



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 22 OF 2016

AMEDI OMURUNGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(From conviction and sentence in Criminal Case No. 14 of 2010 of Senior Resident Magistrate's Court at Malindi)

CORAM: Hon. Justice R. Nyakundi

Miss Sombo for State

Petitioner in person

RULING

Amedi Omurunga approached this court through a Constitutional Petition seeking a review of a mandatory sentence of 20 years imposed against him in the offence of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006. The conviction and sentence was the outcome of a trial presided over by Hon Nyambu in her Judgement dated 8.3.2011.

Being dissatisfied with both conviction and sentence, the petitioner filed appeals to the High Court and Court of Appeal on diverse dates. The instituted appeals were both dismissed for want of merit.

In the petition filed in court on 28.4.2019 he has involved the provisions of Articles 23, 25, 27, 28, 29, 35, 48, 50, 258 and 259 alleging a violation of his constitutional rights and freedoms which denied him an opportunity to offer mitigating during sentencing hearings.

The petitioner's major complaint being that of the mandatory nature of a minimum sentence of 20 years presented for the offence of defilement contrary to Section 8(3) of the Act. That the mandatory sentence of imprisonment did not allow discretion with a possibility of the court to impose a lesser sentence.

By requiring this court to take into account the unconstitutionality of his minimum sentence imposed by the trial court he relied on the dicta of the Supreme Court in **Francis Muruatetu V Republic 2017 eKLR**.

The significance to bear in mind about the principles in **Muruatetu** case is the permission granted to trial courts to exercise some limited judicial discretion in the event the court is of the opinion that there are particular circumstances which relate to the offence and would make it unjust to impose the mandatory sentence. Thus, the mandatory sentences now fall into the category of mandatory minimum that allow the power of discretion and flexibility.

Brief Overview of the Case

The Petitioner was arrested on 4.4.2010 and charged with the offence of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act. The particulars of the charge were that on the night of 4.4.2010 at 9.00 p.m. at Jet Point Beach within Malindi, Coast Province, he intentionally and unlawfully caused his male genital organ to penetrate the female genitals of a minor MK at the time aged 13 years.

The evidence at the trial in support of the prosecution case involved six witnesses. Thereafter the Petitioner was placed on his defence under Section 211 of the Criminal Procedure Code. The evidence at his trial held before the Principal Magistrate at Malindi consisted mainly of visual identification by the complainant and a further circumstantial evidence from PW2-PW6.

The Petitioner having been found guilty was charged with the defilement offence and duly sentenced to 20 years' imprisonment which is the minimum provided under Section 8(4) of the Sexual Offences Act. His first appeal to the High Court and second appeal to the Court of Appeal were both dismissed for want of merit. The Petitioner in reference to the decision in **Muruatetu** seeks the aforesaid sentence be reviewed by this court.

I have considered both the Petitioner's submissions and that of **Ms Sombo** appearing for the State. The issue for determination is whether the principle objective governing sentencing of an offender in **Muruatetu case (Supra)** apply to the circumstances of this Petition. In the event the court is inclined to review the mandatory minimum sentence, then what is the appropriate sentence?

The Law, Analysis and Determination

It is now firmly established pursuant to the Supreme Court decision in **Francis Muruatetu** case and the recent decisions by the Court of Appeal in **Christopher Ochieng V Republic 2018 eKLR** and **Jared Injiri V Republic 93 of 2014** an alternate form of mandatory sentences including offences with presumptive minimum sentences are deemed to be unconstitutional.

The broadly, ordained pathway in the sentencing scheme is for the courts to depart from the mandatory minimum sentence if exceptional circumstances are established depending on the facts of each case. Under this view, there must be scope for discretion to be exercised in a judicial fashion by the trial court so as to meet the ends of justice.

The mandatory sentences which have been part of the Kenyan Legal System for quite some time are thought to undermine fundamental principles underpinning the discretion of judges in sentencing matters to ensure a just, proportionate and impartial sentence.

The fundamental national values and principles of governance under Article 10 of the Constitution include: - **The Rule of Law, Equity, Equality, Good governance, Transparency, human rights, Accountability, integrity etc.**

To this I would add the concept of natural justice and procedural fairness. Mandatory sentence restricts courts discretion however, notwithstanding the position amplified in **Muruatetu** and **Injiri case Supra** provision in the statute regarding mandatory and minimum sentences as legislated remain to be valid and lawful sentences to be applied by various courts.

It follows therefore that the nature of the jurisdiction to be exercised by this court is found in the illustrative case of **William Okengu V Republic 2018 eKLR** where the Court of Appeal stated that: -

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By dint of Article 163(7) of the Constitution, the decisions of the Supreme Court and Court of Appeal have an inordinate and binding effect on all other courts.”

The decision of the Supreme Court opened up the door for review of death sentences even in finalized cases. The Court of Appeal in **Christopher Ochieng and Injiri's** cases(supra) went on to state that promoting the purpose and advancing the principles in **Muruatetu case** the statutory enactments on mandatory minimum sentences in reference to other offences including life imprisonment on the Sexual Offences Act be considered unconstitutional. The courts therefore have the discretion to apply the materiality test as provided in **Muruatetu case** to pass lawful proportionate and just punishment for the offences.

In the instant Petition by the Supreme Court final determination and subsequent recognition taken by the Court of Appeal, the applicant became entitled to the relief sought in the Petition. The key purposes of sentencing as identified by the sentencing guidelines policy 2016 include: -

(1) Retribution

(2) Deterrence

(3) rehabilitation

(4) denunciation

(5) Restoration

(6) Community protection

When it comes to mandatory sentences, the objective is to achieve retribution, deterrence, community protection and rehabilitation as a means of punishing and prevention of crime. In the **Muruatetu case** the Supreme Court also recognized the traditional principles of criminal law in sentencing where a judge or magistrate exercises discretion to arrive at an appropriate sentence based on a range of factors.

(1) The right of the offender

(2) Being a first offender

(3) Whether the offender pleaded guilty

(4) Character and record of the offender

(5) Remorsefulness of the offender

(6) The gravity of the offence.

Furthermore, it is also important to keep in mind the statutory or sentencing guidelines which may provide a guide as to an appropriate sentence to be imposed.

These factors must be considered equally and none of them should be accorded a higher weight than the rest with regard to sentence. This court has had occasion to consider the petition as canvassed by the Petitioner together with the rejoinder by the respondent counsel. The discretion on sentencing under the guidelines in **Muruatetu case** remains unfettered, but it has to be exercised judicially not on whim, sympathy or caprice. The discretion ought to be exercised taking into account the above factors and any other extenuating circumstances to arrive at a just, fair and proportionate sentence.

The statutory anchorage of this discretion therefore leaves the maximum possible sentence a court to pass in the event of the specific aggravating factors under Section 8(4) of the Sexual Offences Act as that of 20 years' imprisonment.

In the present petition I have considered the detailed mitigation relied upon by the petitioner. The relevant factors pertaining to his mitigation involving his personal circumstances as the only son born of a single parent. He placed emphasis that he never committed the offence even after being found guilty and convicted by the trial court. Although that is not a responsive factor in consideration of this petition.

It is not also in dispute that the offender in the primary trial was not remorseful neither is he during this constitutional petition hearing. He still maintains his innocence despite the affirmation of the lower court judgment on both conviction and sentence by both the High Court and Court of Appeal.

The only factor relating to the Petitioner's which may reduce his blame worthiness is his age and prospect that he is willing to transform to be of good conduct and patriotic citizen. The prosecution submission that he is first offender also works in his favor. As regard this case the aggravating factors include: -

(1) The gravity of the offence

(2) The age of the victim and

(3) The type of the offence

She was aged 13 years old. The abuse of trust by the Petitioner to take advantage of the vulnerable victim.

As I conclude on this issue I recall the passage by CJ King who stated that: -

“Sentencing is not an exact science and is essentially a matter of discretion and judgment call. It is fundamental that sentences are to fit the facts of the case. As no two cases are exactly like, or is sentencing challenging to draw a unifying thread that rationalizes and ties together the different sentences imposed on what appears to be similar cases”.

In principal, therefore, I take cognizance that before the conclusion of the petitioner's trial he spent one year and five months in prison remand. It is mandatory under Section 333(1) of the Criminal Procedure Code to take into account the period spent on pretrial detention within the final period is computed by the court. In total the petitioner has served 9 ½ years in prison since his indictment.

I have considered the analysis under the guidelines and the principles in **Muruatetu** together with **Anjiri's** decision. The sentence I pass answers the Petitioner's culpability and the harm done to the complainant which was intended and frustrating. From the reasons set out, I am satisfied that the conditions of imposing a discretionary sentence of 13 years from the date of indictment have been met.

Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY 2019

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R. NYAKUNDI

JUDGE