REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 2 OF 2018

ADHAN NASSIR.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Ms Sombo for the State

RE-SENTENCING

The petition before me was brought in terms of the Supreme Court decision in **Francis Muruatetu & Another v Republic (2017) eKLR**. It is the decision which declared the mandatory nature of death sentence unconstitutional, null and void. The commutation of the same to life imprisonment by an administrative fiat was also declared null and void in the same aforementioned decision. The Landmark decision clothed judicial officers with the discretion to mete out sentences in according to the individual circumstances of each case.

Prior to the decision in **Muruatetu (supra),** all the Honourable Magistrate or Judge had to do was merely to pluck out from the section, the prescribed minimum mandatory sentence and plant it in her own judgement without regard to the individual circumstances of the case. **Muruatetu Case** marked the beginning of a paradigm shift as far as sentencing of offenders is concerned.

It can also be said that **Muruatetu Case (Supra)** necessitated re-sentencing of all persons who were previously sentenced to a mandatory minimum 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.***
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> ***(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.

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 precedence 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.

The Petitioner was indicted, tried and convicted with Unnatural offence contrary to Section 162 (a)(ii) of the Penal Code. The particulars of the offence were that he unlawfully had carnal knowledge of a girl aged 16 years. In the second count, he was charged with stealing a Nokia mobile phone from the complainant on the same date and at the same place.

He was therefore sentenced to serve 21 years imprisonment on the first count, and 2 years on the second. He also appealed on both counts against both conviction and sentence which was dismissed for want of merit. It is indeed true that the offence created in terms of Section 16(a)(ii) of the Penal Code prescribes a minimum mandatory sentence of imprisonment for 21years. In my view, the said section has not been declared unconstitutional despite the enactment of section 8 of the Sexual offences Act. Furthermore, with the coming of the decision in **Muruatetu**, which affected sentencing in both offences created in terms of section 162 of the Penal Code as well as section 8 of the Sexual Offences Act, no prejudice will be occasioned on the Petitioner as far as his sentence is considered. This is because in both offences, sentencing is considered on the basis of the individual circumstances of each case.

In mitigation, I have considered that the Petitioner is a first offender, he is a family man who has responsibilities, that he claims to be remorseful, and that he has undergone reform programs while in prison.

In aggravation, the Petitioner's conduct reveals a high degree of moral blameworthiness. The nature of the offence traumatizes the victim physically and emotionally. There was a teacher-student relation between the Petitioner and the victim, respectively. The Petitioner abused his position of trust which is unethical. The Petitioner dominated the victim in that she followed was he said.

He forced himself on her into having sex. I have noted some degree of coercion or threatening behavior by the Petitioner influencing the girl to comply with his demands for sex. Such behavior of violence employed to acquire sexual intercourse, by any stretch of imagination should not be played down or sacrificed on the altar of the usual and ordinary mitigatory features which are now a mantra to every convicted person.

In this age the girl child requires protection from perpetrators or sexual predators like the Petitioner. This crime is shamelessly very rampant to the extent of even family members abusing the girl child. The court will not lose sight of the fact that this offence is a serious one by nature and it is beyond any reasonable imagination that non-custodial sentence is appropriate.

In light of the foregoing reasons, I find that the sentence of 21 years imprisonment from the date of arrest is not outrageous. I hereby find as such.

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

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R. NYAKUNDI

JUDGE