



**Okello v Republic (Criminal Petition E011 of 2021)
[2022] KEHC 376 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E011 OF 2021**

FA OCHIENG, J

APRIL 27, 2022

BETWEEN

MORRIS JUMA OKELLO APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. He has now invoked the decision of the Supreme Court in the case of *Muruatetu*, which held that the mandatory nature of the Death Sentence was unconstitutional.
2. In his considered opinion, the Supreme Court had now untied the hand of the Judiciary, so that it is now possible to consider to mitigation whenever the Court was determining the most appropriate sentence in any particular case.
3. The Petitioner has cited the case of *David Ochami Odinga v Republic*, High Court Petition No. 71 of 2019, in which the Court substituted the sentence of 20 Years imprisonment, with a sentence of 10 Years imprisonment. The said case was one in which the Petitioner had been convicted for the offence of defilement.
4. The Petitioner also drew this Court's attention to the case of *Paul Odhiambo Mbolav Republic* HC Misc. Application No. 55 of 2019, in which the court substituted the mandatory Life Sentence, (which the trial court had imposed), with a sentence of 10 Years imprisonment.
5. In that case, the Applicant had been convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*.
6. Clearly, as the Petitioner has told this court, the cases he has cited are a reflection of the benefits which the courts have conferred upon persons who had been convicted for the offences of defilement.
7. He therefore asked this court to enable him to enjoy a similar benefit.



8. The Petitioner told this court that he was a first offender.
9. However, a reading of the record of the proceedings before the trial court, reveals that the Petitioner was not a first offender. In the circumstances, I wish to reiterate the Petitioner's own words, when he made the following submission herein;

“The antecedents of an accused person also come into play when the court is considering the appropriate sentence.

If the accused is a first offender, the sentence ought to reflect this fact, as the aim of the court is to encourage reform and discourage recidivism.”
10. The second issue raised by the Petitioner was Section 333 (2) of the *Criminal Procedure Code*.
11. As the learned state counsel, Ms Maureen Odumba has conceded, the period which an accused person spent in remand custody, whilst he was still on trial should be taken into account when sentencing him.
12. In determining the petition, I first take note of the fact that the two decisions relied upon by the Petitioner, were determined before the Supreme Court issued its Directions regarding the decision it had rendered in the *Muruatetu* Case.
13. Pursuant to the said Directions, the Supreme Court made it clear that the decision in the *Muruatetu case* was only applicable to the cases wherein the accused had been convicted for Murder.
14. Nonetheless, the Supreme Court also left the door wide open for the courts to give due consideration if any accused person advances arguments on other mandatory sentences.
15. In my considered opinion, the ratio decidendi of the decision in the *Muruatetu Case* was that mandatory sentences, when prescribed by statute, have the effect of compelling the courts to hand down such sentences regardless of whether or not the Court was of the considered opinion that there was a more appropriate sentence for the particular offender.
16. I find no reason that could justify the limitation of the ratio decidendi in the *Muruatetu Case*, to only those cases in which the accused was convicted for Murder.
17. I appreciate that if the death sentence was carried out it would not be reversible, in any circumstances.
18. However, even if a convict was sentenced to imprisonment, (especially for long periods), his said incarceration cannot be undone, once he has served the sentence.
19. To my mind, the mandatory nature of any prescribed sentence should, on the strength of the Supreme Court's pronouncement in the *Muruatetu Case*, be frowned upon.
20. But I also believe that when there is a prescribed mandatory sentence, the court cannot ignore it completely. I so hold because the function of the court is primarily to interpret the law. Therefore, when the legislature has enacted a particular law, including the prescription of a sentence for any offence, the court should deem that to be a necessary guide concerning the societal attitude to persons convicted for such offence.
21. By enacting law governing the sentence for an offence, the legislature must be deemed to have considered such sentence as appropriate for the said offence.
22. Therefore, even when a court was persuaded that in the circumstances of a particular case, there was a more appropriate sentence than that prescribed as the minimum or the mandatory sentence, I hold the considered opinion that the court must not lose sight of the prescribed sentence.



23. In this case, the Petitioner was not a first offender.
24. After the Petitioner was convicted, the prosecution informed the trial court that the Petitioner was already serving a 30 Years sentence, for a similar charge.
25. The Petitioner confirmed to the trial court that he was imprisoned for 30 years for a separate offence of defilement.
26. When delivering her judgment on the appeal, which the Petitioner lodged at the High Court, T.W. Cherere J. held as follows;

“ A previous sentence on a related offence should, in my considered view, prompt a court to hand down a more severe sentence since it shows that the accused is a habitual offender.”
27. In the circumstances of this case, Cherere J. declined to exercise her discretion under Section 354 (3) (b) of the *Criminal Procedure Code*. The reason for that decision was that the trial court had exercised its discretion judiciously when it sentenced the Petitioner to 30 Years imprisonment.
28. I find absolutely no basis to deviate from the decision of my learned sister. If anything, I believe that there is every reason for affirming the said decision; not just because I cannot sit on an appeal over a decision made by a court of concurrent jurisdiction, but more so, because I believe in the correctness of the said pronouncement.
29. Finally, pursuant to Section 333 (2) of the *Criminal Procedure Code*, I direct the Prison authorities to take into account the period of Seven (7) Months and Ten (10) Days, which the Petitioner spent in custody whilst he was still undergoing trial.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2022

FRED A. OCHIENG

JUDGE

