REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 19 OF 2019

JILO ABDALLA AKARE ……..……..…… PETITIONER

VERSUS

REPUBLIC …… RESPONDENT

Coram: Hon. Justice R. Nyakundi

The Petitioner

Ms. Sombo for the state

RULING

Before me is a re-sentencing petition brought in terms of the new jurisprudential development encapsulated in the case of **Francis Muruatetu & Another v Republic (2017) eKLR**. This was a development towards the derogation of minimum mandatory sentences. The apex court noted that in certain circumstances, minimum mandatory sentences deprives the courts of the requisite discretion to consider the aggravating and mitigating factors. This would allow the courts to mete appropriate sentences which are based on the peculiar circumstances of each case.

Prior to the decision in **Muruatetu**, courts used to listen to mitigating circumstances but has, but nevertheless proceeds to impose a set sentence. 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 section the minimum mandatory sentence and plant it in her own judgement without regard to the individual circumstances of the cases.

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.

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 overtaken by events.

The **Muruatetu Case (Supra)** 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 <u>but await appropriate guidelines for disposal of the same.</u> (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.

In mitigation, I have considered that the Petitioner is a first offender with no previous records, he claims to be remorseful, he has been in custody for approximately ten years, he believes that he has been rehabilitated and he has obtained skills like carpentry which assist him in making a living once he is discharged into the society.

In aggravation, the offence of defilement is undoubtedly heinous. The Petitioner used to send the minor to run his errands and with that she bestowed trust in him. The Petitioner was not shameful in betraying that trust by taking advantage of the trust the minor had in him to satisfy his sexual desires. The complainant

was powerless and not able to defend herself.

In this age the girl child needs to be protected hence the various instruments created to fulfill this purpose. The court is alive to the fact that this crime is shamelessly very rampant to the extent of even family members abusing girl children. The offence is serious as it has a long lasting psychological trauma on the victim and children ought to be protected from such perpetrators.

I'm of the view that pleas of being a first offender and remorseful should not be entertained or given much weight because greater interest should be on the girl's life and that if we entertain such, we are killing our society.

I have already outlined the aggravating circumstances in this petition. They are quite serious. The girl was young and school going and the Petitioner distracted her and killed her future. He was heartless and the act itself on such a young girl is phantasmagoria and too ghastly to contemplate. He does not deserve lenience. The physical and psychological harm to the victim is clearly difficult to fathom.

The sentence that befits the severity of the offence is 18 years' imprisonment from the date of arrest. It is so ordered.

14 days right of appeal.

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

R. NYAKUNDI

JUDGE