



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 104 OF 2019**

**SHIDA KATANA THOYA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT ON RESENTENCING**

1. The Petitioner herein was arraigned before the Malindi Senior Principal Magistrate's Court on a charge of rape contrary to Section 3(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 26/8/2006 at about 7.00 p.m. at [particulars withheld] Village of Wachi Odha Location in Garsen Division of Tana River District within Coast Province, intentionally and unlawfully committed an act which caused penetration by his genital organs with the genital organs of GJ.

2. The Petitioner entered a plea of "not guilty" and his trial began. At the end of his trial, the learned trial magistrate found him guilty and convicted him for the offence of rape and sentenced him to serve 25 years in prison.

3. Being aggrieved by the said conviction and sentence, the Petitioner filed Malindi High Court Criminal Appeal No. 22 of 2009, which the Court dismissed vide a Judgment delivered on 5/7/2010. Thereafter, the Petitioner filed Mombasa Court of Appeal Criminal Appeal No. 258 of 2010 which the Court also dismissed vide a Judgment delivered on 15/11/2013.

4. The Petitioner is seeking a re-sentence in the instant petition pursuant to Supreme Court's decision in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** wherein the Apex Court decided that a mandatory death sentence is against the constitution.

5. The Petitioner submitted that he was sentenced to serve 25 years imprisonment with remission pursuant to Section 46 of the Prisons Act (Cap 90) Laws of Kenya. He further submitted that he was granted to serve a period of 16 years 8 months and has already served over 10 years since conviction. He prays this Court to consider giving him a non-custodial sentence under police supervision order.

6. **M/S Wanjohi**, learned Counsel for the State submitted that the Petitioner was convicted of rape under Section 3(3) of the Sexual Offences Act No.3 of 2006, which Section does not give a mandatory sentence. That being so, counsel submitted that this Petition does not fall within the ambit of **Francis Karioko Muruatetu case** and so this Court lacks the jurisdiction to deal with this matter since resentencing option is not available.

7. I have considered the Petition and submissions of parties. As submitted by M/s Wanjohi, the jurisdiction of this Court to resentence convicted offenders is founded upon the aforesaid case of Francis Karioko Muruatetu, and is hinged on the presence of what has been referred to as "*mandatory nature of this sentence*". Therefore, where the sentences meted out by the trial court was discretionary, this Court would not exercise the jurisdiction to resentence.

8. In this particular case, the Petitioner was charged under Section 3(1) of the Sexual Offences Act, and sentenced under Section 3(3) thereof. Section 3(3) of the Sexual Offences Act states as follows: -

**"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life".**

9. From the foregoing, it is clear that Section 3(3) does not provide for a mandatory sentence but rather a discretionary one subject to a minimum of ten years.

10. The Petitioner was jailed for 25 years, which is one and one-half more than the minimum sentence. The court had the discretion in

sentencing the Petitioner, and the discretion is exercisable judiciously and upon mitigation and other relevant circumstances.

11. The Petitioner referred this Court to this Court's decision in **Juma Mzuri Chovu v DPP, Petition No.83 of 2018 Mombasa**. In that case, the Petitioner had been given a mandatory sentence and that is the reason the court in that case was able to deal with the matter. That case cannot assist the Petitioner herein.

12. For the foregoing reasons, this Court holds that it does not have the jurisdiction to interfere with the sentence imposed by the trial court, and affirmed by both the High Court and the Court of Appeal.

The Petition is dismissed.

Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 18<sup>th</sup> day of March, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant