



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**PETITION NO. 54 OF 2020**

**NGALA SIRIA ABDALLA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner **Ngala Sirya Abdalla** was tried and convicted of the offence of defilement contrary to section 8[1] as read with section 8[3] of the Sexual Offences Act and sentenced to the mandatory minimum sentence of 20 years by the Mombasa Resident Magistrate's court in Cr. Case No 2970 of 2013.

2. The Petitioner appealed against the said decision in Mombasa HCCR No 80 of 2015 and which appeal was dismissed and the conviction and sentence upheld by the High Court. He is now before this court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. The reasoning in the said case was adopted in **Dismas Wafula Kilwake v Republic [2018] eKLR** where the court of appeal stated the following with regards to the mandatory minimum sentences prescribed in the Sexual Offences Act;

*“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in **Francis Karioko Muruatetu & Another v. Republic**, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.*

*Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*

*The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful”.*

3. In his submissions filed on 23/11/2020 the Petitioner averred that the mandatory nature of the sentence made the same unconstitutional. Further that the court in **Yusuf Shianzi Kunani Petition No. 24 of 2019** had declared Sections 8 and 11 of the Sexual Offences Act unconstitutional on a balance of probability. He stated that the court was vested with the discretion to impose sentences proportionate to the gravity of the offence. He further submitted that he had been jailed since 2013 and prayed for leniency.

4. M/s Wanjohi learned prosecutor submitted that the Petitioner be resentenced to serve 15 years imprisonment including the time served. That the complainant was 14 years old at the time of the offence and it was prudent for the heinous crime not to go unpunished. A deterrent sentence was prayed for by Counsel.

5. In his mitigation the Petitioner stated that he was a first time offender and 32 years of age. That he had undertaken various trainings at the prison which included health education, grade three arc welding and he was a devoted Christian having been baptized. He referred the court to the progressive report from the prison which he termed favourable, and commending his character and conduct. He asked this court to

consider the 1 year period he had been in remand custody pending trial and based the same on Section 333(2) of the Criminal Procedure Code.

6. The courts have in the recent times been flooded with numerous re sentencing applications not only on murder cases but with matters related to charges in robbery with violence and sexual offences. In order to clear the confusion and mayhem that came along with who was eligible for resentencing the Supreme Court on 6/7/2021 issued directions and clear guidelines with regards to the said matters. The said directions were cut clear and in the following terms;

**i. “The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code**

**ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu**

**iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.**

**iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.**

**v. In re-sentencing hearing, the court must record the prosecution’s and the appellant’s submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.**

**vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.**

**vi. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;**

**a. Age of the offender;**

**b. Being a first offender;**

**c. Whether the offender pleaded guilty;**

**d. Character and record of the offender;**

**e. Commission of the offence in response to gender-based violence;**

**f. The manner in which the offence was committed on the victim;**

**g. The physical and psychological effect of the offence on the victim’s family;**

**h. Remorsefulness of the offender;**

**i. The possibility of reform and social re-adaptation of the offender;**

**j. Any other factor that the Court considers relevant.**

**viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-viii. sentencing.**

**ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu**

7. I am satisfied that I do not have the jurisdiction to consider this petition for resentencing as it does not fall under the ambit of murder sentences. I therefore dismiss the petition for resentencing as being unmeritorious.

It is ordered accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> 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