



REPUBLIC OF KENYA



**Bisonga v Republic (Constitutional Petition E001 of 2023)  
[2023] KEHC 27140 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CONSTITUTIONAL PETITION E001 OF 2023  
TA ODERA, J  
DECEMBER 18, 2023**

**BETWEEN**

**GEORGE MORARA BISONGA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By a Notice of Motion Application, the Applicant sought to review the sentence imposed on him.
2. The Application was supported by an Affidavit sworn by the Applicant. He deponed that he was arrested, charged, tried, convicted and sentenced for 15 years imprisonment for the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*, No. 3 of 2006. He further deponed that he was relying on the Article 165(3)(b) of *the Constitution*. He also filed “Grounds for Sentence Review”. He stated that he was remorseful for being involved in the commission of the crime. He further stated that he had a family at home whom he would like to take care of. He emphasized that he was begging for mercy for the sentence to be reduced to a lesser sentence as he had transformed in general character and spiritually mentored.
3. The Applicant also sought for the period he had spent in remand to be considered.
4. Mr. Ochengo for the Respondent opposed the Application. The offence for which the Applicant was convicted of was serious and his mitigation was duly considered and the sentence imposed was appropriate. On the Court considering the remand period spent, the Respondent stated that that was already considered.

**Determination**

5. The Applicant seeks to have his sentence reviewed on account of the decision in Petition No. E017 of 2021 by Justice Odunga.



6. I have considered the said decision being *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment). In that decision, Justice J.V. Odunga (as he then was), the question was the constitutionality of the mandatory minimum sentences and whether the principles enunciated in *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR applied to such sentences. I will highlight what I consider applies most to the present case.
85. In my respectful view, the ratio decidendi of the case (the reasons for deciding) appears in paragraphs 47 to 53 which I have extensively set out hereinabove. In summary the reason for the decision was that failing to allow a Judge 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 sentences wholly disproportionate to the accused's criminal culpability, violates their right to dignity.
86. ...In my respectful view, therefore it is neither the applicable rules or the final finding that constitute ratio decidendi but the reason for the finding that a legislation that purports to deprive the Court of its discretion, in imposing a sentence, to take into account, inter alia, the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime is liable to be struck out as being unconstitutional, but due to the fact that it does not permit the court to consider a range of other sentences appropriate to the case. In simple terms, the Supreme Court in *Muruatetu 1* did not outlaw death sentence but simply said that as a mandatory sentence, it was unconstitutional.
90. It is clear that minimum mandatory sentences, prima facie, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.
92. That sentencing is a matter within the discretion of the trial court is not in doubt. That position is well recognized in many jurisdictions. In *S vs Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that:
- “It is trite law that the issue of resentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:
- ‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’
- [Emphasis mine]
7. The Court proceeded to cite several decisions in support of mandatory sentences limiting judicial discretion.



8. Closer home, the Court cited the case of *Christopher Ochieng vs. Republic* [2018] eKLR where the Court of Appeal stated as follows:

“Arising from the decision in Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional... In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court was applied to this provision, it too should be considered unconstitutional on the same basis... Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefor with a sentence of 30 years imprisonment from the date of sentence by the trial court.”

98. In Jared Koita Injiri vs. Republic [2019] eKLR the same expressed itself as hereunder:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

99. That was the Court of Appeal’s position in Dismas Wafula Kilwake vs. Republic [2019] eKLR in which it expressed itself as hereunder:

“Here at home in a judgment rendered on 14<sup>th</sup> December 2017 in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015, the Supreme Court concluded that that mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While we appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. In principle, we are persuaded that 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 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.”

195. The position was similarly adopted by the same Court in *Dismas Wafula Kilwake vs. Republic* [2018] eKLR where this Court stated as follows:

“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. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Court must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must not 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.

112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed. I gather support from the opinion held by the Court of Appeal in *Dismas Wafula Kilwake vs Republic* [2019] eKLR:

“In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences



which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

[Emphasis mine]

9. In conclusion, the Court held as follows:

118.

- 1) To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

10. I am indeed persuaded by that decision and I am in agreement with the general principle that courts can mete out appropriate sentences upon considering the circumstances of the offence. I am further in agreement that sentencing is the preserve of the trial court and the same will be only be interfered with under exceptional circumstances.

11. That said, the Applicant seeks to have his sentence reviewed and laid his argument on the above-cited case. Paragraph 118. (2) of the said decision reads thus:

118.

- 2) Taking cue from the decision in Francis Karioko Muruatetu & Another vs. Republic [2017] those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentences are at liberty to petition the High Court for orders of resentencing in appropriate cases. [Emphasis mine]

12. Looking at the Trial Court’s record, I note that the Applicant was given a chance to mitigate which mitigation was taken on 2.11.2017. The Trial Court noted the mitigation and called for a Probation Officer’s Report. On 9.11.2017, before passing the sentence, considered the Probation Officer’s Report, the recommendations therein, the nature of the offence and the circumstances thereto and proceeded to sentence the Accused.

13. To my mind, there is nothing from the Court’s record that is indicative of the Trial Court failing to consider the mitigation or the circumstances of the case.

14. Indeed, looking at the Applicant’s file, I note that he appealed against the decision of the Trial Court vide Kisii HC Criminal Appeal No. 80 of 2017. A Judgment was delivered on 28.9.2018. This Court affirmed the conviction on both counts of defilement contrary to Section 20(1) of the *Sexual Offences Act* and causing actual bodily harm contrary to Section 251 of the Penal Code. This Court held:

“26. All in all, I affirm the conviction on both counts. The sentenced of fifteen (15) years imprisonment is neither harsh nor excessive to warrant interference. Under section 8(3) of the Act, the minimum mandatory sentence for the offence of defilement where the child is aged between 12 and 15 years old is 20 years’ imprisonment. The appellant was sentenced to 15 years imprisonment which is affirmed as the respondent did not cross-appeal or issue notice to enhance the sentence.



27. The appellant was not sentenced on the second count of assault. I therefore sentence the appellant to one (1) year imprisonment. Both sentences shall now run concurrently.”

15. Section 20[1] of the *Sexual Offences Act* provides as follows:

20. Incest by male persons

(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

The issue of the sentence was again dealt with by dealt with by my brother Hon Justice A. K Ndungu in criminal revision no 2 of 2020 Kisii where he held “ I have considered the application. It is clear the trial magistrate exercised discretion in sentencing and therefore correctly applied the principle in the Muruatetu Case. No wonder that even when the applicant appealed, this court did not find ground to interfere with the sentence.

The applicant has re-approached this court again over an issue already addressed by the court. This is not tenable in Law.

The sentence for the offence is life imprisonment. A sentence of 15 years as already held by the court in the applicant’s appeal is lenient in the circumstances. The application is dismissed.

16. The appeal and revision on the issue of sentence were made by a Court of concurrent Jurisdiction and this court lacks Jurisdiction to interfere with sentence of that court concurrent Jurisdiction and the applicant is also guilty of filing two similar applications on the same issue.

Lastly, the Applicant orally sought to have the term spent in remand considered. Section 333(2) of the Criminal Procedure Code provides: -

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

10. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

11. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR where the Court of Appeal held that:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By



dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.”

17. I have perused the lower court record herein. It is clear that the applicant was arrested on 8.3.2017 and arraigned in court on 10.3.17. he was sentenced on 9.11.17. The lower court record does not reflect that the trial court considered the period and it was also not mentioned in the appeal Judgment. and revision cases.
18. In the end, I find partial merit in the Applicant’s Application and I proceed to dismiss the prayer for sentence review and allow the application on the issue of remand period. I order that the sentence of the offender herein be computed to run from the 8.3.17 when he was first remanded till completion.
19. It is so ordered.

**DATED, DELIVERED AND SIGNED AT KISII THIS 18<sup>TH</sup> DAY OF DECEMBER 2023.**

**TERESA ODERA**

**JUDGE**

In the presence of:

Ochengo for the State

Applicant is in person

