REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 64 OF 2019

ABDALLAH KAHASO KOMBE.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION... RESPONDENT

Coram: Hon. Justice R. Nyakundi

The Petitioner

Ms. Sombo for the state

RE-SENTENCING

The Petitioner was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act. An alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act. He pleaded not guilty to all charges levelled against him. After a full trial, he was therefore convicted of the main count and sentenced to 15 years imprisonment.

It is noteworthy that at the time the Petitioner was sentenced, the 15 years imprisonment sentence was the least severe sentence or punishment prescribed by the law for the offence of defilement of a minor Section 8(4) of the SOA. The Petitioner appealed to both the High Court and subsequently, to the Court of Appeal where his appeals were dismissed, respectively.

The Petitioner has now approached this Court pursuant to the decision of **Francis Muruatetu & Another v Republic (2017) eKLR** which declared mandatory death sentence for murder and the commutation of that sentence by an administrative fiat to life imprisonment unconstitutional.

The rationale is that the mandatory nature of death sentence as provided for in section 204 of the penal code deprives judges' discretion to take into account aggravating and mitigating circumstances which enable the court to arrive to an appropriate sentence based on the peculiar circumstances of each case. Furthermore, mandatory minimum sentences were considered not to be in tandem with the tenets of fair trial that accrue to the accused person in terms of Article 25 of the Constitution of Kenya.

In **Muruatetu Case (supra),** the Supreme Court stated as follows:

> **"The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."**

The **Muruatetu Case** has necessitated re-sentencing of all persons who were previously sentenced to mandatory death sentence. In that case the court further addressed itself as follows:

> **(111) "…For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. (emphasis mine) The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.**

> **(112) (c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.**

I'm alive to the fact that pursuant to the Supreme Court's directive, the Hon. Attorney General was required to appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act and the same was done vide Gazette Notice No. 2160 dated 15th March 2018. It seems that the Supreme Court decision requires that the petitioner and all those in a similar position should wait a sentence re-hearing framework from the Attorney General and the taskforce. However, the Court of Appeal in **William Okungu Kittiny v R [2018] eKLR** expressed itself as follows;

> **"The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."**

In view of the above provisions, it is abundantly clear that this court was clothed with jurisdiction to re-hear and resentence those that were convicted with capital offences whose sentence was mandatory death sentence.

In light of the foregoing, Section 8 of the Sexual Offences Act prescribes mandatory minimum sentences for all offences of this nature, and that all the Honourable Magistrate had to do was merely to pluck out from the minimum mandatory sentence and plant it in her own judgement without regard to the individual circumstances of the case.

By prescribing mandatory sentences, the Act takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances. However, sentencing trends in defilement matters are in a state of transition. There had been a marked paradigm shift by the courts in recent years on the treatment of sentencing for this sort of crime, with fervent calls for consideration of each case by its own circumstances.

A notable development towards derogating minimum mandatory sentences was seen in **Francis Karioko Muruatetu v Republic (2017) eKLR,** where the Supreme Court of Kenya of Kenya declared the mandatory death sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void. "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 in terms of Article 25 of the Constitution, an absolute right," the Supreme Court pronounced.

Following the decision in **Muruatetu Case (Supra)** the Court of appeal extended its application to encompass matters envisaged in terms of section 8 of the SOA in the case of **Christopher Ochieng v Republic (2019) eKLR** which means that the manner in which sentencing is envisaged in the said section has been predominantly and substantially inclined to **Muruatetu decision**.

Sentencing is a notoriously problematic exercise. It is a balancing act. From time to time jurists have espoused brilliant philosophies around it. Guidelines have been developed. The legislature sometimes weighs in with mandatory minimum sentences for certain offences. There are certain basics. The penalty must fit the crime. The interests of the offender must be balanced against those of justice. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized beyond what his misdeed befits. As a matter of principle, punishment should be less retributive and more rehabilitative.

There are more such philosophies or ideologies. But at the end of the day, after everything else has been considered and said, the judicial officer comes down to the hard facts before him; to the individual circumstances of the people before him – the offender and the victim. He cannot be dogmatic about anything. There is no room for an approach that is purely mathematical. A slavish adherence to precedent is manifestly injudicious. In sentencing, the ages of the accused and the victim are relevant. The younger the victim the harsher the sentence, and the older the accused the harsher the sentence.

In passing the sentence the court will not lose sight of the pre-trial and during trial incarceration. The court is alive to the fact that prison life is not easy for the obvious infringement of dignity and freedom. I have carefully looked at the Petition, the written submission on mitigation, and the aggravating circumstances in this matter.

In aggravation, the Petitioner blind folded the complainant into believing that sexual intercourse was part of the healing process. It was an apparent betrayal of the trust that the complainant and her family had bestowed in him. The Petitioner used an unfair advantage to secure and satisfy sexual desires on the minor. This Court considers that the offence was quite an egregious act and that the same was committed against a child of tender years. In that respect there is need to protect children from sexual predators. This is because there is a high possibility that they may suffer psychic or physical injury.

In my view, the rationale is much broader. It is against morality for a man to have sexual intercourse with a child eighteen years and below. It is therefore for the preservation of society's sense of morality that the offence exists. There was no evidence of remorse by the Appellant. On the contrary, he denied any wrongdoing right up to conviction. There can be no doubt that the circumstances herein call for a much severe punishment.

The Sexual offences Act enjoined the courts to mete out severe sentences to send a strong message that society is up in arms to fight this scourge. Sentencing is supposed to take into account the individual circumstances of the accused person as well as possibility of reform and re-adaptation, public interest and the interests of the victim and her relations. Of course the courts should exercise a measure of mercy.

Taking into account the aggravating and mitigating circumstances in this case, there is need to punish as well as discouraging potential

offenders from committing similar offence. In my view the aggravating factors in the instant case outweigh the mitigating circumstances hence the situation warrants term of imprisonment. In the premise, I have no reason to interfere with the learned magistrate's sentence of 15 years imprisonment. I take the view that the sentence befits the aggravating nature of this offence.

For the avoidance of doubt, the sentence runs from the date of arrest in compliance with section 333(2) of the Criminal Procedure Code. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL, 2020

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R. NYAKUNDI

JUDGE