



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

PETITION NO. 13 OF 2020

JOHN MICHAEL MGHANGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGEMENT ON RESENTENCING

1. The Petitioner herein **John Michael Mghanga** was charged with the Offence of defilement contrary to section 8 [1] as read with section 8 [4] of the Sexual Offences Act at the Senior Residents Magistrate court in Wundanyi Criminal Case No 224 of 2014.
2. The particulars were that, on 12/1/2014 in Kishamba Location within Taita Taveta County he intentionally and unlawfully caused his penis to penetrate the vagina of MMM a child aged 17 years. He was sentenced to 15 years imprisonment. His appeal to the High Court was dismissed.
3. The Petitioner is now in this court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.
4. In his submissions filed on 16/3/2021 the Petitioner avers that the Muruatetu Case has created an avenue for review of mandatory sentences. That the court is allowed to exercise discretion in sentencing and for the trial process to be in conformity with the provisions of the constitution on fair trial. He placed reliance on the case of **Yusuf Shiunzi Kunani v Republic Mombasa Petition No 14 of 2019**. He further asked this court to consider his mitigation and for his sentence to be reduced.
5. **Ms. Mukangu**, learned prosecutor opposed the petition. She submitted that the 15 year sentence was sufficient in comparison to the offence. That the victim was a 17 year old and was impregnated as a result of the ordeal. The Respondent prayed for the Petitioner to be confined so as to keep the society safe.
6. In mitigation the Petitioner stated that he was a first offender. That he deeply regretted the offence and was remorseful of the same. The Petitioner submitted that he had undertaken several rehabilitation courses which included theology, health education and paralegal. A favourable progressive report was issued by the prison facility on his behalf. He prayed for his jail term to be revised by this court.
7. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
 - i. **“Sentences are imposed to meet the following objectives:**
 - ii. **Retribution: To punish the offender for his/her criminal conduct in a just manner.**
 - iii. **Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
 - iv. **Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**
 - v. **Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.**
 - vi. **Community protection: To protect the community by incapacitating the offender.**

vii. **Denunciation: To communicate the community's condemnation of the criminal conduct.**"

8. Section 8 (4) of the Sexual Offences Act reads:

"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 not less than fifteen years."

This Court in affirming its jurisdiction in resentencing stated in **Yusuf Shiunzi v Director of Public Prosecution [2020] eKLR** that, **"It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences applies with equal force to minimum sentences."** In the *Muruatetu Case*, the Supreme Court relied on the case of **Vinter and others v the United Kingdom [Applications Nos. 66069/09, 130/10 and 3896/10]** in which the Court held that:

"111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment."

9. The threshold of resentencing applications with regards to sentences couched in mandatory terms was recently revised by the Supreme Court and new directions issued over the Muruatetu Case. Among the directions given was that of resentencing hearings only being applicable to charges under Sections 203 as read with Section 204 of the Penal Code on murder, and not the other cadre of offences such as robbery with violence or sexual offences. Reference is made to **Petition 15 & 16 (Consolidated) of 2015 Francis Kariko Muruatetu and Another v Republic & Others** and more specifically on directions issued on 6/7/2021.

10. The upshot is that this Court does not have the jurisdiction to resentence the Petitioner. The petition is therefore dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JULY, 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