



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**MISC. CRIMINAL APPLICATION NO. 23 OF 2020**

**(CORAM: F.M. GIKONYO J.)**

**(From the sentence in Narok CMCR No. 2087 of 2014 and HCCRA NO. 27 of 2017)**

**JOSEPH**

**LODIAKA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPOND**

**ENT**

**JUDGMENT**

[1]. In an undated application received in court on 29.09.2020, the applicant is seeking for resentencing pursuant to the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* and the Court of Appeal decision in *Benard Mulwa Musyoka*.

[2]. However, on 14<sup>th</sup> July 2021 after the Supreme Court issued further directions on *Muruatetu* on 6<sup>th</sup> July 2021, the applicant opted to base his application on the Constitution.

**Some important facts**

[3]. The applicant was charged with, convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.

[4]. He then filed Narok High Court Criminal Appeal No. 27 of 2017 which was heard and the conviction and sentence was upheld.

[5]. He now seeks resentencing.

[6]. This matter was canvassed by way of written submissions.

**Submissions by applicant**

[7]. The applicant submitted that the mandatory minimum sentencing legislation infringes on the judges right to exercise discretion and the doctrine of separation of powers. He relied on Article 1(1) (3) (a) (b)

(c), 47 of the Constitution, Brayan Carner, Black's Law Dictionary (9<sup>th</sup> Ed. West Publishing Company 2009) 45, De L'esprit De Lois [The Spirit of the Laws] (1748), **Re The Matter Of The Interim Independent Electoral Commission [2011] eKLR, Entick V Carrington(1765) 19 ST TR 1030**, Albert Venn Dicey, The Law Of Constitution ,(Oxford Press 1915) 3-8,

[8]. The applicant submitted that this court has jurisdiction to determine this application given that right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened as claimed. He relied on Article 165(3) (b), 23(1) and 25(c) of the Constitution and the cases of **The Owners Of Motor Vessel Lilian 'S' Vs Caltex Oil (Kenya) Ltd [1989] KLR** at page 14, **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others Application No. 2 of 2011, Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai Estate & 4 Others.**

[9]. The applicant submitted that the mandatory nature of sentence fetters the judge's discretion in applying the sentencing policy and guidelines leading to disproportionality of the sentence to be served. He relied on the cases of **Criminal Appeal No. 262 Of 2012- Hamisi Mwangeka Mwero Vs Republic, John Senjura Patim V Republic [2021] eKLR, Eliud Waweru Wambui V Republic [2019] eKLR, Chu Ken Glim Vs The Commonwealth (1992) 176 CLR 36-37, S Vs Malgas 2001 (2) SA 1222 SCA 1235, S Vs Mofokeng 1999910 SACR 502 (W) At 506 (D), Alister Anthony Pareira Vs State Of Maharashtra,** Article 50(2) (q), 28 of the Constitution.

[10]. The applicant submitted that the mandatory sentence under Section 8(2) of SOA deprived him the right to protection and full benefit of the law when the trial court failed to take into consideration his mitigation on account that the court's hands were tied. He relied on Section 216, 323 and 329 of the Criminal Procedure Code, Article 27 (1), 50(2) (q), 259 and 163(7) of the Constitution.

[11]. The applicant submitted that the directions issued by the Supreme Court that the principle in **Muruatetu** case cannot be applied in other offences is discriminatory, violates human rights; right to a fair trial, does not support inclusiveness and social justice among others. He cited Article 27, **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR, Woolmington V DPP [1935] UKHL 1,** Article 163(7) of the Constitution

[12]. The applicant contends that he was not given a fair hearing due to the mandatory nature of the sentence prescribed by statute. he relied in the case of **Neil V Antrim Magistrates Court (1992)**

[13]. The applicant urged this court to consider policy direction 4.1 of the sentencing guidelines policy 2015. The core objective of custodial sentence being reformation and rehabilitation and that he has several achievements; graduated with the university of London(LLB), participated in the 29<sup>th</sup> African human right moot court competition, he is a paralegal ( justice defenders non-governmental organization), a voluntary teacher-Naivasha inmate's education center, secretary general-mindful leadership program, secretary general-Naivasha inmates sports council(N.IS.C), has theological certificates, coaching certificate –zebstrong/count me in organization, and promoted to a special stage (trusty).He submitted that the acquired knowledge, experience and information has rehabilitated him. He argues that he is now ready to be productive in nation building. He urged this court to find that the time served is sufficient.

[14]. The applicant submitted that the time spent in custody was not computed during sentencing. He relied in the case of **Ahamad Abolfathi Mohammed & Another Vs Republic, Bethwel Wilson Kibor Vs Republic** and Section 333(2) and 137(2) (a) of the CPC.

[15]. The applicant prays for success of his application. He urges the court to pass a more lenient sentence than the 20 years' sentence.

### **Respondent's submissions**

[16]. Prosecution opposed the application on the ground that the Supreme Court in directions issued on 6<sup>th</sup> July 2021 in the **Francis Muruatetu** case stated that the principles set out were applicable to murder cases only. The current application is misguided as it does not amount to an appeal nor a revision.

[17]. The respondent submitted that high court is endowed with powers to consider any question raised on the constitutionality of any provision of the law this is as per Article 23(1) of the Constitution.

[18]. The respondent submitted that from the very onset the national assembly noted with concern the danger that our society faced from sexual violence and decided to treat sexual offences as a special category of crime and came up with minimum sentences but further categorizing the punishment in Section 8 SOA with the age of the victim. They relied on **National Assembly Hansard Of April 26, 2006, In The Case Of The State Vs Vasco Kangulu Libangani (SA 68 Of 2013) [2015] NASC 5**

[19]. The respondent submitted that the minimum sentences play a role in deterring crime as per chapter 4 of the judiciary sentencing policy guidelines. in the case of Republic **V Elijah Mune Ndundu and Another [1978] eKLR.**

[20]. The respondent submitted that the constitution does provide for separation of powers between the executive, legislature and judiciary. The prosecution argued that the doctrine of separation of powers does not mean complete separation of functions but rather there is interdependency between the three arms of government. They relied on the case of **S V Gakeinyatse (CLCLB-092-08) [2009] BWCA 107 (28 January 2009), Mootshe V the State; Motshwari & another V the State [2004] 1 BLR 1, S V Dodo (CCT1/01) [2001] ZACC 16; 2001 (3) SA 382 CC; 2001 (5) BCLR 423 (CC) (5 April 2001.)**

[21]. The respondent submitted that the national assembly in enacting the various sentencing provisions under Section 8 of the Sexual Offences Act did not contravene Articles 159 and 160 of the Constitution of Kenya.

[22]. The respondent submitted that section 8 of the offences act is not discriminative. The National Assembly prescribed different category of sentences taking into cognizance the various stages of psychological and physical development of the children in fulfilling international obligations under Article 19 of the convention on the rights of a child. The legislature in prescribing the different offences in Section 8 SOA took cognizance of the omnibus sentence for all offenders who defiled persons below the age of 18 years was not practicable and would be grossly disproportionate on all accused persons. The prosecution argued that the various punishments set in the penal laws are often premised on the effect that particular crime has on the society. the prosecution cited the cases of **Sammy Abiyo Jiilo V Republic [2021] eKLR, The Court Of Appeal Of Botswana In Mootshe V The State; Motshwari And Others V The State ( Criminal Appeal No. 26 Of 201; Criminal Appeal No. 2 Of 202) [2003] BWCA 20; [2004] 1 BLR 1(CA) 9 31 January 2003), S V Dodo (CCT1/01) [2001] ZACC 16; 2001 (3) SA 382 CC; 2001 (5) BCLR 423 (CC) (5 April 2001.)**

[23]. The respondent submitted that the court of appeal has upheld that the sentences set out section 8 SOA are legal sentences. They cited the case of **Onesmus Safari Ngao Vs the Republic Criminal Appeal No. 5 of 2020 (Unreported) And Mbuvi Kabwere Lawrence Vs the Republic Criminal Appeal No. 48 Of 2017 (Unreported).**

[24]. The respondent submitted that the applicant was given fair hearing by the trial court and his right under Article 50 of the Constitution was adhered to. The applicant has misinterpreted the provisions of Article 50(2) (q) as it relates to appeal and review by a higher court similar to Section 347 (1) (a) CPC. Section 361 CPC also offers the option to appeal to the court of appeal. Section 362 CPC applies only where there is apparent error on face of the record. The high court cannot sit on review of a sentence confirmed by a judge exercising concurrent jurisdiction as it offends Article 165 (6) of the Constitution.

[25]. The respondent submitted that they have noted that the applicant was arraigned in court on 18<sup>th</sup> December 2014 and sentenced on 8<sup>th</sup> May 2015.

[26]. The respondent urged this court to find that the sentence passed on the applicant was not discriminatory nor did it infringe on his constitutional rights. Also that the national assembly and the executive have a legitimate right as the people's representative to prescribe offences and punishment. The respondent prayed that this court does find that the sentence meted on the applicant was not grossly

disproportionate to warrant interference. The prosecution urged this court to dismiss the application.

## **ANALYSIS AND DETERMINATION**

### **Redress for violation of right**

[27]. The application before me is for redress of a denial, violation or infringement of a right or fundamental freedom in the bill of rights. The fundamental provisions cited on re-sentencing are Article 50 (2) (p) (q) of the Constitution as read with Article 50 (6) (a) and (b) of the Constitution. The arguments presented also draw upon the dictum in the case of ***Francis Karioko Muruatetu & Another –vs- Republic (supra)*** that prescription of mandatory sentence takes away the discretion of the court in sentencing, and therefore, is inconsistent with the Constitution.

### **Jurisdiction**

[28]. The jurisdiction of the High Court to hear and determine application for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the bill of rights is conferred under Article 165 of the Constitution. Thus, the application is properly before the court.

[29]. But, every time I encounter such application as this, I cannot help to cite a work of court in **BARAGOI ROTIKEN vs. R [2022] eKLR** on state of affairs in court following Muruatetu decisional law, thus: -

#### **Great flood came...**

**Following the landmark decisional law in Muruatetu case, the motion of cases in which convicted persons sought for reduced or lesser sentences on the basis of the principle laid down therein, resembled the tides rising in the sea. Each successive wave rushes forward, breaks, and rolls back; but the great flood is steadily coming in. At the initial glance, the waters seem retiring; so did the applications. When you look a little longer on the waters, you think the waves were rushing capriciously to and from; so was with the applications. But, we kept looking over time, and saw the sea mark disappear one after another; minimum and mandatory sentences in Sexual Offences Act and other offences constantly dissipated on the basis of the principle laid down in the Muruatetu decisional law. There was now no illusion that the applications will not cease coming. It also became clear to the precedent-setting court-the Supreme Court of the Republic of Kenya- of the general direction in which the ocean is moving- and that it was no longer a mere recoil of a wave which regularly follows every advance, but a great general ebb of monumental proportions; a great flood steadily coming in.**

#### **Turning the tide**

**Extraordinary determination was necessary to stop the tide causing the flood. On 6/7/2021; in an attempt to turn and stem down the tides, the Supreme Court, hemmed application of Muruatetu decisional law to sentences in murder cases only. The Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, and accordingly cautioned as follows: -**

**“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution”.**

**A sigh of relief; applications founded on Muruatetu decision, but which did not relate to section 204 of the Penal Code, were now deemed to be incompetent, and were consequently dismissed. However, the repose was ephemeral; the directions were not a foreclosure of the**

**applicant's right to seek appropriate remedy or reduced sentence through the appellate process or on the basis of the Constitution. Now, courts are again faced with a great number of applications or petitions based on the Constitution in which arguments similar to those in *Muruatetu* case are being advanced in respect of all sentences which deny court discretion in sentencing. The application before me is one of such type. *Aluta continua*....**

### **Applicant's beef with *Muruatetu* directions**

[30]. Although the applicant herein has sought resentencing based on the constitution and other laws, he is not yet finished with *Muruatetu* directions.

[31]. The applicant argued that the directions in *Muruatetu* case that, the principle laid therein does not apply to other cases other than those under Section 204 of the Penal Code, is discriminatory.

[32]. My reading of the directions in *Muruatetu*, discerns not any, or any attempt to introduce any discrimination to any cadre of offenders as it did not place estoppel on the urging of similar arguments in other befitting cases.

### **Claim of violation of right**

[33]. The real issue here is: -

**i) Whether the trial as well as the appellate court failed to exercise discretion in passing sentence upon the applicant or passed sentence solely in servile obedience to the command of minimum sentence prescribed in the Sexual Offences Act.**

### **Circumstances of case**

[34]. The Applicant in this case filed appeal number HCCRA NO. 27 of 2017 which was heard; conviction and sentence of imprisonment for 20 years was upheld by this court (Bwonwong'a J.) on 2<sup>nd</sup> February, 2017. Two pertinent issues emerge. One; the judge heard the appeal and upheld the sentence of 20 years' imprisonment. Two: the applicant did not file an appeal /or withdrew the appeal to the Court of Appeal.

[35]. Nevertheless, in applications such as this, the applicant must show violation of his right to fair trial. Thus, despite prescription of minimum sentences, it is necessary to establish that the court failed to exercise discretion in passing sentence or, passed sentence solely on servile obedience to some law which fettered its discretion, thus, occasioning prejudice to the accused. I doubt, where the court has exercised discretion, a sentence would be said to be illegal or unlawful simply on the basis that a minimum sentence was prescribed.

[36]. It appears from the judgment of the trial court that the trial magistrate after considering mitigating factors found the minimum sentence to be the appropriate sentence in the circumstances and imposed a sentence of 20 years' imprisonment. He stated, thus: -

**“Mitigation noted. The court passes the minimum sentence of 20 years imprisonment as provided for under Section 8(3) of the Sexual Offences Act.”**

[37]. There is nothing to show that the trial court was tied to the prescription of the Act. The trial magistrate exercised discretion in sentencing the applicant.

[38]. This court, (Bwonwong'a J.) also considered all relevant factors in the appeal and upheld the sentence.

[39]. In light thereof, I love the approach adopted by the Court of Appeal in **Samson Mumbaa Murigi v R [2020] eKLR** where it held that: -

**“In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty of 20 years imprisonment which was the prescribed sentence for the offence of defilement under Section 8(3) of the Sexual Offences Act. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial Court took into consideration both aggravating and mitigating factors and arrived at the correct conclusion. Consequently, the appeal against sentence fails.” (Emphasis added).**

[40]. I should also note that indeed this is a serious offence against a young girl of the age of 14 years which took away her innocence. In addition, sexual offences ordinarily cause trauma to, and compromises the integrity of the victim as a human being. Future references to or flash-back of the incident of the sexual assault, either in the memory of the victim or by others or by whatever circumstances reminds of the trauma, shakes the very foundation of the life of the victim. It is such an offence with dire post traumatic consequences. The applicant should pay for his crime, and act as a deterrent for such debauchery.

[41]. The applicant took advantage of a vulnerable child and defiled her. The sentence was not illegal or unlawful, neither was it harsh nor excessive and this ground must fail.

#### **Time spent in custody**

[42]. The applicant remained in custody since arraignment, and pursuant to Section 333(2) of the CPC, the sentence shall run from the date he was first arraigned in court, that is, 18.12.2014. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THIS 23RD DAY OF MARCH 2022 THROUGH TEAMS APPLICATION.**

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**F. M. GIKONYO**

**JUDGE**

**IN THE PRESENCE OF:**

- 1. THE APPLICANT**
- 2. KARANJA FOR THE REPUBLIC**
- 3. MR. KASASO CA**