



**Ngeno v Director of Public Prosecution (Miscellaneous Application
E066 of 2022) [2023] KEHC 4095 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E066 OF 2022**

TM MATHEKA, J

MAY 5, 2023

BETWEEN

DANIEL KIPYEGON NGENO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Through an undated application lodged on 25th October, 2022, the Applicant, Daniel Kipyegon Ngeno, moved this Court for sentence rehearing.
2. The facts as contained in the application are that the Applicant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Molo CM Court Criminal Case No. 1972 of 2011. Thereafter, he lodged an appeal at Nakuru High Court against both sentence and conviction through Criminal Appeal No. 267 of 2013. His appeal was dismissed and on sentence the court was of the view that there was only one sentence available, the life sentence.
3. The Applicant now seeks a review of the sentence imposed by the subordinate Court on the basis that the sentence was unconstitutional in that the court was of the view that its hand was tied and could not exercise its sentencing discretion. He argues that this Court is bound by the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR under Article 163(7) of the *Constitution* and has jurisdiction to hear resentencing and mete out the appropriate sentence in line with the decision in *Petition No. E017 of 2021 Philip Mueke Maingi & Others vs. Republic*, and that this court in doing so will be discharging its obligation pursuant to Article 20(3)(a)(b) of *the Constitution* as read with the Principles in the aforesaid case of *Philip Mueke Maingi & Others*.
4. The Respondent left the matter to the court's discretion.



Applicant's Submissions.

5. The Applicant filed written submissions on 10th November, 2022 which he relied upon in support of his case.
6. In his submissions, the Applicant submitted that this court has jurisdiction to determine this Application pursuant to provisions of Article 163(5)(a)(b) of *the Constitution* 2010.
7. The Applicant argued that this court is bound by the Supreme Court's Decision of Francis Karioko Muruatetu & Another v Republic (supra) which stated that statutory law which provides for the minimum mandatory sentences deprives the court its discretion to impose the sentence it considers appropriate in view of the fact that every case has its own peculiarities.
8. He submitted that the above reasoning in Muruatetu has been extended by this court and the Appellate court to similar cases e.g. in *Fappyton Mutuku Ngui v Republic* [2014] eKLR; *Dismas Wafula Kilwake v R* [2018] eKLR; *Hashon Bundi Gitonga V Republic* [2020] eKLR; & *Samuel Achieng Alego v Republic* [2018] eKLR.
9. The Applicant associated himself with the decision in Alister Anthony Pereira vs State of Maharashtra at paragraphs 70-71 where it was held on sentencing that: -

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

10. The Applicant beseeched this court to be guided by the Sentencing Guidelines as set out in the Sentencing Policy Guidelines, 2016 and his mitigating factors as enunciated in the case of Francis Karioko Muruatetu (Supra)
11. He submitted that he has been in the custody for 9 years now and he has learnt with excruciating pain that crime does not pay. That he has fruitfully engaged in vocational trainings offered and acquired viable skills and he is utterly remorseful for the offence committed, and that he is now of age and cannot be influenced by peer pressure.
12. He urged this court to be persuaded by the holdings in the cases of Ibrahim Kandeny Alusiola v Republic; *Stephen Nguu Muli v Republic* [2019] eKLR; John Omondi Ogutu v Republic [2020] eKLR; *Maurice Oduor Agwingi v Republic* [2020] eKLR; *Hashon Bundi Gitonga v Republic* [2020] eKLR and consequently allow his petition.

Analysis & Determination.

13. The only issue that arises for determination is whether the petitioner's petition has merit.



14. The Petition is premised on the ground that the mandatory sentence under section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) is unconstitutional.

“ 8.

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

15. The applicant basically claims that the minimum sentence provided above denied the trial court discretion to mete out appropriate and just sentence. Therefore, he seeks the sentence imposed to be reduced in accordance with the Provisions of Article 50(2) of [the Constitution](#).

16. He argued that the decision by the Supreme Court in *Francis Karioko Muruatetu & Another –vs- Republic* [2017] eKLR removed the fetters put on magistrates and judges in making judgments and under Article 163(7) of [the Constitution](#) of Kenya 2010 this court has powers to order for resentencing hearing. Let me add that I am alive to the fact that Muruatetu 2 clearly stated that Muruatetu 1 was only intended to apply to murder cases where the death penalty was mandatory.

17. Court of Appeal in *Dismas Wafula Kilwake v R* [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the [Sexual Offences Act](#) was unconstitutional as it denies the court discretion in sentencing.

18. The court in *Hashon Bundi Gitonga v Republic* [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

19. In *Samuel Achieng Alego v Republic* [2018] eKLR the court stated as follows:-

“It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one. In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of [the Constitution](#) as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.

Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates...”

20. The High court in *John Omondi Ogutu v Republic* [2020] eKLR the court had convicted and sentenced the petitioner to 20 years’ imprisonment for the offence of defilement contrary to Section 145 of the [Penal Code](#). He petitioned the High court for resentencing and he was resentenced to 12 years imprisonment. In *Maurice Oduor Agwingi v Republic* [2020] eKLR- the court had convicted and sentenced the petitioner to life imprisonment for the offence of defilement contrary to Section 145 of



the Penal Code. He petitioned the High court for resentencing and his application was allowed. The court resented him to 16 years a period which he had already served.

21. The above cases show that sentencing trends in defilement matters are in a state of transition. There have been new developments by the courts in the recent years. Petition No. E017 of 2021 Philip Mueke Maingi & others vs. Republic It is indeed true that by prescribing mandatory sentences, the [Sexual Offences Act](#) takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.
22. The Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR annulled the mandatory nature of death sentence in Murder cases on grounds that mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.
23. The ratio decided in Muruatetu case has been adopted mutatis mutandis in other offences which prescribe mandatory sentences for example robbery with violence and offences under [Sexual Offences Act](#). Odunga J (as he then was) in *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) taking cue from the decision in Francis Karioko Muruatetu held 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 were at liberty to petition the High Court for orders of resentencing in appropriate cases.
24. The Applicant argues that this court has jurisdiction to determine this Application under Article 163 (a)(b) of [the Constitution](#) which states:-
 - (3) 3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
25. He argues that the high court has the power to hear virtually any claim arising under the law except those in the exclusive jurisdiction of other courts as per clause 5.
26. It is the applicant's argument that the blanket application of s. 8 (2) of the [Sexual Offences Act](#)'s provision for a mandatory life sentence amounts to violation of the fundamental right to a fair trial because an accused person found guilty of an offence ought to be given the sentence that is appropriate in the circumstances of the offence.
27. Applicant herein was sentenced to serve a mandatory life sentence on 30th October 2013. He has served 9 years since conviction and as a means of rehabilitation has been trained in carpentry and Joinery and obtained Grade one certificate. He has also become a model prisoner to the extent that he has been granted the trustee position in prison. The officer in charge Nakuru Main Prison by his letter dated 16th June 2021 has vouched for the Applicant's good conduct. The Applicant has expressed remorse and has been rehabilitated and prepared himself for life outside prison.
28. I have carefully considered the submissions by the applicant. It is evident that although he intended to file a petition, a constitutional petition but when the file was taken for registration, the registry personnel cancelled the word petition and replaced it with miscellaneous turning his petition into something called "Criminal Misc".



29. I draw this conclusion from the fact that his submissions is not just about reviewing of the sentence – but about the fact that the sentence meted to him was meted to him as a mandatory minimum sentence wherein lies the violation of his right to a fair hearing.

30. That it is the nature of the violation that gives this court jurisdiction to hear and determine his petition as per the provisions of Article 165(3) (b) of *the Constitution*. In this I find the words in *Nakusa vs. Tororei & 2 Others (No. 2)* Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 (HCK) illuminating. The Court held that:

“The matter before us is of considerable importance. The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret *the Constitution* and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system... In interpreting *the Constitution*, the Court must uphold and give effect to the letter and spirit of *the Constitution*, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trends. The point demonstrated in the judgement of Dominic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003 is that interpretation of *the Constitution* has to be progressive and in the words of Prof M V Plyee in his book, *Constitutions of the World*: “The Courts are not to give traditional meaning to the words and phrases of *the Constitution* as they stood at the time *the Constitution* was framed but to give broader connotation to such words and connotation in the context of the changing needs of time.”...In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right... In the case of *Patel vs. Attorney General* [1968] ZLR 99 the Zambian High Court opined that the Court should lean on the construction that favoured the applicant rather than that which favoured the state. In the American case of *Gran vs. US* 77 LLaw Ed 212 cited in *Patel vs. Attorney General* (supra) it was held that “the provisions of the Bill of Rights are to be broadly construed” so that they may be protected against gradual encroachment that seeks to deprive them of their effectiveness.

31. From the many Judgments from both this court and the Court of Appeal regarding the mandatory nature of sentences imposed under the *sexual offences Act* and the unconstitutionality of the mandatory nature of those sentences it is evident that there is prejudice suffered by persons who are found guilty of committing these offences, in varying degrees and then subjected to a blanket sentence, irrespective of the circumstances of the offence or the offender, and sometimes even the victim.

32. The applicant has set out his mitigation within his submissions to show that in the time he has been in custody he has reformed. He has also referred the court to the guiding mitigating factors as set out in Muruatetu 1.

- i. Age of the offender;
- ii. Being a first offender;
- iii. Whether the offender pleaded guilty;



- iv. Character and record of the offender;
- v. Commission of the offence in response to gender – based violence;
- vi. Remorsefulness of the offender;
- vii. The possibility of reform and social re-adaptation of the offender;
- viii. Any other factor that the court considers relevant.

33. However, this court cannot lose sight of the fact that the petitioner was charged with defilement that the victim was 8 years old at that time – and that he was found guilty and convicted of the same.

34. Hence in my view, he deserved a stiff penalty so that it would not only serve as a punishment, and a deterrent but also keep him away from society for the safety of young girls like the victim herein, and others who may be tempted to do as he did.

35. In that regard imprisonment is supposed to have an impact on the life of the prisoner. It is expected that there are effective programs to not only punish the offender but also reform the offender and send him on his way back to society to lead a productive crime free life. In this case there is evidence of progressive reformation of the applicant and I am persuaded that his petition is merited.

36. In the circumstances the term of life imprisonment is set aside and substituted with a term of 30 years' imprisonment to be served from the date he was first held in remand custody 4th October 2011.

37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF MAY 2023.

MUMBUA T MATHEKA

JUDGE

M/s Murunga for the state

Applicant appears in person.

