



REPUBLIC OF KENYA



KENYA LAW
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**Too v Republic (Criminal Petition E051 of 2023)
[2025] KEHC 1585 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E051 OF 2023
JRA WANANDA, J
FEBRUARY 7, 2025**

BETWEEN

JOSEPH KIPKOECH TOO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein seeks review of his prison sentence imposed by the Magistrate's Court.
2. He was charged in Eldoret Chief Magistrate's Court (Sexual Offence) Case No. 121 of 2019 with the offence of rape contrary to Section 3 of the *Sexual Offences Act*, 2006. The particulars were that on 1/05/2019 at [particulars withheld] area, Sugoi location in Turbo sub-County, within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the vagina of LC. He was charged with the alternative offence of committing an indecent act with the same victim at the same place on the same date, contrary to Section 11A of the *Sexual Offences Act*.
3. By the Judgment delivered on 24/04/2020, the Petitioner was convicted on the main charge of rape and sentenced to 10 years imprisonment. He has now approached this Court with the present Application dated 31/07/2023, seeking as aforesaid, review of the sentence.
4. In his grounds and Affidavit in support of the Application, the Petitioner deponed that he is a 1st offender, he begs for leniency, and that he is remorseful, reformed and rehabilitated. He also complained that the prison sentence of 10 years was the minimum mandatory prescribed by statute and thus unlawful. Further, he alleged that he spent 1 year, 1 month and 23 days in remand custody but which was not computed in the sentence as required under Section 333(2) of the *Criminal Procedure Code*.
5. Although I gave the parties the liberty to file written Submissions, neither filed any, although to his credit, the Petitioner had informed the Court that he would not be filing anything further.



Determination

6. The issues arising for determination in this Appeal are evidently the following:
- i. whether this Court should review the sentence of 10 years imprisonment meted out by the trial Court.
 - ii. whether the period spent in custody by the Petitioner before sentencing should be taken into account.
7. Regarding sentence upon conviction for the offence of rape, Section 3(3) of the [Sexual Offences Act](#) provides as follows:

“2. Rape

(1) A person commits the offence termed rape if:

(a)

(b)

(c)

(2)

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”

8. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such sentences. In connection to this, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, 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.”

9. 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.



10. On the strength of the Muruatetu 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).
11. 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 Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences.
12. 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 an Appellant for a defilement offence, the Supreme Court stated, inter alia, as follows:

“ 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.
.....”

13. 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 10 years imprisonment on the sole basis that the same, being a mandatory minimum 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*.
14. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, in quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, in which he stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.”



15. The Court in the Muruatetu Case also guided that, in re-sentencing, the following mitigating factors would be applicable; (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.

16. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

“With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.”

17. Applying the above principles to the facts and circumstances of this case, I have considered that the offence of rape is a serious one and I agree that the Petitioner merited a stiff punishment. He was also given the opportunity to mitigate, which he did by pleading that he be pardoned. The trial Magistrate also called for a pre-sentence Report which was duly filed and only after considering the same did she mete out the sentence. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. The victim also had the disability of being a deaf and dumb person, whom the Petitioner took advantage of and violated. Considering the horror that the victim went through, she will definitely be traumatised for the rest of her life. The victim will no doubt bear the scars of the assault by the Petitioner for the rest of her life. Whereas the Petitioner claims that he has been rehabilitated, the objectives of sentencing, specifically deterrence, remain pertinent when the Court is imposing a sentence. Considering the above circumstances, I agree that the Petitioner merited a stiff sentence and I find that the 10 years prison term, though the minimum sentence provided by statute, was proportionate and justified.

18. Regarding the Petitioner’s plea that the period that he spent in custody before sentencing be taken into account, I note that the Petitioner was arraigned on 7/05/2019 and was sentenced on 25/06/2020. As correctly estimated therefore, the trial took about 14 months. There is no indication in the record that the Petitioner was at any time during all this period, released from custody on bond. The charge sheet also indicates that he was arrested on 2/05/2019. His allegation that he spent the whole period in custody is therefore merited.

19. I note that in rendering sentence, the trial Magistrate did not mention whether she took such period “into account” as required under the proviso to Section 333(2) of the *Criminal Procedure Code* which provides as follows:

“(2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”



20. On the same issue, the Court of Appeal in *Bethwel Wilson Kibor vs. Republic* [2009] eKLR stated as follows:

“By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

21. On its part, The Judiciary Sentencing Policy Guidelines (2014) also provides that:

“The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

22. In view of the proviso to Section 333(2) of the *Criminal Procedure Code*, I take into account the said period that was spent by the Petitioner in custody before being sentenced.

Final Order

23. In the end, I make the following final Orders:

- i. I uphold the sentence of 10 years imprisonment for the offence of rape.
- ii. The sentence shall however be computed from the date of arrest, namely, 2/05/2019.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF FEBRUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Petitioner present virtually from Eldoret Main Prison

Mr. Okaka h/b for Ms. Mwangi for the State

Court Assistant: Brian Kimathi

