



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 60 OF 2020**

**BENSON ABUCHI.....PETITIONER**

**VERSUS**

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

**JUDGEMENT ON RESENTENCING**

1. The Petitioner herein **Benson Abuchi** was charged with the Offence of defilement contrary to section 8 [1] as read with section 8 [4] of the Sexual Offences Act at the Senior Residents Magistrate court in Kwale SO Case No 682 of 2016.
2. The particulars were that, on 3/7/2016 at [particulars withheld] Village in Shimoni Sub-Location within Kwale County he intentionally and unlawfully caused his penis to penetrate the vagina of M K a child aged 16 years. He was sentenced to 25 years imprisonment. His appeal to the High Court was dismissed vide a judgement delivered on 24/3/2019.
3. The Petitioner is now in this court for resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.
4. In his submissions filed before this court the Petitioner avers that the petition before the court is brought under the provisions of Article 50[2] of the Constitution. The Petitioner avers that the 25-year sentence was de- humanizing and degrading and against the objectives of the Judiciary Sentencing Policy Guidelines 2016; that the sentence was unconstitutional and excessive and the same ought to be reduced to 10 years.
5. The Respondent opposed the petition. It was submitted that the 25-year sentence was sufficient in comparison to the offence; that the Petitioner was the victim's grandfather and it was in the interest of the public that a deterrent sentence be meted upon the Petitioner to prevent the commission of this offence by other people in the society.
6. The threshold of resentencing applications with regards to sentences couched in mandatory terms was recently revised by the Supreme Court on 6/7/2021 where the apex Court restricted the application of Muruatetu case to sentences in murder cases only. The Supreme Court has reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, thus: -

***“[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.***

***[15] 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.”***

7. It is clear that this petition falls short of the threshold in resentencing guidelines on matters with mandatory sentences as per the Muruatetu Case guidelines, and on which Muruatetu case, the Petitioner herein based his application. This court is therefore *functus officio* and hence the petition is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER, 2021.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Ms. Peris Court Assistant