



REPUBLIC OF KENYA



**Mbirithia v Director of Public Prosecution (Petition
E027 of 2023) [2023] KEHC 3561 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E027 OF 2023
TW CHERERE, J
APRIL 20, 2023**

BETWEEN

JULIUS KIUNGA MBIRITHIA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Petitioner was on July 1, 2011 convicted for the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* and was sentenced to life imprisonment.
2. Petitioner's appeal Meru CR Appeal No 111 of 2011 was dismissed on November 28, 2013 and he did not appeal to the Court of Appeal.
3. Petitioner seeks resentence on the ground that he was sentenced to a mandatory sentence.
4. Ms Rita for the DPP opposed the application on the ground that the offence involved a 3 ½ year old that had to undergo constructive surgery as a result of the injuries inflicted on her by the Petitioner.
5. I have considered the Supreme Court decision in *Francis Kariuki Muruatetu & Another v Republic & 5 others* [2017] eKLR (Muruatetu 1) cited by the Petitioner and I find that it is inapplicable for the reason that the Supreme court 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) clarified that Muruatetu 1 only applies to persons sentenced to death for offences of murder.
6. Whereas *Philip Mueke Maingi v Republic* [2017] eKLR and *Edwin Wachira & 12 Others* Petition Nos 57, 88, 90 and 97 of 2021 dealt with resentence of persons charged with sexual offences, this case is peculiar for the brutal manner in which Petitioner attacked an innocent defenceless 3 ½ year old leaving her with lifelong injuries both physical and psychological.



7. In the South African case of *S v Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that sentencing vests a discretion in the trial court to consider what a fair and appropriate sentence should be.
8. Another South African case of *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35 set out the purpose behind a sentence as follows:
‘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 punishments, they are not the only ones, or for that matter, even the over-riding ones. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.’
9. Closer home, 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) held that to the extent that the *Sexual Offences Act* prescribe mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution*
10. Flowing from the foregoing, I find that it would not serve any meaningful purpose to confine Petitioner to a life of hopelessness. I am therefore persuaded to resentence Petitioner to a determinate sentence.
11. In resentencing the Petitioner, I have taken into account the provisions of Section 333(2) of the *Criminal Procedure Code* and the fact that he might have spent some time in custody from the date of his arrest to the date of conviction and it is not expected that Petitioner will seek any further concession from the court.
12. In the end, Petitioner is thus resented to serve 30 years from the date of his conviction on July 1, 2011.
13. It is hoped that Petitioner will undertake some form of training as a way of reformation so that he can easily integrate with the community once released.

DELIVERED AT MERU THIS 20TH DAY OF APRIL 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Petitioner - Present in person

For the State - Ms. Rita (PC- 1)

