Susan Kigula & 417 Others vs. Attorney General, Const. App. No. 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function and concluded that:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution.” (Emphasis supplied)

19. I am in agreement with the sentiment in the Maingi case that sentencing is an exercise reserved for the judicial function, and that it is for the court to ensure that sentences, however prescribed by the legislature, are imposed in accordance with the Constitution.



20. Article 28 of *the Constitution* provides for the right to dignity; and Article 27(1) provides for the right to equality before the law. These presume that a person is not sentenced merely by the act he has done based on the age of the victim. An offender who, for example who with violence, defiles a 16 year old repeatedly, cannot be placed in the same category from the point of sentencing as an offender and victim who fall in love, despite the legal incapacity of the 16 year old victim.
21. Thus, mandatory sentences violate the dignity and respect for the person. They preclude the court from viewing an offender in an individual light as a person with individual humanity.
22. In the case of *Taifa v Republic (Criminal Appeal E018 of 2022) [2022] KEHC 14230 (KLR) (24 October 2022)* (Judgment) Aburuli J held:

“In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.” (Emphasis supplied)
23. In *WOR v Republic (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022)* (Judgment) FA Ochieng J (as he then was) held that mandatory sentences under the Sexual Offences was unconstitutional, when he stated *inter alia* that:
  - “50. Having received the mitigation from the Appellant, and the pre-sentencing report from the Probation Officer, the Court effectively decided that they counted for nothing.
  51. Prior to the Supreme Court’s decision in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the courts construed mandatory sentences in a literal sense; just like the trial court herein.
  52. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of Murder, was unconstitutional because it took away the Court’s discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.
  53. ...
  54. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act*.
  55. I am unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
  56. Accordingly, I do hereby set aside the sentences.”



24. Clearly, the above decisions were made by courts of equal status and hence this court is not bound by them, although they are persuasive.
25. In the case of *Dismas Wafula Kilwake v R [2019]* eKLR the Court of Appeal, referring to the mandatory sentences under the *Sexual Offences Act* stated:

“We are persuaded there is no rational reason why the reasoning of the Supreme Court which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.

Being so persuaded, we hold 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”. (Emphasis supplied)

26. The guidance given in the *Dismas Kilwale case* is therefore that: a court must ensure that when sentencing under section 8 of the *SOA*, the interpretation it gives to the sentencing provision must not take away its discretion and independence in meting the sentence.

#### **Whether to Substitute the mandatory sentence**

27. In the *Taifa v Republic case* (*supra*) Aburuli J held:

“Taking into consideration the decision of the Supreme Court in *Muruatetu 2021* (*supra*), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the *Muruatetu 2017* decision, the trial court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful. For the above reasons, I hereby accord the appellant the opportunity to mitigate for this court to consider whether or not to reconsider the mandatory minimum sentence of 20 years imprisonment meted out on him.”

28. In the present case the critical question is whether the trial court or High Court at the time of appeal, exercised discretion in meting sentence. The mitigation was:

“The accused person is remorseful; he seeks the court’s leniency. He is a first offender and the family sole bread winner”

29. The trial court ruled:

“... the mitigation tendered is taken into consideration, however section 8(4) of the *sexual offences Act* provides that a person...is liable upon conviction to a term of not less than 15 years. The section provides for a minimum sentence...”

Here, the trial court did not exercise any discretion after taking into account the mitigation. It merely meted the minimum sentence provided for.



30. The appeal in the High Court was against both conviction and sentencing. However, the Court did not make any mention of the Muruatetu case or principles, nor did it make any reference to the role of mitigation in the sentencing arrived at in respect of the accused. The High Court stated:
- “On sentencing, the minimum sentence provided under section 8(4) of the SOA is 15 years; the appellant was sentenced to the bare minimum as provided. I have no reason to interfere with the sentence”
31. In my view, although there is nothing to prevent the courts from meting the minimum sentence in appropriate circumstances after taking into account the mitigation, clearly it must be evident that the mitigation was properly considered and played a role in the actual rendition of the sentence.
32. I have taken into consideration the mitigation pleaded in the first instance and the mitigation now availed.
33. The Prisons Report indicates as follows: that the offender has participated in rehabilitation programmes; that he is obedient and industrious; and that he has embraced the correctional core values of reformation and rehabilitation. In addition, the petitioner provided testimonials of courses he had taken whilst in prison.
34. These are post facto mitigation factors not available at the time of initial sentencing and are more appropriate for purposes of review. Nevertheless, I have taken them into consideration herein.

### **Disposition**

35. In the end, I declare that the mandatory minimum sentence under section 8(4) SOA is unlawful only if applied without due and considered regard for and incorporation of mitigating circumstances prior to, and in the sentencing exercise. The sentence can itself be meted in law. However, it cannot be applied without due and clear regard to mitigating circumstances, discretion of which the court must show it has taken on aboard.
36. Accordingly, I hereby reduce the sentence of the offender from 15 years to 13 years in the circumstances. The period shall take into account any period spent in custody.
37. Orders accordingly.

**DATED AT KERUGOYA THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023**

**R MWONGO**

**JUDGE**

Delivered in the presence of:

Ndiritu for the Petitioner

Petitioner - Present at Embu Prison

Maari for the Republic

