



Merikol v Republic (Petition 10 of 2018) [2023] KEHC 18783 (KLR) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 10 OF 2018
RN NYAKUNDI, J
JUNE 12, 2023**

BETWEEN

PETER MERU MERIKOL PETITIONER

AND

REPUBLIC RESPONDENT

(Being an application seeking for sentence review against the sentence in Iten Chief Magistrate's Criminal Case No.891 of 2009)

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

1. The petitioner was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 16th day of October 2009 at about 8.00 am he caused his penis to penetrate the vagina of VCK, a child aged 6 years. The appellant was convicted and sentenced to life imprisonment. He lodged an appeal against the conviction and sentence and the same was dismissed and his conviction and sentence was upheld.
2. The petitioner filed an appeal in the high court in High Court Criminal Appeal No. 200 of 2010 and upon considering the grounds and the submissions of the parties, the appeal was dismissed on January 24, 2013.
3. The petitioner then instituted the present petition vide an application dated July 24, 2018 seeking that his sentence be reviewed. The application was premised on the grounds set out in the supporting affidavit and the contents of the submissions filed in support of the same.
4. It is the petitioner's case that the sentence meted was harsh considering that he was a first offender. Further, that he is remorseful, repentant and reformed as he has learned some lessons in prison. He urged that he has undergone rehabilitation in prison and attained various certificates which he intends to use to earn a living. He cited the case of Muruatetu and contended that in the same light that the



mandatory death sentence was declared unconstitutional, mandatory life sentence under the *Sexual Offences Act* be declared unconstitutional. The petitioner cited the cases of Petition E017 of 2021, *Phillip Muere Maingi & 5 others vs DPP and Attorney General* and Petition 97 of 2021 in support of his submission that his mandatory life sentence be reviewed. He urged that the court allow his petition.

5. The respondent did not file any submissions in response.

Whether the sentence of the appellant should be reviewed

6. Article 50(2)(p) provides as follows;

(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;

7. The emerging jurisprudence on mandatory minimum sentences is that mandatory minimum sentences are unconstitutional. In Mombasa High Court Constitutional Petition No. 97 of 2021 – *Edwin Wachira and 9 others vs Republic*, Hon. Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

8. In *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

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. (Emphasis mine)

9. In the premises, this court can consider the mitigation of the petitioner as there is now a provision for a lesser punishment for the offence he was convicted of, that was not available at the time of sentencing. I have considered the submissions of the petitioner and his mitigation and in light of the emerging jurisprudence, it is my view that a life sentence was harsh and excessive. There is a need to move towards determinate sentences for offences where a life sentence is prescribed. In the premises, I hereby substitute the sentence of life imprisonment in lieu of 40-years custodial sentence to be calculated from the date the petitioner was arraigned in court for plea and subsequent trial.

DELIVERED, DATED AND SIGNED AT ELDORET ON THE 12TH DAY OF JUNE 2023

In the Presence of:

Accused Present



Mugun for the State

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R. NYAKUNDI

JUDGE

