



**Kobuthi v Republic (Constitutional Petition E007 of 2024)  
[2024] KEHC 8954 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION E007 OF 2024**

**LM NJUGUNA, J**

**JULY 24, 2024**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLES 22(1), 23(1), 25(D), 50(1) & 51(2) OF THE CONSTITUTION OF  
KENYA 2010 AND SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE**

**IN THE MATTER OF ARTICLES 20(1),(2) &(4), 21(1), 48  
AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 23(1), 25(C), 27(1)(2), 47, 48, 50(2)(P), 51(1) AND 165(3) OF THE  
CONSTITUTION OF KENYA 2010 AND IN THE MATTER ARISING FROM SECTION  
8(1) AS READ TOGETHER WITH SECTION 8(2) OF THE HE SEXUAL OFFENCES ACT  
NO. 3 OF 2006 AND SECTION 333(1)&(2) OF THE CRIMINAL PROCEDURE CODE**

**BETWEEN**

**FRANCIS NJERU KOBUTHI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner has filed an undated petition seeking the intervention of this court on the sentence imposed. He was sentenced to life imprisonment vide Runyenjes Criminal Case No. 189 of 2007 where he was charged with defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual offences Act*. The petitioner appealed against the conviction and sentence of the trial court to the High court in Embu Criminal Appeal no. 108 of 2007 and the appeal was dismissed. He filed a second appeal to the Court of Appeal in Nyeri vide Criminal Appeal No. 86 of 2013 and it was also dismissed. The petitioner, through the petition herein, seeks the following orders:



- a. A declaration that the decision of the Supreme Court in Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (Muruatetu 1) applied equally to all offences which attract mandatory sentences;
  - b. A declaration that failure to comply with section 333(2) of the Criminal Procedure Code constitutes unfair trial in sentencing;
  - c. A declaration that mandatory sentences offend Article 50(2) of *the Constitution* as it denies the court its discretion;
  - d. A declaration that the sentence imposed upon the petitioner is inconsistent with Articles 25(c) and 50(2) of *the Constitution*;
  - e. A declaration that the petitioner is entitled and guaranteed to the Supreme Court remedies in Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (Muruatetu 1);
  - f. A declaration that section 216 and 329 of the Criminal Procedure Code were not complied with hence contravening Articles 25(c) and 50(2) of *the Constitution*;
  - g. A declaration that the petitioner herein is entitled to all the benefits of Articles 25(c), 27(1)&(2), 50(2)(p) and 51(1) of *the Constitution*; and
  - h. That the petitioner is satisfied with the conviction and now requests this court to take into account the period spent in custody in tandem with section 333(2) of the Criminal Procedure Code and Article 50(2) of *the Constitution*
2. It is the petitioner's case that he has suffered behind bars since 2007 when he was imprisoned. That he has reformed and has learned several useful crafts which he intends to put to good use once he is released. He produced training certificates and recommendation letters from the prison administration in support of his petition.
  3. The petition was canvassed by way of written submissions.
  4. The petitioner submitted that he was sentenced to life imprisonment which was the mandatory sentence stipulated in the *Sexual Offences Act* even though he raised some mitigating factors which were not considered by the trial court before sentencing. He relied on the cases of Sammy Musembi Mbugua & 4 Others v. AG & Another (2019) eKLR as applied in the case of KNN v. Republic (2020) eKLR and Douglas Muthaura Ntoribi vs Republic Misc. Criminal Appeal Case No. 4 of 2015, (2018) eKLR where the court stated that the purpose of the prison is to reform convicts. He submitted that excessive punishment does not serve justice and the society.
  5. Further reliance was placed on section 46 of the *prisons Act* which provides for remission of a third of the sentence, which in this case, cannot apply to him because he is serving life imprisonment. That he was a first offender and during his incarceration, he has remained well-behaved. That at the time of his imprisonment, he was 40 years old and he has been in prison for 17 years.
  6. That before his incarceration, he had a wife, who died while he was in prison, and 5 children whose only support is their deceased mother. He submitted that he has reformed through the training programs offered in prison and that he would be a meaningful member of the society especially with his knowledge of the crafts he has learned in prison. That he intends to be a good father to his children since they are orphaned following the death of their mother.
  7. The respondent submitted that in as much as the findings of the court in Muruatetu 1 extended to offences carrying minimum mandatory sentences, the findings of the 2 superior courts should not be



disturbed since the victim was 9 years old at the time of the incident and the sentence was deterrent. It submitted that according to scientific studies, defilement contributes to psychotic behaviors in adults who were abused as such as children. That the sentence is in line with the objectives of the Judiciary Sentencing Guidelines 2023. That the sentence imposed on the petitioner is just in the circumstances of the case.

8. The issues for determination herein are:

- a. whether this court has jurisdiction to grant the orders sought in the petition; and
- b. whether the petition has merit.

9. On the issue of whether this court has jurisdiction to determine the petition, the same is targeted at re-sentencing. The petition is rightly before this court as the High Court bears original jurisdiction to entertain constitutional petitions. Further, this court has jurisdiction to entertain matters of resentencing as donated to it through recent jurisprudence, particularly in the Court of Appeal decision in the case of Julius Kitsao *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023). In this case, it was held thus:

“...we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*”.

10. On the issue of whether the petition has merit, the petitioner seeks review of the life sentence. Article 48 of *the Constitution* guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which includes the right to downward review of a sentence in appropriate cases. The life sentence was imposed by the trial court after conviction as prescribed under section 8(2) of the *Sexual Offences Act*. In the case of Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (supra), it was held thus:

“Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right.... 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...” (emphasis added)

11. Following the findings of the Supreme Court in Muruatetu 1, the High Court, in the case of David Wafula Kilwake & Another v. Republic [2018] eKLR stated:

“We hold that the provisions of section 8 of the *Sexual Offences 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.”

12. This is not to say that mandatory minimum sentences cannot be applied. In fact, *Muruatetu 1* did not outlaw the mandatory minimum sentences. Rather, focus was on the discretionary power of the sentencing court. If the circumstances of the case demand that the mandatory sentence be meted out, the trial court cannot be held to have erred in that regard. In the case of *Athanas Lijodi v Republic (2021) eKLR* the Court held thus:

“On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases *Muruatetu’s* case notwithstanding. This Court has on many occasions invoked the *Muruatetu* decision to reduce sentences that were hitherto deemed as minimum sentences.”

13. The Supreme Court warned on application of *Muruatetu 1* in its directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions) (*Muruatetu 2*), stating thus;

“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*”

14. This court is guided by the directions in *Muruatetu 2* and will thus proceed cautiously, while considering the guidelines for resentencing as provided therein. The petitioner herein has been in prison for the past 17 years. It is his case that he has since reformed and he has acquired useful skills to help him navigate life outside prison. He submitted that he has no issue with the conviction but seeks the court’s intervention on the sentence. The victim was 9 years old at the time of the offence.

15. From the standpoint of *the Constitution* of Kenya, the petitioner indeed makes a valid case. The court in *Phillip Mueke Maingi & 5 Others v. DPP & another Machakos High Court Petition No. E017 of 2021* held that to the extent that the *Sexual Offences Act* prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall afoul of Article 28 of *the Constitution*. This decision seems to cover any section of the Act which provides for mandatory minimum sentence. The court further ordered that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases

16. The mandatory indeterminate life sentence was imposed by the trial court, regardless of the mitigating or aggravating factors present at the time. I am guided by the Superior courts in the above-cited decisions to the extent that mandatory or minimum sentences curtail the trial court’s discretion on sentencing. The sentence is not unlawful but it can be subjected to the review on the strength of stare decisis. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (*supra*), considered the case of defilement where the victim was 4 years old at the time of the offence. It rendered the indeterminate nature of life imprisonment discriminatory and the life imprisonment sentence was reduced to 40 years imprisonment on appeal.

17. In light of this decision, the life imprisonment sentence imposed on the petitioner should be defined. The Superior court also revisited the issue in the case of *Evans Nyamari Ayako v. Republic Criminal*



Appeal No. 22 of 2018 the Court of Appeal sitting at Kisumu rendered itself on 08<sup>th</sup> December 2023, as follows:

“.....On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

18. Consequently, and being guided by the Superior Courts’ decisions, I find that the petition has merit and is hereby allowed. The life imprisonment imposed on the petitioner is hereby set aside and substituted with a sentence of 40 years imprisonment, to run from the date of conviction.

19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... **for the Petitioner**

.....**for the Respondent**

