



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbulele v Republic (Criminal Petition E005 of 2022)  
[2023] KEHC 20034 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20034 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL PETITION E005 OF 2022  
WM MUSYOKA, J  
JULY 17, 2023**

**BETWEEN**

**ERICK MAINA MBULELE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. I am determining this matter without having the benefit of the original records from the trial and appellate courts. Efforts to locate these files from the Kisumu Court of Appeal court registry and the Busia High Court registry, where the appeals were filed, have proved futile. However, I have a copy of the complete record of the typed proceedings and judgment of the trial court in Busia CMCCRC No 823 of 2010, and a photocopy of the judgment in Busia HCCRA No 87 of 2011. There is some evidence that an appeal was filed at the Court of Appeal, in Kisumu CACRA No 64 of 2014, but I do not have, before me, a copy of the judgment of that court, if at all the appeal lodged there was determined. All I have is an averment by the petitioner, that his appeal, at the Court of Appeal, was not successful.
2. The petition and application, dated July 13, 2022, principally seek re-sentencing. The petitioner had been convicted, in Busia CMCCRC No 823 of 2010, of defilement of a minor of 6 years, contrary to section 8(1)(2) of the *Sexual Offences Act*, No 3 of 2006, which attracts, upon conviction, a penalty of mandatory life imprisonment, and the trial court had imposed that sentence, on August 22, 2011. His appeals, to the High Court and Court of Appeal, against both conviction and sentence, were not successful.
3. The application, no doubt, rides on the decision in *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle that all mandatory sentences were unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been



imposed, with a view to revising or reviewing them. The Supreme Court has since re-visited the issue, in *Francis Karioko Muruatetu & another vs Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision in *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was of application only in murder cases, and not any other.

4. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of the *Constitution* of Kenya of 2010. The offence, that the petitioner was convicted in respect of, attracts a mandatory sentence. The principle laid out in *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), declaring mandatory sentences unconstitutional, was restated and reiterated in *Philip Mueke Maingi & others vs Director of Public Prosecutions & another* Machakos HC Petition No E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others vs Republic Mombasa* HC Petition No 97 of 2021 (Mativo, J) with respect to offences under the *Sexual Offences Act*. I will be guided by the above decisions in the review that I am just about to undertake.
5. As mandatory sentences have been pronounced unjust and unconstitutional, by the High Court, Court of Appeal and the Supreme Court, it then stands that the sentence imposed on the petitioner herein is no longer tenable. I hereby set it aside.
6. Subsequent to setting aside that sentence, I have to consider the alternative sentence that I should impose. The offence of defilement of a minor of tender years is a felony, so grave that the Republic assigned to it the mandatory penalty of life in prison, to underscore how heinous and abhorrent it is. The consequences of it are a lifetime of trauma for the minor victim. A deterrence sentence is called for, and imprisonment would be the most ideal, to keep the offender away from the society, to deter him and secure the community, and to give him an opportunity to reform and to be rehabilitated. See *Julius Kitsao Manyeso vs Republic* Malindi CACRA No 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA).
7. In *Julius Kitsao Manyeso vs Republic* Malindi CACRA No 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), the appellant had defiled a minor of tender years, aged only 4½ years. The appellate court substituted the sentence of life imprisonment with a definite term of imprisonment of 40 years. In the instant case, the minor was aged 6, according to the charge sheet, dated May 17, 2010. PW2, her grandmother, produced a birth certificate, which indicated that the minor was born on November 15, 2003, which meant that she was 6 years and several months old as at May 12, 2010, when the offence was committed. The complainant was a child of tender years. Consequently, I shall, guided by *Julius Kitsao Manyeso vs Republic* Malindi CACRA No 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), hereby, impose an imprisonment sentence on the petitioner of 40 years. The time spent in custody shall be reckoned in the calculation of sentence. Plea was taken on May 17, 2010. He was convicted and sentenced on August 22, 2011. Although the petitioner had been granted bond, he never got to process it, and he remained in remand custody throughout his trial. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 17<sup>TH</sup> DAY OF JULY 2023**

**WM MUSYOKA**

**JUDGE**

**Mr. Arthur Etyang, Court Assistant.**



**Appearances**

**Erick Maina Mbulele, the petitioner, in person.**

**Mrs. Chekonga, instructed by the Director of Public Prosecutions, for the respondent.**

