



**REPUBLIC OF KENYA**

**IN THE COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION 16 OF 2020**

**JUMA SAID WANJE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Petitioner in person**

**Mr. Alenga for the state**

**RE-SENTENCING**

The instant petition for re-sentencing has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** where the minimum mandatory sentence for murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the **Muruatetu** decision **Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The same was also extended cases of defilement by the Court of Appeal in **Christopher Ochieng v Republic (2019) eKLR**.

The petitioner was initially charged convicted and sentenced for the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act No.3 of 2006. He has now come under **Muruatetu** seeking that the life imprisonment sentence meted out on him be set aside and for the court to impose an appropriate sentence. The factual matrix of the matter at trial were that the petitioner defiled the complainant aged three years on the 22<sup>nd</sup> day of October, 2013 in Malindi District within Kilifi County. He had his appeals dismissed both in the High Court and the Court of Appeal for lack of merits.

In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (**See Ambani Vs Republic**). The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71** where the court held the following on sentencing:-

*“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.*”

In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge:-

- (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) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender and
- (h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law-abiding person.
4. **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 demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

I have taken into account the petitioners' mitigating circumstances. He is a first offender with no previous criminal record. He believes that after having undergone several workshops on rehabilitation programs offered while in prison reformed him. He claims to be remorseful for having committed the offence. I will also consider the period that the petitioner spent in remand custody which is two years and 4 months in addition to a period of four years he has spent in prison as part of his sentence. The petitioner holds the view that the sentence already served is enough to deter and rehabilitate an offender.

In aggravation, this Court notes that the offence was quite egregious act and that the same was committed against a child of tender years. In that respect there is need to protect children from sexual predators. In my view, the rationale is much broader. It is against morality for a man to have sexual intercourse with a child eleven years and below. It is therefore for the preservation of society's sense of morality that the offence exists.

There was no evidence of remorse by the Appellant. On the contrary, he denied any wrongdoing right up to conviction. There can be no doubt that the circumstances herein call for a much severe punishment. In light of the decision in **Muruatetu Case** and **Christopher Ochieng Case (Supra)** the life imprisonment sentence meted out by the Honourable trial magistrate is hereby revised. I therefore sentence the petitioner to 25 years imprisonment from the date of arrest.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Alenga for state
2. The petitioner