REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL PETITION NO. 36 OF 2018

HASSAN KEMBOI KIPROTICH.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner was charged before the Chief Magistrate's Court at Kitale, with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act and sentenced to life imprisonment on **22nd of May, 2017**.

2. The Petitioner filed Criminal Appeal No. 44 of 2017 before the Kitale High Court and the same was dismissed on **30/4/2018**.

3. He has now filed the current petition urging the Court to reconsider the sentence. The main contention is that in view of the Supreme Court decision in the case of **Francis Kariuko Muruatetu & Another –V- Republic (2017) eKLR** the court should consider the life imprisonment sentence imposed on him. In the said case, the Supreme Court held as follows:

> ***The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.***

4. The current case relates to a charge of defilement under Section 8(2) of the Sexual Offences Act. The Petitioner submitted, on the authority of **Muruatetu case** that the sentence imposed on him was unconstitutional owing to the fact that **Section 8(2)** of the **Sexual Offences Act** does provide for the penalty of life imprisonment. Indeed, the Supreme Court made it manifest in **the Muruatetu Case** that it was not there dealing with the constitutionality of the death penalty, but its mandatory nature. Hence, it held that:

> **[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.**
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> **[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution**.

5. Applying the same principle to mandatory minimum sentences as provided for in the **Sexual Offences Act**, the Court of Appeal had occasion to express itself in **Jared Koita Injiri vs. Republic [2019] eKLR,** thus:

> ***Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;***
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> ***"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the***

accused persons under the Article 25 of the Constitution; an absolute right."

In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* **of the** *Sexual Offences Act***, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."**

6. The reasoning in ***Muruatetu Case*** was also extended to sentences imposed by the Sexual Offences Act – and possibly all other statutes prescribing minimum sentences by the Court of appeal in a recent decision in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the following to say about 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.*

7. *It therefore follows that* the ***Muruatetu*** decision applies *mutatis mutandis* to the provisions of **Section 8(2)** of the **Sexual Offences Act** which imposes the mandatory life imprisonment for the offence of defilement.

8. It is worth noting that the Supreme Court in the Muruatetu case, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable as a guide namely:-

(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 relation to gender-based violence.

(f) remorsefulness of the offender

(g) the possibility of reform and social-re adaptation of the offender

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of defilement.

9. In determining the sentence to be imposed on the Petitioner, It is imperative that I look at sentences which have been imposed by other Courts following the decision in the Muruatetu case in offences of this nature. In the case of ***Guyo Jarso Guyo v Republic [2018] eKLR*** Chitembwe J, re-sentenced the petitioners to 20 years imprisonment. In the case of Baraka Safari v Republic [2018] eKLR, Odunga J substituted life imprisonment with 15 years. The Court of Appeal in the case **Johana Lwebe Muyugo v Republic [2019] eKLR** substituted the life sentence with a sentence of 25 years. I am guided by the said authorities.

10. Taking into account the mitigating and aggravating factors and also factoring the time served, I therefore do find that the life imprisonment meted on the Petitioner was/is excessive in the circumstances.

11. The life imprisonment sentence is hereby set aside and is replaced with **Twenty (20) years** sentence from 22/5/2017.

Signed, Dated and Delivered at Kitale on this 5th day of March, 2020.

H.K. CHEMITEI

JUDGE

5/3/2020

<u>In the presence of;-</u>

Ms Kagali for the Respondent

Applicant present

Court Assistant – Kirong

Ruling read in open court