



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 24 OF 2019**

**YUSUF SHIUNZI.....PETITIONER**

**AND**

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

**JUDGMENT**

1. The Petitioner herein **Yusuf Shiunzi Kunani** was found guilty of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The particulars of the charge were that between 4/11/2012 and 7/11/2012 in Mwembe Tayari Location of the then Mombasa District unlawfully and intentionally caused his penis to penetrate the vagina of MN a child aged 16 years. The accused was convicted and sentenced to 15 years. His appeals both to the High Court (Criminal Appeal No. 143 of 2018) and to the Court of Appeal (no. 11 of 2018) were dismissed, and the conviction and sentence upheld.

2. The Petitioner is now in this Court vide the petition dated 4/6/2019 praying for the following orders:

- (a) A declaration that the mandatory minimum sentences as it is in Section 8 (1) as read with 8 (2) and (4) and 11 (1) of the Sexual Offences Act No. 3 of 2006 are inconsistent with or in contravention of Articles 50 (2), 25, 27, 28 and 29 of the constitution of Kenya 2010.
- (b) A declaration that maturing adults under the age of 18 years have reached the age of discretion and can make intelligent and more informed decisions about their lives and bodies.
- (c) A declaration that the Sexual Offences Act (the Act) itself does not conform to the new constitution and needs to be altered with adaptations to rhyme with the new constitution 2010 because of some of its penal laws.
- (d) Declare that Section 124 of the Evidence Act Cap 80 Laws of Kenya is inconsistent with the provisions of the Sexual Offences Act No. 3 of 2006.
- (e) A declaration that in the case of prosecution charging of sexual offences case of a girl under the age of 18 years, the crown must prove lack of her consent.
- (f) A declaration that Section 124 of the Evidence Act is in contravention of Articles 50 (2), 25 and 27 of the constitution 2010. Court to give direction that there is discrimination because other offences like robbery and murder have a lee way, why not sexual offences Act? Or that such an order(s) as this Hon. Court shall deem just.
- (g) The Petitioner herein to benefit of the least severe of the prescribed punishment as it is in Article 50 (2) (p) of the constitution 2010.

(The prayers are exactly as framed by Petitioner)

3. The Petitioner's case is that he was arrested on 24/12/2012 and charged with of defilement contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 on 27/12/2012 in Mombasa Magistrates Court No. 3545/12. He was convicted and sentenced to serve 15 years imprisonment. His conviction was premised on Section 124 of the Evidence Act Cap 80 Laws of Kenya thus denying him a right to a fair trial. The Petitioner was given a chance to mitigate but the mitigation was of no consequence because of the mandatory minimum sentence as it is in Section 8 (4) of the Sexual Offences Act. The Petitioner avers that the mandatory minimum sentence in Section 8 (4) of the Sexual Offences Act deprived the court of its discretion to exercise judicial powers on sentencing as provided in the judicial sentencing policy guidelines 2016, thus reducing the court to a rubberstamp by the legislature. Therefore, the mandatory nature of minimum sentence as

provided aforesaid is against the spirit of the constitution under Article 160 (1) on separation of powers. The Petitioner states that the 15 years imposed upon him does not conform to the international standards as required under Articles 2(5) (6) of the constitution, and the objectives of sentencing as stated in Sentencing Guidelines Policy 2016.

4. The Petitioner avers that having exhausted all his appeals he lodged this petition under Article 50 (2) (q) of the constitution seeking review of his sentence, and that he is very remorseful for the offence that he committed and vows not to indulge in any criminal activity.

5. In mitigation the Petitioner avers that he is a first offender and THAT he has learnt his lesson the hard way and vows to be an ambassador of peace; that he has served 4 years SINCE conviction; that his sentence be counted from the first date he appeared in court on 27/12/2012; that he is fully reformed and humbly requests to be reintegrated back into the society; that he is the sole bread winner in his family which is suffering due to his incarceration and has an ageing mother who is a widow and a peasant farmer; that he has since reconciled with the complainant's family which often visits him at the prison facility to offer him solace; that the complainant has since married and is blessed with two children thus leading an independent life; that before arrest and conviction he was married and blessed with 2 children who have since dropped out of school due to financial constraints; that before his arrest and conviction he was a trained P1 teacher and because of his passion in teaching he had even opened up a school of his own and created employment and helped eradicate illiteracy in the society, a project which has since disintegrated due to his continued incarceration; that while at the prison facility he has continued with his passion despite the difficult conditions, has helped promote literacy amongst fellow prisoners that has earned him several accolades and he humbly requests that the remaining period of his sentence be made non-custodial so that he can do community work as he assists advocates against crime in society.

### **The Response**

6. The Petition is opposed by the DPP vide submissions filed in Court on 24/9/2019. The DPP's case is that the Petition has no merit since the Petitioner has already lost the two appeals in the High Court and the Court of Appeal. As for sentence the DPP submitted that the said 15 years imprisonment is reasonable and should stay.

7. It is noteworthy that the DPP did not comment on the alleged unconstitutionality of Section 8 of the Sexual Offences Act, and the constitutionality of the mandatory minimum sentences which the Petitioner complains about, and which indeed are the bedrock of this petition.

### **Determination**

8. This petition is not concerned with the guilt or otherwise of the Petitioner. He is already convicted and has lost all his appeals. It is the alleged unconstitutionality of the sections of the law under which he was convicted that is of concern to this Court.

9. The Petitioner's case is that the mandatory minimum sentences in Sections 8 and 11 of the Sexual Offences Act do not permit the Court to consider peculiar circumstances of each case in order to arrive at an appropriate sentence informed by these circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be appropriate in the particular circumstances.

10. The Petitioner further states that Section 124 of the Evidence Act Cap 80 Laws of Kenya is also unconstitutional because it allows the court to receive evidence of alleged victim of sexual offences without corroborative evidence. The unconstitutionality lies in the fact that the alleged victim of the defilement is given overriding power over the accused person.

11. I shall deal with Section 124 of Evidence Act first. This section was, in my view, promulgated to take care of very dire circumstances where a victim of a sexual assault is the only witness to the offence. The circumstances of this provision must have taken into account how difficult it is to prove a sexual offence which normally takes place in secret. Further, more often than not, the victims are the weaker party and are rarely in control during the offence, and in fact, more often the victims are young girls whom the law seeks to protect. Section 124 of the Evidence Act states in part as follows:

**“provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict an accused person for reasons to be recorded in the proceedings, that, the court is satisfied that the alleged victim is telling the truth.”**

12. Looking at that section critically, the legislature did not give a blanket admission of such evidence. The legislature rightfully recognized the role of the trial court, and the duty of that court to be satisfied that the victim of alleged sexual offence is telling the truth. The legislature therefore left the discretion to the trial court to record its own view of the matter. There is nothing unconstitutional in that regard since the provision does not abrogate the constitutional principles of fair trial under Article 50. It cannot be said that what the trial court observes is unconstitutional. And the evidence of the sole witness is not admitted without the trial court's satisfaction. The Petitioner's allegations about unconstitutionality of the said Section 125 of the Evidence Act has no merit and is misplaced.

13. This leads me to allegations of unconstitutionality regarding the mandatory minimum sentences under Section 8 and 11 of the Sexual Offences Act.

14. Section 8 of the Sexual Offences Act provides as follows:

**“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

15. Section 11(1) of the Sexual Offences Act provides that:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

16. Sections 8 (2) and 11 provide for mandatory minimum sentences. However, the constitutionality of such sentences is highly doubtful since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. While the Court has the leeway to impose any sentence over and above the minimum sentence, the sections do not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. These provisions therefore fail the constitutional test in **Francis Karioko Muruatetu & Another vs. Republic**, Petition No. 15 of 2015, where the Supreme Court addressed this issue thus:

**Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a nonderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.**

**Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.**

**With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.**

**We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts’ mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.**

**The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.**

**We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court’s statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender’s version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.**

**If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused’s criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of ‘overpunishing’ the convict.”**

17. Similarly, in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6 Kwa Zulu Natal High Court** held that:

“It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in **S v Scott-Crossley 2008 (1) SACR 223 (SCA)** at para 35:

**‘Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.’**

The Judgment continues:

**“ . . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”**

18. The Courts have always frowned on mandatory sentences that place a limitation on judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b)**, the South African Court of Appeal (Corbett, CJ) held that:

**“the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court’s normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.”**

19. And in **S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, Stegmann, J opined that:

**“For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat’s paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.”**

20. Further, in **S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h)**, Davis, J held that:

**“mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused.”**

21. It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

**“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”**

22. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

**"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”**

23. The trial court in this matter considered the mitigating submissions of the Petitioner, but sentenced him to a mandatory 15 years in prison. There was nothing the court could do because its hands were tied by statute. The foregoing developments in the law now makes it possible for courts to consider appropriate sentencing in each particular case.

24. I have considered this petition especially in the light of the aforesaid Muruatetu case, and I am satisfied that the Petitioner has made out a case, and that the petition in regard to the unconstitutionality of the mandatory minimum sentences under Sections 8 and 11 of the Sexual Offences Act is proven on a balance of probability.

25. The Petitioner has served 4 years since conviction and his mitigation has satisfied this Court. Since this matter has gone upto the Court of Appeal, it is not prudent to send the matter back to the trial court for resentencing. I will deal with that as a constitutional imperative at this stage of proceedings.

26. I am satisfied that the circumstances of this case would afford the Petitioner lesser years in prison than the said 15 years had the trial court had the mandate to entertain and effect mitigation.

27. Of special note for consideration is the attitude of the Petitioner while in prison and what he has achieved or done there. The Petitioner has been very resourceful in prison, provides para legal services to inmates, and also teaches in prison. He has led by example and his reformation is almost palpable. He is also sickly and diabetic. He has demonstrated a case for leniency. Accordingly therefore, I hereby set aside the mandatory sentence of 15 years and in place thereof I jail the Petitioner for a term of seven (7) years from the date of conviction on 8/11/2016.

Right of appeal in 14 days.

**Dated, Signed and Delivered at Mombasa this 15<sup>th</sup> day of May, 2020.**

**E. K. OGOLA**

**JUDGE**

Judgment delivered via Zoom in the presence of:

Ms. Ogega for State

Ms. Oyier for Petitioner

Petitioner on line at Shimo La Tewa Prison

Mr. Kaunda Court Assistant