Chelimo v Republic (Criminal Petition E005 of 2023)
[2025] KEHC 2014 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2014 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL PETITION E005 OF 2023

JRA WANANDA, J

FEBRUARY 21, 2025

BETWEEN

EZEKIEL KEMBOI CHELIMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is yet another one of those disturbing sexual offence cases. I say so because it relates to the defilement of a 4 years and 11 months old girl-child. The Petitioner is seeking a re-sentencing hearing.

2. The Petitioner was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006 in Iten Senior Resident Magistrate's Criminal Case No. 1015 of 2010. The particulars were that on 20/08/2010 about 2.00 pm, at [xxxxxxxx] sub-location of Keiyo District, within the now defunct Rift Valley province, he intentionally and unlawfully caused penetration of his penis into the vagina of one SC, as aforesaid a girl aged 4 years and 11 months. After the trial, he was on 28/07/2011, convicted of the offence and sentenced to life imprisonment.

3. Dissatisfied with the decision, the Petitioner lodged an Appeal in this Court, namely, Eldoret High Court Criminal Appeal No. 157 of 2011. The Appeal was heard and dismissed in its entirety vide the Judgment delivered on 19/1/2012 by Mshila J. Dissatisfied with the further decision, the Petitioner filed Eldoret Court of Appeal Criminal Appeal No. 12 of 2012, which, too, was dismissed on 10/12/2015.

4. The Petitioner has now returned to this Court with the undated Notice of Motion filed on 27/07/2023 seeking re-sentencing as aforesaid. The Petitioner primarily relies on the decision in Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) (17 May 2022) by Odunga J. (as he was then) and also the case of Edwin *Wachira & 9 others v Republic Mombasa HC Petition No. 97 of 2021* by Mativo J. (as he then was), in which, he submitted, minimum

sentences for sexual offences were declared unconstitutional. He pleads that he has been in prison for too long having spent 13 years so far, that he is a 1st offender with no criminal record, and that he is remorseful, repentant and reformed, having taken prison life positively.

5. The Petitioner also filed undated Submissions in which he urged that the life imprisonment was not the only sentence that could be meted considering that he was aged 63 years old at the time when he was convicted, and is currently 76 years old, that his right to a fair trial and to benefit from the least prescribed sentence, and that his right to equal protection and equal benefit of the law and non-discrimination were violated. He contended that he is serving an excessive sentence and therefore subjected to inhuman and degrading treatment. He submitted further that he is remorseful for the act he committed and that the Court should offer him leniency and issue a lesser sentence that would end soon. He cited the case of Republic v Thomas Patrick Gilbert Cholmondeley [2009] eKLR. He added that he is reformed, rehabilitated, repentant and ready to re-join the society as a mentor to the old and young, and is a law-abiding citizen as he has learnt through the most painful manner, and that he now has both mental and spiritual reformation.

6. On his part, Prosecution Counsel, Mr. Calvin Kirui, filed the Submissions dated 17/09/2024. He submitted that the sentence prescribed for the offence as per Section 8(2) of the *Sexual Offences Act* is life imprisonment, though he appreciated that the Court is not to consider itself bound by the minimum sentences prescribed and ought to balance between the mitigation by an accused person vis a vis the aggravating factors. He added that it is trite law that sentencing is at the discretion of the trial Court and like all discretionary power, it must be exercised judiciously and a proper basis must be laid for the Court to interfere with the sentence of the trial Court. He maintained that the Court can only interfere when there is evidence that the discretion was exercised injudiciously, or was manifestly harsh or that the Court considered extrinsic factors, or omitted to consider material factors.

7. Counsel submitted further that in the Petitioner's grounds, he alleged that the trial Court failed to recognize the decisions in Machakos Petition No. E017/2021 and Mombasa Petition No. 97/2021 but that in Machakos Petition No. E017/2021, the Court's stare decisis was that "the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.". He then cited the case of MMI v Republic [2022] eKLR, in respect to the principles guiding interference with sentencing by the appellate Court. He also cited the case of Shadrack Kipkoech Kogo v R, Eldoret Criminal Appeal No. 253 of 2003 and submitted that the fact that a sentence is manifestly excessive is a factor for consideration by an appellate Court and is a good ground for interfering with the discretion of the sentencing Court but that in this case, the victim was of a very tender age and this is an aggravating factor which called for a deterrent sentence.

8. Counsel argued that the trauma and impact of this incident on the child's life will remain with her forever. He reiterated that life imprisonment is provided for in respect of the offence under Section 8 (1)(2) of the *Sexual Offences Act*, is the legal sentence and there is therefore no basis for this Court to interfere with the sentence.

Determination

9. The issue for determination herein is "whether this Court should re-sentence the Petitioner by substituting the sentence of life imprisonment imposed by the trial Court"

10. As a preliminary matter, as aforesaid, both the High Court and the Court of Appeal have already dealt with the Applicant's respective appeals and dismissed them. What the Applicant may therefore be said to be doing is inviting this Court to interfere with the decisions already affirmed by both this same Court, and also by the Court of Appeal, which is a higher Court, an action which is untenable in law.

A High Court Judge cannot sit on appeal over a decision of the Court of Appeal. As the Applicant exercised his right of appeal to the Court of Appeal and upon which the Court of Appeal pronounced itself, in my view, this Court is now functus officio. This Court cannot once again entertain an Application for revision with respect to the same matter.

11. On this point, I cite the case of Kenya Hotel Properties Limited vs. Attorney General & 5 Others (2020) eKLR, where the Court of Appeal expressed itself as hereunder:

> " Despite several declarations of finality made by various Judges of the High Court and benches of this Court, the matter appears to have an uncanny capacity for reincarnation. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere. We think the Supreme Court in the S.K MACHARIA case captured the essence of the need for courts to respect and stay within jurisdictional tethers and constraints..."

12. I also echo the words of Kiarie Waeru Kiarie J made in the case of Joseph Maburu alias Ayub vs Republic [2019] eKLR, in which he stated the following:

> " Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

13. The upshot of the foregoing is that this Court lacks the jurisdiction to re-open the matters already litigated upon and determined, and cannot therefore entertain the present Application.

14. I will however still interrogate the Application on merits in the event that I am wrong in declining to assume jurisdiction.

15. In regard thereto, Section 8(2) of the *Sexual Offences Act* provides as follows:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

16. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view of the above, it is clear that the sentence imposed by the trial Court was within the statute. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should be discouraged and that Courts should retain the discretion to depart therefrom. In connection to this issue, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder and a mandatory death sentence, stated as follows:

> " (66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

17. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report thereon.

18. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

19. Further, the constitutionality of the life sentence is now being regularly questioned. In dealing with a matter where, as herein, the Appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, the Court of Appeal, in the case of Manyeso *vs Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), stated as follows:-

> " ... an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved .... we are of the

view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence ... We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

20. However, by the clarification made by the same Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

> "7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the *Penal Code*, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.
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> .....
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> 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;
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> .....
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> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".
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> 11. .....
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> We therefore reiterate that this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.
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> .....
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> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating

that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

.....

18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code*;

....."

21. Recently, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on the Appellant, the Supreme Court stated as follows:

52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

.....

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

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61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. .....

.....

62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued

before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

.....

68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

22. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of life imprisonment on the sole basis that the same, being a mandatory sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

23. Regarding the issue of the constitutionality of the life imprisonment, or lack thereof, as this is not an appeal, this Court is also not properly mandated to revisit the trail Court case to assess that issue.

24. In any case, it is also relevant to note that the victim in this case was a 4 years and 11 months infant, an innocent angel of very tender age, such a vulnerable human being who needed protection from all, including from the Appellant. Sadly, the trust of the infant was crushed by the Appellant's heinous and beastly act. Instead of acting as her protector, the Appellant turned out to be the very savage monster he was supposed to protect the child against.

25. I do not have to be a psychologist to discern that the child will suffer lifelong trauma resulting from the act and will forever remember that her chastity was robbed from her by a person who was supposed to protect her, and into whose care she was entrusted by the child's mother. The child's relatives, and moreso the parents must also be silently suffering from serious trauma caused by of the act. It cannot therefore be denied that the Appellant merits a stiff and deterrent sentence. From this point of view, I would not have interfered with the sentence even if I had that mandate.

Final Orders

26. In the circumstances, the Applicant's undated Notice of Motion filed on 27/07/2023 is hereby dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF FEBRUARY 2025

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Appellant present

Prosecution Counsel Ms. Mwangi for the State

Court Assistant: Brian Kimathi