



**Biwott v Republic (Criminal Petition 25 of 2020)
[2024] KEHC 13575 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 25 OF 2020
JRA WANANDA, J
NOVEMBER 6, 2024**

BETWEEN

DAVID KIBET BIWOTT PETITIONER

AND

REPUBLIC RESPONDENT

(Eldoret High Court Criminal Appeal No. 66 of 2018. Judgment delivered on 23/04/2019 by Majanja J. Sexual Offences Act in Eldoret Chief Magistrate's Criminal Case No. 4333 of 2012.)

JUDGMENT

1. The Petitioner has approached this Court vide the Notice of Motion dated 14/02/2020 seeking a resentencing hearing. 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* in Eldoret Chief Magistrate's Criminal Case No. 4333 of 2012. He was convicted of the offence and sentenced to life imprisonment on 02/05/2013.
2. Dissatisfied with the sentence and conviction, the Petitioner lodged an Appeal in this Court, namely, Eldoret High Court Criminal Appeal No. 66 of 2018. The Appeal was heard and dismissed in its entirety vide the Judgment delivered on 23/04/2019 by Majanja J.
3. The Petitioner has now returned to this same Court with the present Petition challenging the constitutionality of the sentence of life imprisonment and has urged this Court to substitute the sentence with an appropriate one, as per the findings in the case of Francis Karioko Muruatetu & Anor vs Republic (Supreme Court Petition No. 15 of 2015).
4. The Petitioner, in his Submissions filed on 20/09/2023 submitted that he only seeks to mitigate his sentence under the provisions of Articles 50(2)(q) of the *Constitution*, that mandatory sentences are unconstitutional and a threat to the doctrine of separation of powers, that where the legislature has legal access to undertake and discharge judicial functions of the Judiciary, there can be no more threat to the doctrine of separation of powers and the independence of the Judiciary than that. He cited



Civil Application No. 11 of 2016 Kalpana H, Rawal & 2 Others v Judicial Service Commission & 3 Others [2016] eKLR and the case of Wilfred Manthi Musyoka v Machakos county Assembly & 4 others [2018] eKLR. He submitted further that in his separation of powers theory works, *The Spirit of the Laws* (1948), Montesquieu addressed this eternal mischief of abuse of power by those to whom it is entrusted.

5. The Petitioner submitted that the principle of separation of powers is reflected in our Constitution at Article 1 and also cited other jurisdictions that appreciate the need of judges to exercise their discretionary powers in sentencing. He cited other foreign cases, including *S v Mchunu and Another* (AR24/11) (2012) Zakzphc 56 Kwa Zulu High Court and the case of *S v Toms* 1990 (2) SA 802 (A) AT 806(L)-807(B) the South African Court of Appeal. He also cited various other local cases such as *Machakos Petition E017 of 2021 – Philip Mueke Maingi v DPP*, the decision of the Court of Appeal in *Dismas Wafula Kilwake v Republic* [2018] eKLR, *Evans Wanjala Wanyonyi, HCCR Appeal No. 174 of 2015, Paul Ngei vs Republic* [2019] eKLR and *Sammy Wanderi Kugotha v Republic* [2021] eKLR.
6. He also prayed that should the Court impose a custodial sentence, then regard be put on the period he spent in custody from the date of his arrest, namely, 15/10/2012 and noting that he was convicted on 2/5/2013. He cited Section 333(2) of the Criminal Procedure Code and the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.
7. In conclusion, the Petitioner submitted that while in prison, he has embraced the rehabilitative programs being offered. He named one of his achievements as having attained Kenya Certificate of Primary Education and that as such, he is ready to be productive in building the nation. He asked the Court to consider that he was convicted while aged 33 years and that he is now 42 years, that he was a first offender, and married and blessed with 2 children. He urged the Court to give him another chance to enable him assist his family.
8. The Respondent, on its part, filed its Submissions on 15/06/2023 through Senior Prosecution Counsel, Ms. Emma Okok. She submitted that under Section 8(2) of the *Sexual Offences Act*, life imprisonment is the minimum sentence provided for by law for an accused person who has been charged with defiling a child below the age of 11 years. She acknowledged that recent jurisprudence from this Court and the Court of Appeal reveal a trend whereby Courts are now moving away from imposing the minimum mandatory sentences provided for under the *Sexual Offences Act* on the ground that the same is unconstitutional. She cited the case of *Philip Mueke Maingi & 5 Others vs the Director of Public Prosecutions and the Attorney General* (High Court of Kenya at Machakos Petition No. E071 of 2021).
9. She urged that from the foregoing, it is evident that each case should be determined on its own merit during resentencing hearing. She urged further that the State, having carefully perused the proceedings of the trial Court, noted that the complainant was 10 years old at the time of the incident and therefore a child of tender years, that on the material date at around 4.p.m the child met the Petitioner on the way as she was going to check on their cow, that the Petitioner, who was a neighbour of the child's family, pulled her by the hand, dragged her towards a nearby maize garden, removed her underpants and defiled her. According to Counsel, the Petitioner, being a neighbour to the child and an adult, abused the trust bestowed upon him by society and instead of protecting the child, he turned out to be her tormentor. She added that the incident caused the child psychological trauma and distress.
10. She submitted that retribution and deterrence are some of the objectives of sentencing, and that taking into account the evidence adduced and the circumstances of the case, the sentence of life imprisonment meted out on the Petitioner was a sufficient and deterrent sentence. She urged this Court not to interfere with the same, and find that the Petition lacks merit.



Determination

11. The issue for determination herein is “whether this Court should substitute the sentence of life imprisonment imposed by the trial Court with a determinant one”
12. Section 8(2) of the [Sexual Offences Act](#) provides as follows:

“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.”
13. Section 8(2) above therefore prescribes only one mandatory sentence – life imprisonment. In view of the above, it is clear that the sentence imposed by the trial Court was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory or minimum sentences should now be discouraged and that Courts should retain the discretion to depart from such mandatory sentences. In connection to this issue, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

“(66) It is not in dispute that article 26(3) of the [Constitution](#) permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the [Constitution](#) must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”
14. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report thereon.
15. On the strength of the Muruatetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others v [Director of Public Prosecutions & another \(Petition E017 of 2021\)](#) [2022] KEHC 13118 (KLR).
16. However, by the clarification made by the same Supreme Court in its subsequent directions given in [Muruatetu & Another v Republic; Katiba Institute & 4 others \(Amicus Curiae\) \(Petition 15 & 16 of 2015\)](#) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

“7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while



the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.

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10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

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Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.

11.

We therefore reiterate that this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

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14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

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18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

- i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

.....”



17. Recently, just about 3 months ago, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on the Appellant, the Supreme Court stated as follows:

52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

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57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

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61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed.

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62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

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68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

18. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of life imprisonment on the basis that the



same, being a mandatory sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

19. It is also true that the constitutionality of the life sentence has also now been questioned. In dealing with a matter where, as herein, the Appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, the Court of Appeal, in the case of *Manyeso vs Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), stated as follows:-

“... an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence ... We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”

20. However, this not being Appeal, this Court is bereft of the jurisdiction to re-open the case for the purposes of reviewing the constitutionality of the sentence of life imprisonment.

21. Further, as aforesaid, the Petitioner had already filed an Appeal to this Court, namely, Eldoret High Court Criminal Appeal No. 66 of 2018. The Appeal was on both limbs of conviction and sentence and the same was dismissed by Majanja J on 23/04/2019. On the issue of sentence, Majanja J stated as follows:

“ 12. The age of a child is a question of fact. There is no doubt that PW 2 was below the age of 18 years. Her birth certificate was produced and even though it was prepared during the proceedings, PW 3 was clear that PW 2 was born on 30th April 2002. She was aged below 11 years and such, the trial court was mandated to pass the sentence of life imprisonment under section 8(2) of the Act. The sentence was therefore within the law.

13. I affirm the conviction and sentence. The appeal is dismissed.”

22. This same High Court having already made a conclusive finding that the sentence of life imprisonment was lawful, what the Petitioner is inviting this Court to do is to interfere with the sentence already affirmed by this very Court, an action that is untenable in law. A High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction. This Court is now functus officio. I echo the words of Kiarie Waeru Kiarie J made in the case of *Joseph Maburu alias Ayub vs Republic* [2019] eKLR, in which he stated the following:

“Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black’s Law Dictionary Tenth (10th) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting



a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”

23. I also cite the decision of L. Njuguna J in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR, where, faced with a similar situation, she held as follows:

“However, as I have noted, the Petitioner herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (See Section 362-364 of the Criminal Procedure Code).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn’t have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

24. In view of the foregoing, it is evident that Petitioner’s recourse was to move to the Court of Appeal, not to return to this Court to seek a review in disguise. The upshot of the foregoing is the conclusion that this Court lacks the jurisdiction to entertain the present Petition.
25. For the said reasons, the issue of the proviso to Section 333(2) of the Criminal Procedure Code which requires that the period spent in custody during a criminal trial, before sentencing, be taken into account when computing sentence, does also not arise.

Final Order

26. In the premises, this Petition is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024.

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Okaka for the State

Petitioner present

Court Assistant: Brian Kimathi

