



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 68 OF 2019**

**MWATEMO MGEDZO.....PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**RULING**

1. The Petitioner was convicted for the offence defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, and sentenced to 20 years imprisonment in Kwale Cr. Case No. 1215 of 2011. The Petitioner has been in jail for the last 8 years. The Petitioner now seeks a review of his sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 (2017) eKLR* in which the apex court found the mandatory nature of the death sentence to be unconstitutional.

2. The particulars of the offence are that the Petitioner defiled a child between the age of twelve and fifteen years in Kwale County. The trial Court file has since disappeared without a trace and efforts to trace bore no fruits.

3. The Petitioner regrets the offence, and he is asking this court for forgiveness. He submits that he is 77 years old and very sickly. He prays to be released by the court so that he can spend his last days at home with his family.

4. His Prison's Progress Report indicates that he is of good conduct, an upright Muslim, and he is remorseful for what happened. The report also indicates that the Petitioner is an elderly man who is suffering from a hypertensive heart disease and he is unstable and has to be supported by fellow inmates due to age related diseases.

5. Ms. Wanjohi learned prosecutor for the Respondent submitted that in view of the fact that the petitioner is sickly and there are no records on the offence he committed, the matter ought to be left at the discretion of the court.

**The Determination**

6. It is noteworthy that when the Supreme Court made the landmark judgment in the *Muruatetu* case in December 2017, many convicts approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being, that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. However, on 6/7/2021, the Supreme Court limited the application of *Muruatetu* case to sentences in murder cases only. The Supreme Court has 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, thus: -

**“[14]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. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.**

**[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”**

7. Accordingly, in so far as, this petition is founded on *Muruatetu* decision this court is *functus officio*. In the circumstances, the court cannot

assume jurisdiction on this petition for review of sentence.

8. Be that as it may, this court notes that **Covid-19** is with us, we are all living in challenging times. The Judiciary has taken cogent steps to decongest prisons with the result that the courts are encouraged to consider the release of prisoners in deserving cases, under the Community Service Order, and other legal instruments.

9. The case before the court is peculiar in the sense that the Petitioner is a very old man. He is 77 years and sickly, suffering from hypertensive heart condition and he requires support from his fellow inmates, since he is unstable due to age related conditions. The girl he defiled is now married to someone else. The Petitioner's demeanor in court was of a desperate old man. I have no doubt in my mind that the Petitioner is suffering a great deal in prison. It is with these considerations in mind that I make the following Judgment without interfering with the sentence imposed on the Petitioner of 20 years by the trial court.

10. The Petitioner is a senior citizen of this country. He is aged and frail, but he appears very apologetic and has a very positive attitude to his predicament, which be blamed on retrogressive cultural practices.

11. It is noteworthy that we are living in dangerous times due to the Covid -19 pandemic. The elderly and those with underlying conditions are worse off in prison, and crowded places. Recognizing the threat that the pandemic has caused and continues to, more so in crowded spaces, prisons included, the National Council on the Administration of Justice (NCAJ) issued a circular on the 15/3/2020, in its plan to combat the threat of Covid -19 entitled Administrative and Contingency Management Plan to Mitigate Covid -19 in Kenya's Justice Sector. In part, it states:

**“8. Judges in all stations will in the meantime review the deserving cases already identified by Authorities and issue appropriate revision orders in an effort to decongest the prisons ---”**

12. Following the said circular, the Honourable the Chief Justice issued directives to the courts to decongest the prisons by review of deserving cases. Pursuant thereof, courts moved quickly and decongested, and continue to decongest prisons to curb the runaway pandemic that has threatened to cut short lives of the most vulnerable, including the elderly. Numerous convicts have since been released from prison. I shall state a few.

13. In **Criminal Revision No 8 Of 2020-Susan Mueni v Republic [2020] eKLR**, the convict who was 84 years old despite her revision being dismissed was released with a view to decongest the prison. She had been sentenced to serve six years imprisonment.

14. In **Petition No. 60 of 2019 - Wallace Chege Waihiga v Director of Public Prosecutions [2020] eKLR**, the convict who was 79 years old and sickly was released with a view to decongest the prison. He had been sentenced to serve 15 years' imprisonment.

15. In **Petition No. 140 of 2018- Abdul Rahaman Bakari v Director of Public Prosecutions [2020] eKLR**, the convict was released with a view to decongest the prison.

16. I have considered the petition and the above stated authorities. The Petitioner is most vulnerable being in a congested prison at the Shimo La Tewa Prison, in Mombasa County. The Petitioner has been punished enough for the offence committed and in my view, he is harmless at his age. Therefore, his continued stay at the prison will not serve the aim of punishment.

17. I now exercise my discretion judiciously, as I have stated above, and hereby set free the Petitioner not only to decongest the Shimo La Tewa Prison, but also upon consideration of his age, health and Covid-19 pandemic.

18. Accordingly, the Petitioner is hereby forthwith released and set free on the condition that he shall report to the nearest police station twice every year for the next 3 years.

That is the Judgment of the Court.

**DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JULY, 2021**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant