Gachingiri v Republic (Miscellaneous Criminal Application E080 of 2022) [2024] KEHC 2735 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2735 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION E080 OF 2022

SM MOHOCHI, J

MARCH 11, 2024

BETWEEN

ELIJAH KAMAU GACHINGIRI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is an application by Elijah Kamau Gachingiri filed pursuant to Articles 2, 3(a), 19, (2) 20(1), 22(1), 22(1),23(1) 25(c) 26(1), 27(1)(4), 28, 50(2)(p)(q), 159(2) and 165(3) of the *Constitution* and *Practice and Procedure Rules* 2010, filed on the 7th July 2022, that invites the court to rehear his sentence and is grounded on the Applicant's evenly dated sworn affidavit.

2. The Applicant was charged in Criminal Case Number 117 of 2007 in Chief Magistrate's Court at Nakuru with the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offenses Act* and convicted on his "own plea of guilty" and sentenced to serve life imprisonment as a mandatory minimum sentence.

3. The Particulars of the offence was that;

> " On the 13th May 2007 at [Particulars Withheld] Area within Nakuru District in Rift Valley Province, unlawfully had sexual intercourse with (GW) (name redacted) a girl aged 4 years old"

4. Aggrieved with the conviction, Elijah Kamau Gachingiri preferred an Appeal in High Court at Nakuru HCRA No. 06 of 2020 that was dismissed for having been filed thirteen years (13) after judgment and that, the honourable court has got the discretion on sentencing following the decision In *Dismas Wafula Kilweka v Republic* Petition number 15 and 16 of 2015 [2018] eKLR.

5. That the High Court of Kenya at Machakos in *Peter Mueke Maingi & 5 Others v D.P.P and Attorney General* in Constitutional Petition No. 17 of 2021 termed the mandatory minimum sentences in the *Sexual Offences Act* No. 3 of 2006 unconstitutional and ordered those sentenced under the minimum sentences to apply to the high court for sentence rehearing.

6. That, the court be pleased to find that, he was convicted as a first offender and has been in custody for the past sixteen (16) years.

7. That he is a young man whose life is greatly affected by the imprisonment, while in prison he has taken full advantage of the rehabilitate programmes offered in the correctional facility as is evident in the attached documents together with a prison report and thus humbly pray that his prayers be granted and the life imprisonment sentence be substituted with a lenient definite sentence as is provided for under Article 50 (2) (p) and (q) of the *Constitution* and that the court further invokes the Provisions of Section 333(2) of the *Criminal Procedure Code* to have his sentence include the pre-trial remand period. He makes this application in regard to the above-mentioned articles in reliance of Article 165(3) (b) of the constitution which empowers this court to handle application of this nature.

Applicant's Submissions

8. That due to the Provisions of the *Constitution* of Kenya 2010 under Articles 50(2)(p) and (g) and other provisions of the law, it has enabled the Applicant to file a re-sentencing application on mitigation only seeking leniency.

9. The Applicant contends that, mandatory minimum sentences are unconstitutional and they are a threat to the doctrine of separation of powers and the independence of the Judiciary. When the legislature has legal access to undertake and discharge judicial functions of the Judiciary, then there can be no more threat to the doctrine of separation of powers and the independence of the Judiciary than that. That can only be the height of the sequestration of the Judiciary. Courts have severally warned against such scenario, Justice J. B. Ojwang, a retired Judge of the Supreme Court of Kenya while articulating the principle of supremacy of the Judiciary in Civil Application No. 11 of 2016 *Kalpana H, Rawal &, 2 others v Judicial Service Commission & 3 others* [2016] eKLR as follows:

> " While the Constitution requires all State organs to perform their part in giving fulfillment to the Constitution, the ultimate arbiter is the Judiciary, which has unlimited powers of interpretation. Interpretation of the Constitution and of any law, is far-removed from a condition of violence, tumult, or hurt to anyone' as the Judiciary's operations are minutely governed by known law and procedure and this justifies the standing of the judicial function as the essential underpinning of the new constitutional dispensation."

10. On the subject of separation of powers, the Court in *Wilfred Manthi Musyoka v Machakos county Assembly & 4 others* [2018] eKLR had the following to say:

> " As regards as regards the doctrine of separation of powers, in his separation of powers theory, Montesquieu had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [The Spirit of the Laws (1948)):
>
> When the legislative and Executive powers are united in the same person, or in the same body of magistrate, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers".

11. That this principle is reflected in the *Constitution* at Article 1(3) which provides that sovereign power which pursuant to Article 1 (1) of the *Constitution* "belongs to the people of Kenya and shall be exercised only in accordance with this Constitution": ..., is delegated to the following State organs, which shalt perform their functions in accordance with this *Constitution*-

    (a) Parliament and the legislature assemblies in the county governments;

    (b) the national executive and the executive structures in the county governments; and

    (c) the Judiciary and independent tribunals.

12. It is thus appreciated by the High Court in ' *Trusted Society of Human Rights v The AG and Others*, High Court Petition No. 22 a of 2012: [2012] eKLR. at paragraphs 63-64 where it held as follows:

> " Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable through the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."
>
> Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power Is vested in the Executive, Legislature and Judiciary"

13. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case.

14. It is axiomatic that sentencing is an exclusively judicial function. This creates a potential constitutional argument against minimum mandatory sentencing regimes in jurisdictions that recognize the principle of a separation of powers between the legislature, executive, and judiciary. It can be argued that a legislature that mandates to the judiciary what the punishment must be for a person convicted of a particular crime infringes the separation of powers, because it purports in effect to exercise what is a judicial function, namely that of sentencing. Such regimes reduce the judge to the status of an officeholder applying a rubber stamp to a result pre-ordained by the legislature, once a finding of guilt has been made. This undermines a key plank of the constitutional structure, that of checks and balances between different arms of government.

15. A judiciary that is, in effect, directed as to what sentence to impose does not act as a check and balance on legislative overreach. Just as legislators cannot arrogate to themselves the function of determining an individual's guilt, so too they cannot arrogate to themselves the function of determining an individual's punishment. Acceptance of either proposition would obviate the need for courts. Both offend the principle of separation of powers. A court is not simply there to rubber-stamp a legislative or executive determination of guilt nor is it there to rubber-stamp a legislative or executive determination of punishment. Courts have a substantive, not decorative, role in the constitutional design.

16. In *Liyanage v The Queen* [1967] AC 259, the Privy Council invalidated a Ceylonese Law providing for a minimum mandatory jail term of 10 years for particular offenders, because of the disproportionality in Sentencing that resulted. The court found the provision was invalid because it infringed the separation of powers principle enshrined in the Ceylonese Constitution. It did so by imposing a "legislative judgment": rather than the sentence being determined by the Judiciary, it was determined by

the legislature. If such laws were permitted, judicial power could be "wholly absorbed by the legislature and taken out of the hands of judges." The separation of powers arguments against minimum mandatory provisions were also accepted and applied by the United Kingdom courts in *Keyes v The Queen* [2002] 2 AC 235, 258 and in *R (Anderson) v Home Secretary* [2003] 1 AC 837.

17. In jurisdictions like ours, whose *Constitution* provides expressly for a separation of powers between the judiciary and non-judicial arms of government, the Court can and should find that legislation mandating the imposition of particular penalties for proven particular activity, and requiring the court to rubber-stamp legislature approved outcomes created without regard to specific cases, is unconstitutional. Such laws potentially gravely undermine the separation of powers that the creators of many constitutions carefully enacted to avoid the arbitrary, capricious exercise of power. They require judges to exercise judicial power in a way that is not legitimate and that undermines the authority and integrity of a court. A judiciary that refuses to hold the line against such legislative incursions on the judicial role risks surrendering its fundamental role in the broad constitutional scheme.

18. That it is good to appreciate that even other jurisdictions appreciate the need of judges and convicting magistrates exercising their discretionary powers when it comes to sentencing other than just following the stipulated mandatory nature of sentences.

19. In *S v Mchunu and Another* (AR24N1) (2012) ZAKZPHC 56 Kwa Zulu High Court held that: -

> " it is trite law that the issue of sentencing is one which vests a discretion in the trial court.
>
> The trial court considers what a fair and appropriate sentence should be. The purpose behind the sentence was set out in *S v Scott - Crossley* 2008(1) SACR 223 (SCA) at para 35 Plainly, any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishment, they are not the only ones, or for that matter even overriding ones... it is true that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interest of justice nor those of society."

20. That it is also evident that the court in other jurisdictions have always frowned on mandatory sentence that places a limitation on Judicial discretion. In, *S v Toms* 1990 (2) SA 802 (A) AT 806(L)-807(B) the South. African Court of Appeal (Corbett CJ) held that: - sentence that place a limitation:

> " The infliction of punishment is a matter for the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubberstamp.
>
> The imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing. function of the court. A provision which reduces the court to a mere rubberstamp is wholly repugnant"

21. In *S v Mofokeng* 1999(1) SACR 502 (w) AT 506 ((a), the South African Court of Appeal held that:

> " For the legislature to have imposed minimum sentences severely curtail discretion of the Courts, offends against the fundamental Constitutional Separation of powers of the legislature and the judiciary. It tends to undermine the independence of the Court's and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

22. Also, in *S v Jansen* 1999 (2) SACR 368 at 373 (g) – (h) Davis J. held that:

> " the Mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum leaving no room for an examination of the prospects of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignify of the accused."

23. In the above cited case law, it was the courts view that the opinion of the Supreme Court with respect to mandatory sentence apply with equal force to minimum sentences. This view is supported by the Kenya judiciary sentencing policy guidelines where it is appreciated that: -

> " Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustices particularly for juvenile offenders."

24. The Applicant urges the court not to remain blind to the fact that our jurisdiction has also appreciated the importance of judges and magistrates exercising their discretion on sentencing depending on the circumstances of the case and any internal and external factor that they may deem fit to consider while sentencing.

25. The Court of Appeal in *Dismas Wafula Kilwake v Republic* [2018] eKLR, the court set out the factors to be considered in sentencing under the Act. It observed as follows:

> " We hold that the provisions of section & of the *Sexual Ofences Act* must be interpreted so as not to take away the Discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the Society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the Court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The Argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or review available in the event of arbitrary or unreasonable exercise of discretion in sentencing".

26. In the case of *Evans Wanjala Wanyonyi*, HCCR Appeal no 174 of 2015 and Criminal Appeal no. 312 of 2018 a case of defilement contrary to Section 8) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006, the Court of Appeal sitting at Eldoret (coram: Makhandia Kiage & Otieno-Odeck JJA) were guided by the merits of the court of Appeal decision in *Christopher Ochieng v Republic* (supra) and *Jared Koita Injiri v Repubic* Kisumu Criminal Appeal No 93 of 2014 in relation to sentencing and thus held:

> " We are convinced and satisfied that the enhanced mandatory 20 years imprisonment term meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 years term of imprisonment meted upon the appellant and substitute it with one of imprisonment for a term of 10 years with effect from date of sentence by the trial court."

27. Further in *Paul Ngei v Republic* (2019] eKLR, the Court of Appeal at Kisumu substituted the appellant's mandatory minimum sentence of twenty (20) years with one of twelve (12) years imprisonment and held that, at paragraph 13:

> " In the instant matter, there is on record mitigation by the appellant and we see no reason to remit the matter to the trial court for rehearing on sentencing. Guided by the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* (supra) and persuaded by the decisions of this court in *Christopher Ochieng v R* (supra) and *Jared Koaita Injiri v. R*, Kisumu Criminal Appeal No 93 of 2014, we are convinced and satisfied that the mandatory 20-year term of imprisonment meted upon the appellant cannot stand. We are inclined to intervene as we hereby do. We set aside the 20-year sentence meted upon the appellant and substitute the same with a sentence of twelve (12) years imprisonment with effect from 9th May 2013 when the trial court passed sentence."

28. That, recently the High Court sitting at Narok in *Sammy Wanderi Kugotha v Republic* [2021] eKLR, substituted the appellant's mandatory minimum sentence of life imprisonment with one of twenty (20) years imprisonment and held that, at paragraph 13:

> " [65]. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the *Sexual Offences Act* is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the Constitution. But I proclaim a new approach; a new yardstick. Section 7 of the Transitional Provisions under the Sixth Schedule of the *Constitution* foresaw the dilemma of application of the *Constitution* upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity with the *Constitution*. The section provides: -
>
> 7. Existing laws
>
> 1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary bring it into conformity with this Constitution.
>
> [66]. In light thereof, I do think, it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially existing law- the offense or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore. read the word "'shall" in section 8(2) of the *Sexual Offences Act* to mean "may'" in order to bring the section into conformity with the Constitution.
>
> [67] Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with the Constitution. In the meantime, they should take up pronouncements such as this one, and carry out appropriate legislative enactment or amendments to existing law in order to bring it into conformity with the Constitution.

[68]. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. This is an important consideration here.

[69]. I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to eke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing. In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for this young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment.

[70]. In sum, I set aside the life sentence. In lieu thereof, the appellant will serve 20 years' imprisonment from the date he was first sentenced."

29. Reference is made to the case of Guyo Jarso Guyo v Republic (2018) Petition No. 6 of 2018 where the high court of Kenya sitting at Marsabit substituted a life imprisonment term meted upon the appellant to a 20 years' imprisonment term and *Paul Odhiambo Mbola v Republic* [2020] eKLR where the court at Kisumu substituted a life sentence with a 10-year sentence which the applicant had served.

30. The Applicant submit that, he was convicted to serve Life Imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and implores this court to find that the sentence imposed upon me was a statutory minimum mandatory sentence and that even my mitigations then could not have changed it since the trial judges' hands were then tied by the statutory provisions. I now humbly beg leave of this honorable court to use its discretionary powers following the Constitutional provisions under Article 50(2)[q] and the above cited laws and invoke the mandatory minimum sentence of life sentence and substitute it with a more lenient sentence.

31. Further reference is made to the Recent decision in *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General* the high court in Machakos did order that:

" 118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant as follows; -

1) To the extent that *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentences to impose, such sentences fall foul of article 28 of the constitution. However, 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.

2) Taking cue from the decision in *Francis Karioko Muruatetu another v Republic* [2017] eKLR(Muruatetu 1) those who were convicted of the sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentences are at liberty to petition the high court for orders of resentencing appropriate cases."

32. Further refence is made to the case of *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR Pages 63 it was held that;

> " ..By dint of Section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced... "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.....It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

33. The Applicant urges that in the eventuality that the Court imposes a custodial sentence may consider the period spent in custody since the date of arrest as per Section 333(2) of the *Criminal Procedure Code* and the principles in the above cited cases.

34. The Applicant contends that, while in the correctional facility he has embraced fully the rehabilitative programs being offered and that it is also wise to appreciate that the essential rationale for sentencing is rehabilitation.

35. He urges the court to be guided by the *Francis Karioko Muruatetu and Another v. Republic* (supra) para 7.1 part (9) it was acknowledged that "possibility of reform and re-adaptation of offenders". Under policy direction 4.1 of the sentencing guidelines policy 2015 core objective of the custodial sentence is reformation and rehabilitation.

36. The Applicant contends that he is fully rehabilitated having obtained Certificates in carpentry and joinery grades (i) and (ii) and ready to be productive in building our nation thus urging the court to find the same and conclude that the time he has already served is sufficient.

37. That the Applicant has made efforts to reconcile with the complainant who is my family member and now they are reconciled and do swear that he is and will be a law-abiding citizen. It is also his sincere prover that this court find that he was not married and would like to go and get married he thus humbly request for another chance in life since before being incarcerated he was yet to get married.

38. Based on the above mitigating factors the Applicant humbly implore this honorable court to pass a lenient sentence that will enable him re- unite with his family, community and the free world at large.

39. Finally, Applicant urges court to consider his submissions and find that this is the most appropriate time to have him offer his contribution to the society and participate in the nation building as a law-abiding citizen being armed with the skill to make him earn a living apart from serving the community.

40. The Applicant thus prays for his application to be allowed and the court be pleased to find that the period he has already served to be sufficient based on the rehabilitative programme's undertaken, the above cited case laws and the mitigating factors discussed above or Order that he serve the remaining period of sentence that this court may met out under probation or community service order.

Respondent's Case

41. The Respondent did not oppose the application and urged the court to consider the aggravating circumstances that the victims was four (4) years old. She suffered a broken hymen at that tender age and suffers lifelong trauma and shall never fully recover and that the Applicant as a family member and

uncle to the victim betrayed the trust to protect the child he violated as circumstances to impose an appropriate imprisonment term.

Analysis and Determination

42. The Power of High Court to call for records is provided for under Section 362 of the *Criminal Procedure Code*:

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".

43. Section 364 of the *Criminal Procedure Code* provide for the Powers of High Court on revision as follows;

> " (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
>
> (c) in proceedings under section 203 or 296(2) of the *Panel Code*, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
>
> Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

44. In the case of Prosecutor v Stephen Lesinko [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to Section 362 of the *Criminal Procedure Code* as follows: -

a. Where the decision is grossly erroneous;

b. Where there is no compliance with the provisions of the law;

c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record; and

d. Where the material evidence on the parties is not considered;

45. The Supreme Court clarified that their decision in the Muruatetu case only related to the mandatory death sentence for murder cases under Section 203 and 204 of the *Penal Code*, and did not apply to any other statutory mandatory death sentences or minimum sentences.

46. Specifically, the Supreme Court issued the following guidelines:

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

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

b. The *Judiciary Sentencing Policy Guidelines* to be revised in tandem with the new jurisprudence enunciated in Muruatetu.

c. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

d. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

e. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code* as well as those of the victim before deciding on the suitable sentence.

f. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

g. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –

i. Age of the offender

ii. Being a first offender

iii. Whether the offender pleaded guilty.

iv Character and record of the offender

v Commission of the offence in respect of gender-based violence.

vi. The manner in which the offence was committed on the victim.

vii. The physical and psychological effect of the offence on the victim's family.

viii. Remorsefulness of the offender.

ix. Possibility of reform and social adaptation of the offender.

x. Any other factor the court considers relevant.

h. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

i. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.

47. This Court is guided by the finding in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) where the Court of Appeal held that:

> " The reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applied to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denied a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences were allowed to be heard in mitigation. That was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution"*.
>
> "An indeterminate life sentence was inhumane treatment and violated the right to dignity under article 28 of the *Constitution*. An indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. It was 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 was achieved".

48. This Court in reviewing the sentence examined the court proceedings by Hon Matheka (SRM), for the 15th May 2007 as follows:Accused person convicted in his own "plea of guilty".The prosecutor indicated that he did not have other previous records, praying that the accused be treated as 1st offender.Accused was asked whether he has any to state in mitigation? he says 'no'.Hon Matheka as she then considered, the terms of the case perused the P3 and the treatment notes. Noting 'minor's

hymen broken'The P3 also indicate that the subject was defiled and Sustained injury.Accused person having nothing to say.Clearly this is grievous offence and the accused person is the kind of person who should be kept far away from little girls and far along him..... under section 8(3) of the sexual offence act the sentence provided therein is a sentence of Life imprisonmentThe provision of section 8 (2) are in mandatory terms of a person convicted of defilement for a child aged 11 years or less shall upon conviction be similar to imprisonment for life.I sentence the accused person to imprisonment for life.Right of appeal 14 days.

49. This Court's evaluation of the Proceedings reveals that the Applicant was never accorded any leniency as a first-time offender and the court imposed the sentence in mandatory terms without exercising its discretion.

50. The exercise of discretion by the trial magistrate in sentencing was not judicious and that the Applicant was denied the benefit of a first-time offender with reason being the mandatory sentence.

51. The Court ought to have clearly recorded reason(s) why the Applicant was undeserving of any sympathy.

52. The Applicant has been in Prison custody for almost Seventeen (17) years a period which he has achieved remarkable qualifications and with good conduct as above, the Applicant will soon qualify under Section 46; (1) (Cap 90), the *Prisons Act* earn a remission of one-third of his sentence.

53. From the foregoing therefore, this court shall interfere with the sentence imposed by Hon Matheka(CM) as she then was, of Life Imprisonment, by setting it aside and substituting therewith a term imprisonment.

54. In the upshot this court finds this Application to be of merit and accordingly allow the same.

    i. The Sentence of Life Imprisonment imposed on the Applicant on the 15th May, 2007 is hereby set aside.

    ii. The Applicant shall serve a +

    iii. Twenty-Five (25) Years imprisonment sentence to run from the 13th May 2007.

55 It is so Ordered.

SIGNED, DATED and DELIVERED IN OPEN COURT AT NAKURU ON THIS 11TH MARCH 2024

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MOHOCHI S.M

JUDGE