



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CONSTITUTIONAL PETITION NO. 03 OF 2018**

**THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF THE ARTICLE 22 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLE 223 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23,24, 25, 26, 27, 28, 48, 50, 258 AND 259 OF THE CONSTITUTION**

**BETWEEN**

**JOHN MALUSI TUNDU..... PETITIONER**

**-VERSUS-**

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

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mwangi for the state**

**Petitioner in person**

**R U L I N G**

The petitioner in this case was tried and convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-Section (2) of the Sexual Offences Act No. 3 of 2006. Suffice it to say, the trial Court at Hola sentenced the petitioner to serve life imprisonment. It was in this respect he was aggrieved with both conviction and sentence which necessitated him to prefer an appeal to the High Court. The petitioner's appeal on both conviction and sentence was dismissed for want of merit. That dismissal triggered a further appeal to the apex Court which delivered its decision on 10.3.2017 dismiss the substance of the appeal.

In a figured petition, the petitioner has once again moved this Court to consider the matter pursuant to Article 50 (6) (a) (b) of the Constitution. The effect of the provisions is that a person who is convicted of a criminal offence may petition the High Court for a new trial if:

**(a). The person's appeal, if any, has been dismissed by the Highest Court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal, and**

**(b). New and compelling evidence has become available.**

**Determination**

Thus in Article 50 (6) (a) of the Constitution, the petitioner has exhausted his right of appeal to the highest Court of Appeal with jurisdiction on such matters. The Court dismissed his appeal for want of merit. Nevertheless, this Court has the jurisdiction to entertain the petition under Sub-Section 6 (b) of the aforesaid article of the Constitution on existence of new and compelling evidence which has become available.

It is therefore the question not merely whether the Court has the jurisdiction but it is exercisable only in the event of the petitioner satisfying the criterion on new and compelling evidence which was not available during the trial or in subsequent appeals to both the High Court and Court of Appeal.

From the petitioner’s submissions, he has referred the Court to the issue of age as a mitigating factor. Secondly, the petitioner has submitted on the strength of **Francis K. Muruatetu v R {2017} eKLR** principles enunciated by the Supreme Court on mandatory sentences.

Having considered the matter, the legislative intention in adopting the Sexual Offences Act was to make the epidemic of serious sexual crimes through the imposition of mandatory sentences in order to achieve general deterrence. This has been endorsed in several superior Courts decision. Another objective that can be seen from the provisions besides the key objective of deterrence relates to the eradication of the inconsistencies and disparities that are present in the sentencing process. This need for restoring consistency arises from the fact that Judges and Magistrates have always had an almost unfettered discretion in the imposition of sentences, thus resulting in open disparities for offences with similar facts.

Owing to this predominant legal position on mandatory sentences, the Supreme Court decision in **Muruatetu (supra)** of 2017, has been an oasis of discussion amongst scholars and judicial officers to address the concerns on mandatory sentences. Primarily, following the original decision by the Court other inferior Courts interpreted the Sexual Offences Act to address the difficulties associated with the mandatory sentences. The effect was to apply the principles in **Muruatetu – Mutatis and Mutandis**

Accordingly, all the way from the Court of Appeal to the Magistrates Court, there was a deviation from the imposition of mandatory sentences to give effect to the principles in **Muruatetu case (supra)** which rendered such sentences unconstitutional. In spite of that jurisprudential development, in the latest clarification by the same Apex Court in **Muruatetu case (2021)**, the Judges found that the principle is only applicable to the death penalty contrary to Section 204 of the Penal Code and to that extent no Court shall exercise discretion within the framework of **Muruatetu** to the statutory scheme of the Sexual Offences Act.

What stands out clearly is that the petitioner has no remedy under the guidelines in **Muruatetu case**, for this Court to depart from the prescribed sentence.

The escape clause or the possibility of review is on the compelling new evidence made available to this Court. The discretion under Article 50 (6) (b) of the Constitution is therefore limited and restrictive. It is clear from the petition looked at by this Court in specifics and general terms, the petitioner has failed to meet the test as provided for in the Constitution.

This Constitutional rule when applied to the facts of the petition, fails the criteria of the nature of the circumstances that can convince the Court of new and compelling evidence, that a lesser sentence would be fair and appropriate to the petitioner.

In light of this, I find no merit in the petition. It’s therefore good for dismissal for want of sufficient material and evidence for the Court to invoke Article 50 (6) (b) of the Constitution to review the sentence imposed by the trial Court and subsequently confirmed by the superior Courts as indicated in their respective Judgments.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER , 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

- 1. Mr. Mwangi for state
- 2. The Petitioner