



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 127 OF 2018

PHILIP KIPKOECH CHEPKWONY.....APPLICANT

VERSUS

REPUBLIC.....STATE

RULING

1. The Applicant was convicted of the offence of defilement of a girl contrary to section 145(1) of the Penal Code. The particulars of the offence were that on the 9th day of March, 2004, at [particulars withheld], Kericho District, the Appellant unlawfully had carnal knowledge of RO (Complainant), a girl under the age of sixteen.
2. The Applicant pleaded not guilty and the case proceeded to full trial after which he was convicted. The Learned Trial Magistrate, then, sentenced the Applicant to life imprisonment.
3. The Applicant appealed to the High Court, and then to the Court of Appeal. Both Superior Courts affirmed the conviction and sentence. In affirming the sentence, Kimaru J. of the High Court adverted his mind to the circumstances of the offence and remarked:

On sentence, evidence was adduced that the Appellant was tested and found to be HIV Positive. The Appellant defiled the Complainant in the full knowledge that there was a possibility that he could infect her with the said AIDS virus. Although the Prosecution did not establish that the Appellant had indeed infected the Complainant with the AIDS virus, this Court cannot ignore the fact that the Appellant was armed with a lethal weapon which he used to potentially inflict a fatal injury on an innocent girl child.

The Appellant is a danger to the children in the society and should therefore be put away so that he may not pose any more threat to the innocent children of this nation. This court is aware that sometimes justice has to be tempered with mercy. In this case, this Court does not see how it can exercise mercy on the Appellant who deliberately and without due regard to an innocent girl, sexually assaulted her and potentially infected her with the AIDS virus.

4. The Applicant seeks to bring himself under the Muruatetu Doctrine. This is derived from the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] Eklr**. In the **Muruatetu Case**, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.
5. In **Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)**, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court advised similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.

I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then

*mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine for prudential reasons, to await the work of the Taskforce or other docket management considerations.*

6. Even though I have taken the position that this Court has jurisdiction to re-sentence prisoners who were sentenced to death before the **Muruatetu Case**, the Applicant here does not fall into this category. As reproduced above, in his case, both the Trial Court and the High Court considered the life sentence he received to be inappropriate in the circumstances of the case. The Court specifically addressed the circumstances of the offence and then pronounced sentence based on the individual circumstances of the case.

7. Consequently, the reasoning in **Muruatetu Case** does not apply to the Applicant's case: he was not sentenced pursuant to the mandatory death penalty provisions of the law. The sentencing Court considered his specific circumstances and the circumstances of the case – and then pronounced the sentence of life imprisonment. It is not open to this Court to review the exercise of discretion of my fellow High Court Judge and the Court of Appeal.

8. Consequently, I reach the conclusion that the Applicant cannot, in the circumstances of this case, benefit from the doctrine propounded in *Muruatetu Case*. I therefore dismiss his application for re-sentencing as unmeritorious.

9. Orders accordingly.

Dated and delivered in Nakuru this 19th day of December, 2019.

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JOEL NGUGI

JUDGE