



**Mutwiri v Republic (Criminal Revision E217 of 2024)
[2024] KEHC 15667 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL REVISION E217 OF 2024
HM NYAGA, J
DECEMBER 5, 2024**

BETWEEN

HARUN MUTWIRI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a petition dated 15/07/2024 the Applicant has moved the court for the following orders:-
 - a. That a declaration be made under the provisions of Article 27, 23(3)(d) of the Constitution that Section 8(2) of the Sexual Offences Act are unconstitutional to the extent that they provide for the mandatory life imprisonment sentence to accused persons convicted of Defilement which infringes the inherent right of every accused person to a fair trial as envisaged under article 25(c) of the constitution.
 - b. That this honourable court be pleased to issue a declaration that the minimum – maximum sentencing provisions under the sexual offences act are unconstitutional in so far as they infringe on the inherent right of every accused person to have his/her mitigating factors considered as envisaged under Article 50(2) of the Constitution as read with section 216 and Section 329 of the Criminal Procedure Code.
 - c. That a declaration be made subject to prayer No. 1, 2 and 3 that the Applicant herein be remitted back to the trial court for rehearing on sentence only so that my mitigating factors can be considered and appropriate sentence awarded.
2. The Applicant’s case is that he was charged in Maua Chief Magistrate’s Court in Criminal Case No. 3615 of 2007 with the offence of defilement, contrary to Section 8(1) and 8(2) of the Sexual Offences Act. That he was duly convicted and sentenced to twenty (20) years imprisonment.



3. That he preferred an appeal to the High Court *vide* Criminal Appeal No. 106 of 2010 whereby the sentence of the lower court was set aside and he was sentenced to life imprisonment. His second appeal to the court of appeal was dismissed.
4. The Applicant states that he has approached the court following the directive of the supreme court in the second *Muruatetu* case that all other Applicants facing mandatory sentences including offences under the sexual offences Act approach the High Court and seek similar declaration as those in *Muruatetu* (Supra).
5. The Applicant argues that the *Sexual Offences Acts* provision for a mandatory life sentence under Section 8(2) thereof fails to conform to the tenets of a fair trial that accrue to accused persons under article 25(c) of the *Constitution*.
6. It is further argued that Section 8(2) of the *Sexual Offences Act*, deprives the court the use of judicial discretion as provided under Sections 218 and 329 of the *Criminal Procedure Code*.
7. It is further argued that mandatory minimum sentences are unjust and unfair as they deny the court the discretion impose appropriate sentences as it deems fit.
8. Lastly it is argued that failing to take mitigation factors into consideration offends the right to equal protection and benefit of the law under Article 27(1) of the *Constitution*.
9. The Applicant sought reliance on the following cases;
 1. *Francis Karioko Muruatetu & Anor Vs Republic* in Petition No. 15 & 16 (consolidated) of 2015 at the Supreme Court of Kenya.
 2. *Philip Mueke Maingi & 5 Others Vs DPP* in Petition No. e017 of 2021 at Machakos High Court.
 3. *Francis Musyoka Nzau Vs Republic* in Petition No. E027 of 2022 at Meru High Court.
 4. *Hassan Mutwiri Vs Republic* in Petition No. E015 of 2022 at Meru High Court.
 5. *Julius Kiunga Mbirithia Vs Republic* in Cr. Petition No. e027 of 2023 at Meru High Court.
10. In response to the Application the Respondent stated that the Applicant has approached this court for a revision of the sentence. That following the decision in *Julius Kitsao Manyeso Vs Republic* (2020) eKLR indeterminate life sentences were found to be unconstitutional.
11. The Respondent thus proposed that the life sentence be substituted with a prison term of thirty (30) years.

Analysis And Determination

12. The issues raised in this application/petition are not new. Ever since the decision in *Francis Muraretetu* (Supra) other superior courts have applied the ratio decidendi in the case to other offences other than murder. These include the decisions cited by the Applicant.
13. The question to be answered is whether this court has jurisdiction to entertain this application.
14. In the famous case of *The owners of Motor Vessel Lilian S vs Caltex Oil (K) Ltd* (1989) KLR 1, the court had this to state on the question of jurisdiction;

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of



proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction.”

15. I have considered the matter. It is not in doubt that the accused was charged under the [Sexual Offences Act](#), 2006. The Trial Court sentenced him to life imprisonment. The Applicant’s appeal to this court was dismissed as was his appeal to the Court of Appeal.
16. In the case of [Republic Vs Joshua Gichuki Mwangi](#) (2024) KESC the Supreme Court was deliberate in settling the record straight in regards to the re-sentencing for other offences other than murder. The court hold as follows;

“

“(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the *Muruatetu* Case to other statutes prescribing mandatory or minimum sentences as follows;

“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:

“[48] 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 SC Petition No. E018 of 2023 26 regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of the *Constitution*; an absolute right”.

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.”

17. The ratio decidendi in the decision was summarized as follows:

66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.



"69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

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." (my own emphasis)

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.

To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases." [Emphasis ours]"

18. In light of the above, it is clear that the Supreme Court has ruled out the application of the principles in both *Muruatetu 1* and *Muruatetu 2* to any other offences other than murder.
19. It is well documented that several convicts had already benefited from the application of the two decisions mutatis mutandis to other offences including robbery with violence and defilement. That has now been halted by the last decision of the Supreme Court.
20. This is a case under the *Sexual Offences Act*, which provides for minimum sentences in some instances. The Act thus gives the discretion to the court to impose sentences which are higher than the minimum.
21. The issue of the sentence imposed was fully exhausted an appeal. The second appeal was dismissed as well.
22. I find that having been before the superior courts as set out above this court, even as a Constitutional Court, lacks jurisdiction to address the question of sentence again.
23. Perhaps once the Supreme Court has expressed itself on the application of the principles in *Muruatetu* in respect to the other offences then the applicant can come back to court.
24. The decision *Republic Vs Joshua Gichuki Mwangi* (*supra*) is binding on this court and as such I hold that this court is bereft of the necessary jurisdiction to determine this matter.
25. This application is thus dismissed.
26. The Applicant should continue to serve his sentence and await any further directions that may be given by the Supreme Court.

DATED, SIGNED & DELIVERED IN OPEN COURT AT MERU THIS 5TH DAY OF DECEMBER, 2024.

H.M. NYAGA



JUDGE

In the presence of:

