



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Republic (Criminal Appeal 48 of 2019)
[2023] KEHC 3262 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 48 OF 2019**

HM NYAGA, J

APRIL 20, 2023

BETWEEN

PAUL MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence by Hon. B. Mararo,
Principal Magistrate, Children’s Court Nakuru on 16th June 2019)*

JUDGMENT

1. The Appellant, Paul Mwangi, was charged with the offence of Defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act, 2006*. The particulars of the offence were that on May 26, 2018 in Rongai Sub-County within Nakuru county, unlawfully and intentionally committed an act of inserting a male genital organ namely penis to a female genital organ namely Vagina of MA, a child aged 10 years which caused penetration.
2. He also faced an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that on May 26, 2018 in Rongai Sub-County within Nakuru County, unlawfully and intentionally committed an act by touching the female genital organ namely Vagina of MA, a child aged 10 years with his genital organ namely Penis.
3. The accused was convicted, apparently, on the main count and on June 16, 2019 he was sentenced to life imprisonment. I say apparently because the trial magistrate did not specify which offence he had convicted the appellant on.
4. Being dissatisfied with the trial court’s decision, he lodged an appeal against both conviction and sentence before this court. However, on October 5, 2021 he withdrew his Appeal against conviction. He then went ahead to address the court on the sentence only.



5. In mitigation, he told the court: -

“I now accept I did this. All I am asking is for forgiveness and leniency. I am remorseful. I am 74 years old. I broke my legs here in prison. I am now on wheel chair. I have to be carried around. I beg for humanitarian touch. Please consider non-custodial sentence.”

6. Subsequently, the court called for his probation report. The same was duly filed on November 22, 2021. However, the trial Judge, Justice Prof J Ngugi (as he then was) was elevated to the Court of Appeal before he could determine the appeal.

7. As stated the Appeal herein is now only on sentence.

8. In Kenya, sentencing is governed by the Constitution, the relevant legal provisions and the Judiciary Sentencing Policy Guidelines 2016.

9. The Sentencing Guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.

10. Under section 8(2) of the Sexual Offences Act, it is provided that where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. This, until recently, was seen as the ‘mandatory’ sentence imposed by the statute.

11. The issue of mandatory sentences was addressed in Francis Karioko Muruatetu & others vs Republic (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

“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 that the Courts of their legitimate jurisdiction to exercise discretion not



to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

12. The Supreme Court further stated that in considering the provisions of Section 329 of the Criminal Procedure Code gave guidance on sentencing as follows:

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

13. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

14. For instance, in Jared Koita Injiri vs Republic [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the Sexual Offences Act. The Court of Appeal opined that

“if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”

The court further stated:

“The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”

15. The Court of Appeal in Dismas Wafula Kilwake vs R [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the Sexual Offences Act is unconstitutional as it denies the court discretion in sentencing.

16. It is well known that in Francis Karioko Muruatetu & another vs Republic; Katiba Institute & 5 others (amicus curie) (2021) eKLR (Muruatetu 2) the Supreme Court did clarify that its earlier decision was only applicable to murder cases. The court urged other petitioners facing other mandatory sentences to move the appropriate courts for the same remedy. The court stressed as follows;

“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. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under



section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

17. Subsequently, in *Philip Mueke Maingi & others vs Director of Public Prosecutions & another* (2022) eKLR the court was called upon to determine a petition by convicts charged with sexual offences and who had been sentenced to mandatory sentences. The case called for fresh jurisprudence following the 2 decisions of the Supreme Court. Justice V Odunga (as he then was) held that;

“In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact 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 injustice particularly for juvenile offenders.

To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

Taking cue from the decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (Muruatetu 1) 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.”

18. The above decision has been applied by other superior courts when called upon to do so in petitions for resentencing in similar cases and on appeals that are still pending that involve similar issues. The same principles have been widely accepted to be the correct position in law and are applicable herein.
19. The appellant is not challenging the validity of the sentence meted by the Trial Court. That argument would fail miserably as the court had the jurisdiction to mete out the sentence if it saw it fit to do so. In essence, his sole prayer is for this Court to review and/or consider a non-custodial sentence.
20. According to his resentencing report, the offence adversely affected the victim to an extent of dropping out of school due to stigma. Efforts by her mother to take her back to school have proved futile.
21. The Appellant is said to be a class 5 drop out. He dropped out of school due to financial constraints then engaged in farming and poultry business and later set up his hop in [Particulars withheld] Village. It is indicated that the convict took advantage of the Victim due to poverty and seemed not to comprehend the harm caused to the victim.
22. The report further indicates that the appellant has been in prison for 2 years only and his relatives are reluctant to receive him back. The first part of that statement is factually incorrect. The court record shows that the accused had been in custody throughout the trial, which commenced on May 31, 2018. That puts his stay in lawful custody at slightly under 5 years.



23. I have considered the mitigation by the convict herein, the Sentencing report and the seriousness of the offence which was committed on a child aged 10 years. There is no justification for the Appellant to have preyed on a minor. He deserves severe punishment so that others like him will be deterred from committing such an offence.
24. However, as stated, life imprisonment is no longer mandatory, and this court can exercise its judicial discretion and mete out any other sentence it deems appropriate.
25. Considering the advanced age of the accused, I hereby set aside the life sentence imposed by the trial court on the principal count of defilement and substitute it with a sentence of 20 years imprisonment. The same shall commence from May 31, 2018, when the appellant was first remanded in custody.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF APRIL, 2023.

H. M. NYAGA

JUDGE

In the presence of:

C/A Immanuel

Ms Murunga for state

Appellant present

