



**Bett v Director of Public Prosecution (Criminal Miscellaneous Application  
E121 of 2021) [2023] KEHC 22432 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22432 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL MISCELLANEOUS APPLICATION E121 OF 2021  
SM MOHOCHI, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**ROBERT KIPNGETICH BETT ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant, Robert Kipngetich Bett through an undated application moved this Court for sentence rehearing.
2. The facts as contained in the application indicate that the applicant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Nakuru CM Court Criminal Case No. 591 of 2016. Thereafter, he lodged an appeal at Nakuru High Court against both sentence and conviction through Criminal Appeal No. 30 of 2017 but it was dismissed on November 19, 2018.
3. The Applicant now seeks a review of the sentence imposed by the CM Court. He argues that this court is bound by the decision of the Supreme Court of *Francis Karioko Muruatetu & another vs 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 article 165 of the *Constitution*.
4. He further averred that the court in Petition No. E017 of 2021 *Philip Mueke Maingi & others v Republic*, held that those convicted of the 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.
5. The Applicant contended that this court in resentencing will be discharging its constitutional obligation pursuant to article 20(3), (a) and (b) of *the Constitution*.



6. The Respondent did not file any response to the application.
7. The matter was heard on June 12, 2023. The applicant pleaded for forgiveness and prayed that the court considers a lighter sentence to enable him sensitize other people not to commit crimes.
8. He told court that, he is reformed and has earned certificate in religion and carpentry and shall train others.
9. The Respondent left the matter to the court's discretion.

### **Analysis & Determination**

10. The only issue that arises for determination is whether the Applicant's plea for resentencing is merited.
11. In this case the applicant was charged under section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The said provisions states:

“ 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.”

12. The Applicant was, not sentenced to serve life imprisonment but was sentenced to 20 years' imprisonment on March 13, 2017. He appealed against both conviction and sentence and Ngugi J on November 19, 2018 dismissed his entire Appeal.
13. The issue of mandatory sentences was addressed in [Francis Karioko Muruatetu & others v 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.”

14. In clarifying the import case of its earlier decision, in [Muruatetu](#) 2 the Supreme Court gave the following guidelines:

- “ 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
  - i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.



- ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
- iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
- iv. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
- v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code as well as those of the victim before deciding on the suitable sentence.
- vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
  - a. Age of the offender
  - b. Being a first offender
  - c. Whether the offender pleaded guilty.
  - d. Character and record of the offender
  - e. Commission of the offence in respect of gender based violence.
  - f. The manner in which the offence was committed on the victim.
  - g. The physical and psychological effect of the offence on the victim's family.
  - h. Remorsefulness of the offender.
  - i. Possibility of reform and social adaptation of the offender.
  - j. Any other factor the court considers relevant.
  - k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
  - l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences



imposed under section 204 of the Penal Code before the decision in Muruatetu.

15. In light of the fact that there is no pending appeal before any court in regards to this matter and of the directions under paragraph (iii), (vi)& (viii) I am of the opinion that this court is clothed with jurisdiction to determine this application.
16. 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.
17. For instance, in *Jared Koita Injiri v 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 v 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.”
18. The 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* is unconstitutional as it denies the court discretion in sentencing.
19. Odunga J (as he then was), in *Philip Mueke Mainigi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;

“Taking cue from the decision in Francis Karioko Muruatetu directed 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 are at liberty to petition the High Court for orders of resentencing in appropriate cases.”
20. In the case of *Fappyton Mutuku Ngui v Republic* [2019] eKLR the court directed the trial court to rehear the Applicant’s sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.
21. 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.



22. 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 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...”

23. From the foregoing, it is indeed correct to state 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.

24. In this case the trial magistrate stated that she had considered the mitigation of the accused person but proceeded to sentence him as per section 8(3) of the Sexual Offences Act which provides for the minimum sentence of 20 years. It is apparent therefore to reasonably presume that the trial magistrate proceeded on the footing that her hands were tied by the minimum sentence and failed to exercise discretion in sentencing. On this finding the appeal on sentence must succeed.

25. The Appellant in mitigation told court that

“I ask for leniency of the court. I am 19 years old.”

26. I have considered the above mitigation and also the fact there was no evidence that the Appellant was a repeat offender.

27. I have also taken into account the rehabilitative programmes undertaken by the Applicant while in prison.

28. I have referred to other authorities on similar cases of defilement. For instance, in *DS v Republic* [2022] eKLR the court dealt with an accused who had been convicted for defiling a girl aged 15 years. The court revised the sentence downwards from 20 years to 15 years’ imprisonment.

29. Another example is *Republic v Nicholas Wambogo* [2022] eKLR where the appellant had been sentenced to three (3) years imprisonment for defiling a 14-year-old girl. The State appealed against the sentence and the High Court revised the sentence upwards to 15 years’ imprisonment.

30. It is thus apparent that the trend has been to mete out sentences less than the “mandatory” sentence, unless there are aggravating circumstances. In this case there were none, in my opinion. Therefore, I proceed to order that the sentence of 20 years imposed by the lower court on March 13, 2017 is hereby set aside and substituted with a sentence of 15 years which will run from the date the applicant was first remanded in lawful custody i.e. February 29, 2016.

**SIGNED, DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> SEPTEMBER, 2023**



**MOHOCHI S.M**

**JUDGE**

In the presence of: -

