



REPUBLIC OF KENYA



**Andasa v Republic (Criminal Petition E006 of 2023)
[2023] KEHC 22557 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E006 OF 2023
RE ABURILI, J
SEPTEMBER 20, 2023**

BETWEEN

JECONIA MALAWA ANDASA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein Jeconia Malawa Andisa moved this court *vide* a Petition dated 12.5.2023 seeking for orders of resentencing pursuant to the decision delivered by the High Court sitting at Machakos in Petition E017 of 2021, *Maingi & 5 Others v Director of Public Prosecutions & Another* (2022) KEHC (13118) KLR.
2. The Petitioner was convicted for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* 2006. Thereafter the trial court sentenced him to life imprisonment. This was *vide* Winam SPM SO Case NO. 1510 of 2014.
3. It was the Petitioner's case that he had appealed to the High Court in Criminal Appeal No. 55 of 2016 at Kisumu but the said appeal was dismissed. The petitioner further averred that the mandatory nature of his sentence subjected him to blind affliction.

The Petitioner's Submissions

4. The Petitioner submitted relying on the Maingi supra case submitted that the mandatory sentence imposed on him violated Article 27 of the *Constitution* and was discriminatory to the offender.
5. He argued that he was arrested at the age of 47 years and having served 6 years to date was 53 years old. He further submitted that following his arrest his family had disintegrated as he could not cater to them and that subsequently, his wife had deserted the children who had been forced to fend for themselves.



6. It was further submitted that his health had drastically derailed and deteriorated as he suffered from a chronic skin allergy and chest complication.
7. The petitioner further submitted that he was remorseful and reformed as at the time he had served behind bars he had learnt how to be a good citizen through the life skills activities that he had gained during his stay in prison.
8. It was his submission that he had maintained disciplinary measures during his incarceration and further that he had undergone numerous transformational programmes such as Grade III in Carpentry and Journey Sponsored by (NITA), Series of Bible Students and Health Education amongst other testimonials.

The Respondent's Submissions

9. It was submitted that there was overwhelming evidence against the petitioner in this matter and that the respondent proved its case beyond reasonable doubt. Further, the respondent submitted that there were no inconsistencies in the prosecution's case and that all the ingredients of the offence of defilement were proved.
10. The respondent submitted that the sentence meted out on the petitioner was lawful considering the seriousness of the offence that involved a complainant who was 3 years old. Reliance was placed on the cases of *Maingi & 5 Others v Director of Public Prosecutions & Another* [2022] KEHC 13118 and the Court of Appeal decision in the case of *Joshua Gichuki Mwangi v R* Nyeri Criminal Appeal No. 84 of 2015 which the respondent interpreted that in both instances, the courts upheld the mandatory nature of sentences in the *Sexual Offences Act*.

Analysis & Determination

11. I have carefully considered the Petition, submissions and the decisions referred to. There is only one issue for determination in this petition for resentencing and that is, whether this court should review the sentence passed on the petitioner herein.
12. The *Sexual Offences Act* is an Act of Parliament to make provision for offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes. It is a law which generally, and in equal measure, applies to everyone in Kenya facing charges under that law.
13. It can only be the position that the sentence for one charged and convicted under Section 8(1) as read with 8(2) of the *Sexual Offences Act* is life imprisonment.
14. The case against the petitioner herein was that he defiled a child aged three and a half years. The trial court convicted and sentenced the petitioner to life imprisonment in accordance with Section 8 (1) s read with section 8(2) of the *Sexual Offences Act*. It was also evident that the petitioner herein appealed to this court *vide* High Court Criminal Appeal No. 55 of 2016 which appeal was dismissed by D.S. Majanja (J) on the 28.3.2016.
15. Sentencing is at the discretion of the trial court and thus cannot be interfered with unless it is shown that the Court imposed an illegal sentence.
16. Notably, the Petitioner was not sentenced to death thus rendering the case of *Francis Karioko Muruatetu and Another vs Republic* Petition No 15 of 2015 inapplicable, following the clarification by the Supreme Court in the Muruatetu II case.



17. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under *Sexual Offences Act*. It observed as follows: -
- “ [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”
18. Having said so, this Court is alive to the Supreme Court’s decision in Petition No. 15 & 16 of 2016 *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR where the apex Court declared the mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* as unconstitutional to the extent that it deprived a convicted person the opportunity to mitigate and curtailed the discretion of the trial court in sentencing having regard to the circumstances of each case.
19. That notwithstanding, on 6th July 2021, the Supreme Court clarified the principles espoused in the case of *Francis Karioko Muruatetu & Another v Republic* [2021], that the decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*.
20. The petitioner herein anchored his petition on the Maingi supra case wherein Odunga J (as he then was) held that the mandatory minimum sentences under the *Sexual Offences Act* are unconstitutional and that there was a need for legislative amendments to the *Sexual Offences Act*.
21. On its part, the respondent submitted that the sentence meted out on the applicant was lawful and relied on the Maingi case as well as the *Joshua Gichuki Mwangi supra* stating that the said cases upheld the mandatory nature of sentences in the *Sexual Offences Act*.
22. I must add that in the instant circumstances, the petitioner correctly interpreted the Court’s holding in the Maingi case.
23. In the case of *Julius Kitsao Manyeso v Republic*, Criminal Appeal No. 12 of 2021, the Court of Appeal sitting in Malindi, in an appeal where the appellant had similarly been charged with defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*, the Court found that the sentence of life imprisonment was unconstitutional and that thus they had the discretion to interfere with the said sentence.
24. Guided by the Court of Appeal’s decision in the *Julius Kitaso Manyeso*, this Court similarly finds and holds that it has discretion to interfere with mandatory sentence of life imprisonment imposed on the petitioner who has now served six years in prison and appears reformed.
25. In his mitigation, before the trial court, the petitioner urged the trial magistrate to look at both sides of the case and further that the property he had left at home was being destroyed. The petitioner has similarly pleaded in mitigation before this court that he has reformed and gained skills that would help him reintegrate into the society. He has from the certificates and testimonials filed in court, undertaken several biblical studies that have changed his life and the Prisons authorities vide their recommendation letter dated 29/12/2021 state that he had remarkably reformed through the Prisons rehabilitation



programmes. That his character and discipline were exemplary and he was ready for reintegration into the society

26. This court is alive to the fact that the petitioner was convicted for defiling a child of 3 ½ years and of the likely ramifications of his actions on the child's future. I am therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence.
27. Taking into account all the above, I allow this petition for resentencing, set aside the sentence of life imprisonment imposed on the petitioner and substitute therefor a sentence of thirty five (35) years in prison to run from the date of his arrest on 16/10/2014 taking into account the time spent in custody before conviction as he was not on bond during the trial.
28. This file is closed.
29. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2023

R.E. ABURILI

JUDGE

