



**M'Irware v Director of Public Prosecution (Petition E081 of 2023)  
[2024] KEHC 9545 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9545 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION E081 OF 2023**

**EM MURIITHI, J**

**JULY 25, 2024**

**IN THE MATTER OF ARTICLES 2(4), 10(2)(B), 19, 22(1), 23(1)(3)(D)(F), 25 (C),  
27(1), 28, 29(F), 50(1)(2), 159(2)(A) AND 165(3)(D)(I)(II) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF INTERPRETATION OF THE MINIMUM MANDATORY  
PROVISIONS UNDER THE SEXUAL OFFENCES ACT NO. 3 OF 2006**

**AND**

**IN THE MATTER OF SECTION 216 AND 329 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF KENYA JUDICIARY SENTENCING POLICY GUIDELINES**

**BETWEEN**

**JAMES MWEBIA M'IRWARE ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein filed a petition dated 17/7/2023 seeking:
  - a. A declaration be made under the provisions of Article 27, 23(3)(d) of *the Constitution* that Section 8(2) of the *Sexual Offences Act* is unconstitutional to the extent that they provide for the mandatory life imprisonment sentence to accused persons convicted of Defilement which infringes the inherent right of every accused person to a fair trial as envisaged under Article 25(c) of *the Constitution*.



- b. That, this honorable court be pleased to issue a declaration that the minimum – maximum sentencing provisions under the *Sexual Offences Act* are unconstitutional in so far as they infringe on the inherent right of every accused person to have his/her mitigating factors considered as envisaged under Article 50 (2) of *the Constitution* as read with Section 216 and Section 329 of the *Criminal Procedure Code*.
  - c. That, a declaration be made subject to prayer no. 1, 2 and 3 that the petitioner herein be remitted back to his respective trial court for rehearing on sentence only so that his mitigating factors can be considered and appropriate sentence awarded.
2. The petitioner in his affidavit in support of the petition avers that he was arrested in 2008 and charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* vide Nkubu Cr. Case No. 37 of 2008. After his conviction and subsequent sentence to life imprisonment, he lodged Meru High Court Criminal Appeal No. 25 of 2010 and Nyeri Court Appeal Criminal Appeal No. 113 of 2013, which were both dismissed and the sentence upheld. Having exhausted his appellate right, he now seeks to challenge the constitutionality of section 8(2) of the *Sexual Offences Act*, in view of the Supreme Court’s directive. According to him, the mandatory sentence of imprisonment for life provided under section 8(2) of the *Sexual Offences Act* fails to conform with the tenets of fair trial that accrue to accused persons under Article 25(c) of *the Constitution*. The said section deprives the court the use of judicial discretion in matters concerning the life of an individual. The trial court’s failure to take into consideration his mitigating factors and appropriate sentence is against his right to equal protection and equal benefit of the law under Article 27(1) of *the Constitution*. This court has judicial powers under Articles 23(1) and 165(3)(b) of *the Constitution* to hear and determine application for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom and to hear and determine a question whether any law is inconsistent with or in contravention of *the constitution*.
  3. Directions were taken that the petition be heard by way of written submissions which were duly filed on 20/7/2023 and 25/3/2024 respectively.
  4. The petitioner urged that the mandatory life imprisonment under section 8(2) of the *Sexual Offences Act* deprives the court the power to exercise judicial discretion and hand over sentences which are proportionate to the offences committed. He urged the court to find that Section 8(2) of the *Sexual Offences Act* violates his rights under Articles 25(c), 28 and 50(2)(p) of *the Constitution*.
  5. The respondent urged the court to consider that the traumatic impact and aftermath of the petitioner’s actions will affect the victim her whole life, and thus the sentence ought to ensure retribution and serve as a deterrent to others. It urges that the petitioner showed no remorse during the trial and even after being caught red handed in the act, he came up with a reprehensible defence that he had been fixed. It urged the court to condemn the petitioner’s despicable actions by upholding the sentence and dismissing the petition.

### **Determination**

6. The judgment of the trial court has not been availed to enable the court establish what the petitioner’s mitigation was and whether the same was duly considered. However, the High Court and the Court of Appeal dismissed the petitioner’s appeals and upheld the sentence. Of course, the imposition of a lawful legal sentence of imprisonment for life on the petitioner cannot be deemed to be a violation of his rights.
7. The only question to be resolved as sought in this petition is, therefore, whether the sentence of imprisonment for life is constitutional.



8. In the pendency of this Judgment, the Supreme Court has in *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) dealing the question of challenge on constitutionality of minimum sentences in *Sexual Offences Act* guided all courts bound by its decisions in terms of Article 163(7) of *the Constitution*, as follows:

“(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

(67) This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions.”

9. The Court is aware of its own decision in *Hesbon Kiruja Mureithi V. R.*, Meru HC Cri. Pet. No. E009 of 2022 where following Court of Appeal decisions therein discussed on its indeterminate nature, the sentence of life imprisonment was unconstitutional and clarified in terms of a jail term for a number of years, which following the guidance of Kisumu Court of Appeal Criminal Appeal No. 22 of 2018 Evans Nyamari Ayako V. R, respectfully agreed that the life sentence may be equated with an imprisonment for thirty years.

10. However, with the direction and guidance of the Supreme Court, in Joshua Gichuki Mwangi, the matter of adopting any number of years as equivalent term of years to the life sentence shall have to await legislative stipulation or a judicial declaration upon full argument through the heir-archical court system of Kenya from the High Court, Court of Appeal to the Supreme Court, as held in *Muruatetu & Another v. R; Katiba Institute & 4 Ors. (Amicus Curie) (Petition No. 15 & 16 of 2015)* [2021] KESC 31 (KLR) (the Muruatetu Directions).

11. The Supreme Court in Joshua Gichuki Mwangi while considering the issue of constitutionality of minimum sentences said:

“(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.”

12. The Court is mindful of this strict regime towards the outlawing of a provision on sentence. In this Petition, which was filed in person by petitioner not served with full argument on the question of the constitutionality of the life sentence and is unable to declare it unconstitutional as sought by the Petitioner.

### **Orders**

13. Accordingly, for the reasons set out above, the sentence of imprisonment for life is upheld.

14. The Petition is declined.

15. File closed

Order accordingly.

**DATED AND DELIVERED ON THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. James Mwebia Applicant in Person.

Ms. Masila for the Respondent.

