



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL PETITION NO 65 OF 2020**

**JAMES OSIRO LIECH.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to life imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal to the High Court in **Kisumu Criminal Appeal No 93 of 2011**. His Appeal was dismissed.
3. On 20<sup>th</sup> August 2020, he filed an application for review of the sentence. In his affidavit that he swore in support of his application, he relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** and stated that the court had held that mandatory sentences deprive courts of legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to the relevant aspects of character and record of each accused person.
4. He also relied on the case of **Christopher Ochieng vs Republic [2018] eKLR** where the court held that minimum mandatory sentences are unconstitutional. He added that his rights under Article 25(c), 27(1)(2), 28 and 50(2)(p) of the Constitution were violated.
5. In his Written Submissions, he reiterated his aforesaid averments and asserted that the discretion of the Trial Court to meet out a sentence that was commensurate to the circumstances of his case were curtailed by the minimum requirement. He pointed out that he opted not to appeal and urged this court to grant orders for re-sentencing in the wake of the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**.
6. He pleaded with the court to consider that he was fifty five (55) years at the time of his arrest and that he spent twelve (12) years in custody. He was currently aged sixty seven (67) years of age. He said that he was a family man with the responsibility of taking care of a young family and thus urged the court to grant him the chance of re-shaping his future which would otherwise be ruined by the long incarceration. He asserted that he was a first offender and remorseful.
7. He contended that he had undertaken various transformation programs in vocational training and other life skills in prison which included Grade 2 and 3 Certificates in sheet metal and Certificate in Biblical Studies from Lamp and Light. He submitted that he had acquired valuable skills which would enable him integrate well back to society.
8. The State opposed the Petitioner's application for review of sentence on the ground that the decision in **Francis Karioko Muruatetu & Another vs Republic** (supra) did not apply in defilement cases.
9. It also argued that despite the Petitioner's claim that he was sixty seven (67) years old, he did not prove the same. It added that the World Health Organization (WHO) data for 2018 indicated life expectancy as 64.4 for male and 68.9 for females and total life expectancy average as 66.7. It relied on the case of **Ali Abdalla Mwanza vs Republic [2018] eKLR** where the Court of Appeal reduced a sentence of 40 years to 20 years after considering the life expectancy of the Appellant. It therefore left the issue of life expectancy at the discretion of the court.
10. On 6<sup>th</sup> July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.

11. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

12. It further directed that in a 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. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

13. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in *Muruatetu*.

14. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.

15. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, 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. It was clear that the said case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution of Kenya.

16. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, 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 and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

17. The fact that the Petitioner herein was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of defilement and not murder and as the Supreme Court decreed in its guidelines on 6<sup>th</sup> July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein. His prayer that the court reviews his sentence thus fell by the wayside.

18. This court had due regard to the case of **Ali Abdalla Mwanza vs Republic** (Supra) and noted that the case was not applicable herein as the same related to a murder case where courts have power to re-sentence convicted persons by virtue of the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). The Petitioner herein had been sentenced to the mandatory sentence of life imprisonment for an offence under Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2016.

19. Unless the issue of re-sentencing in defilement cases is heard by the High Court, then escalated to the Court of Appeal and eventually heard by the Supreme Court resulting into a similar conclusion like in **Francis Karioko Muruatetu & Another vs Republic** (Supra), this court is bound and court's hands would remain tied. It did not therefore deem it prudent to consider the question of life expectancy at this juncture.

20. In the mind of this court, the finding in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** in which the Court of Appeal had held that the court could not be constrained by Section 8 of the Sexual Offences Act to impose the provided sentences if the circumstances did not demand it had now been preceded by the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) which has now clarified the offences that courts could entertain in re-sentencing hearings.

## **DISPOSITION**

21. For the foregoing reasons, the upshot of this court's decision is that the Petitioner's application for review of the sentence that was filed on 20<sup>th</sup> August 2020 was not merited and the same be and is hereby dismissed.

22. Accordingly, the court hereby upholds the conviction and sentence of the Petitioner herein for the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No 3 of 2006.

23. It is so ordered.

**DATED and DELIVERED at KISUMU this 24<sup>th</sup> day of September 2021**

**J. KAMAU**

**JUDGE**