



**Kioji v Republic (Criminal Petition E022 of 2022)
[2024] KEHC 8542 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL PETITION E022 OF 2022**

LW GITARI, J

JULY 8, 2024

BETWEEN

GEOFFREY KIOJI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Ruling relates to the petition which was filed by the Petitioner herein seeking orders that Section 8(2) of the [Sexual Offences Act](#) No.3/2006 is unconstitutional to the extent that it provides for the mandatory life imprisonment sentence to the accused person convicted of defilement which infringes the inherent right of an accused person to fair trial as envisaged under Article 25(c) of the [Constitution](#).
2. That the court be pleased to issue a declaration that the minimum/maximum sentence provision under the [Sexual offences Act](#) are unconstituional in so far as they infringe on the inherent right of every accused person to have his or her mitigating factors considered.
3. That a declaration be made subject to prayer 1&2 that the Petitioner herein be remitted back to the trial court for rehearing and sentence only so that his mitigation factors can be considered and appropriate sentence awarded.
4. Th brief background of the petition is that the Petitioner was charged with defilement contrary to Section 8(2) of the [Sexual Offences Act](#) in the Senior Magistrate’s Court at Marimanti Criminal Case No.308/2008. He was tried and after a full trial he was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment. He was dissatisfied with both the conviction and sentence and so he filed an appeal to the High Court of Kenya at Meru. He lost the appeal and the Judge enhanced the sentence from fifteen years to life imprisonment as provided under Section 8(2) of the [Sexual Offences Act](#).



5. The Petitioner then filed his appeal against the decision of the High Court to the Court of Appeal. The appeal was dismissed and conviction and the sentence was upheld.
6. The Petitioner then filed this petition under Article 165(3) (d) (i) (ii) as well as under Articles 2(4), 10(2)(b), 19, 22(1), 28, 29(f) 50(1) &(2) and Article 159(2)(a) seeking the above declarations. This Petition was disposed off by way of written submissions. The Petitioner's contention is that Section 8(2) of The Sexual Offences Act is unconstitutional as it robs an accused the right to an individualized sentence that took into consideration factors relating to the petitioner, personal information and the circumstances surrounding the offence committed. He submits that the mandatory life imprisonment sentence is arbitrary and oppressive and violates the right to be free from cruel, inhuman and degrading punishment. It is further his submission that the mandatory sentence deprives the trial court the exercise of its judicial discretion and violates the right to fair trial.
7. The respondent submits that this court has jurisdiction under Article 23(1) and 165(3)(b) of the Constitution to determine whether the petition has raised issues that threatened, denied, violated or infringed on the fundamental rights and freedoms that are accrued to the Petitioner. That the petition gives the parties an opportunity for a conversation as to whether the mandatory life imprisonment sentence under Section 8(2) of the Sexual Offences Act is unconstitutional. It is the respondent's contention that the life imprisonment sentence does not violate Article 25(c) of the Constitution. It provides that:-

“25(c) Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial.”

The respondent further submits that the mandatory life imprisonment sentence does not rob the Petitioner an opportunity for an individualized sentence that takes into consideration factors relating to the Petitioner's personal information and the circumstances surrounding the offence. The respondent contends that the Section 8(1) (2) of the Sexual Offences Act prescribes a mandatory life imprisonment sentence for person convicted for defilement of a minor below eighteen years. That all the person convicted are treated in the same way at the sentencing stage by imposing the life imprisonment sentence. That the sentence is not oppressive and does not violate one's constitutional right. He prays that the petition be dismissed.

I have considered the petition and the submissions. The issue for determination is where the mandatory life imprisonment under Section 8(1)(2) of the Sexual Offences Act is unconstitutional and violates the rights of the accused to a fair trial and deprives the court the judicial discretion in sentencing.

Article 25(c) of the Constitution (supra) provides that the right to fair trial is one of the Rights and Freedoms that may not be limited. The sentence prescribed under Section 8(1)(2) of the Sexual Offences Act prescribes a minimum mandatory sentence. Article 165(3) (b) & (d) of the Constitution gives this court jurisdiction to determine whether the petition before it has raised issues that have threatened, denied, violated or infringed on fundamental rights and freedoms that have accrued to the Petitioners.

8. The Petitioner's case is that the minimum mandatory sentence deprives an accused person the right to fair trial as the trial Judge's has no room to exercise discretion in sentencing.

In the case of Francis Karioko Muruatetu -v-Republic (2017) eKLR. The Supreme Court of Kenya held that, inter alia that the mandatory nature of the death penalty deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence that where a court listens to



mitigating circumstances but has nonetheless to impose a set sentence, the sentence fails to conform to the tenets of fair trial that accrues to an accused person under Article 25 of the Constitution an absolute right.

The Supreme Court further held that it is the duty of the court to ensure that all persons enjoy the right to dignity which is guaranteed under Article 28 of the Constitution.

The court stated-

" Failing to allow a Judge discretion to take into consideration the convicts mitigating circumstances the diverse character of the convicts and the circumstances of the crime but instead subjecting them to the same (mandatory) sentence thereby treating as an undifferentiated mass violates their right to dignity."

This holding has been applied by the courts to hold that the minimum mandatory sentences under the Sexual Offences Act are unconstitutional in so far as they deprive the courts their inherent discretion in sentencing. The Supreme Court however set its holding straight and issued directions in Muruatetu -2 stating that it did not invalidate the mandatory sentence or minimum sentences under the Penal Code and the Sexual Offences Act. But also stated that parties were at liberty to challenge the constitutional validity of sentences before the High Court. Thus nothing bars this court from applying the reasoning in Muruatetu when determining the constitutional validity of minimum mandatory sentences and mandatory sentence under the Sexual Offences Act.

The Petitioner challenges the maximum mandatory sentence as inhuman and deprives him of the right to human dignity under Article 28 of the Constitution. The Article provides that:-

Every person has inherent dignity and the right to have that dignity respected."

In Francis Musyoka Nzau -v- Republic High Court Meru Petition No.E027 of 2022 the Judge 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, falls foul Article 28 of the Constitution....."

In Maingi & 5 Others -v- DPP & Another Petition E017/2021 (KLR) 2022 High Court Judge Ondunga (as he then was) held "that the minimum mandatory sentences (under the Sexual Offences Act) does not meet the Constitutional threshold particularly Article 28 of the Constitution..... The sentence imposed must meet the Constitutional dictates."

A sentence that condemns a convicted person to an indefinite sentence fails to meet the Constitutional threshold of a person's right to human dignity. I associate myself with my brother & sister Judges and find that Petitioner's right to Human dignity under Article 28 of the Constitution was violated by the indefinite sentence of life imprisonment. The sentences under the Sexual Offences Act may be imposed in appropriate cases. What remains unconstitutional is that they deny the court to exercise discretion in sentencing.

The petitioner was arrested on 30/7/2008. He was sentenced on 15/4/2009 to serve fifteen years in jail. The sentence was enhanced to life imprisonment on 22/9/2011 by the High Court and upheld by the Court of Appeal on 11/7/2013. I order that the life imprisonment sentence shall be substituted with a term of fifteen years of imprisonment from 30/7/2008.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY OF JULY 2024

L.W. GITARI



JUDGE

