



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 36 OF 2020**

**JACOB KARIUKI KAMOTHO.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. The petitioner filed a petition dated 09/03/2020 seeking orders for resentencing on the basis of the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR and Evans Wanjala Wanyonyi -vs- Republic (2019) eKLR.**

2. **The background information was that the petitioner was convicted of the** offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006 in Embu Chief Magistrate's Criminal Case No. 474 of 2011 and subsequently sentenced to life imprisonment and after which he appealed to Embu High Court *vide* HCCA No. 24 of 2012. The appeal was dismissed for lack of merit. He later appealed to the Court of Appeal *vide* Criminal Appeal No. 176 of 2017 which appeal was still pending at the time of filing and hearing this petition.

3. The petitioner submitted the instant petition was based on the **Muruatetu's case** and that he had served ten (10) years of the sentence imposed. He further stated that he was aged 74 with seven children who depend on him since and that his wife passed on. The respondents through Ms. Ngesa opposed the petition and submitted that the petitioner's appeal was dismissed by the High Court and that the petitioner committed the offence on his twelve (12) years old daughter and thus the sentence was legal and not excessive.

**B. Analysis of the law and Determination**

4. I have considered the petition herein and the parties' submissions and it is my opinion that the main issues for determination are twofold: -

- a) Whether this court has jurisdiction to entertain the petition.
- b) Whether the petitioner has made a case for resentencing.

5. This petition is premised on the Supreme Court's decision in **Francis Karioko Muruatetu & Another -vs- Republic (supra)** wherein the court held that to the extent that section 204 of the Penal Code provided for the mandatory death penalty, then the same was inconsistent with the Constitution and invalid. The court was of the view that the mandatory sentence denied the trial court discretion in sentencing.

6. The *ratio* in this decision has been applied by the courts in other provisions of law which provides for mandatory minimum sentences. For instance, in **Evans Wanjala Wanyonyi v Republic [2019] eKLR** the Court of Appeal found that section 8(1)(3) of the Sexual Offences Act No. 6 of 2003 was unconstitutional as it provided for mandatory minimum sentence. (See **Jared Koita Injiri -v- R CR. APP. NO. 93/2014** and **Denis Kinyua Njeru -Vs- Republic (2017) eKLR**). In **William Okungu Kittiny -Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the Muruatetu decision *mutatis mutandis* to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence.

7. As such, it is clear from the above authorities that the general legal position is that provisions of law which provides for a mandatory minimum sentence are unconstitutional for it limits the discretion of the court in sentencing. The main issue in this petition is whether Section 20(1) of the Sexual Offences Act, 2006 under which the petitioner was charged provides for mandatory minimum sentence. The answer to this question will determine whether the sentence meted upon the petitioner ought to be reviewed pursuant to the resentencing jurisdiction bestowed upon this court pursuant to **Muruatetu's case.**

8. I note from the petition that the petitioner focused on Section 8(1) (3) of the Sexual Offences Act as the basis of this petition whereas he was convicted of the offence of incest contrary to Section 20(1) of the said Act. It is my opinion that for purposes of rendering the determination, it is proper to assume that the petition was based on the provisions of Section 20(1) as opposed to Sections 8(1)(3) and thus I will proceed to render this determination on the said corrections.

9. Section 2 of the Sexual Offences Act, 2006 provides: -

*“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:*

*Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”*

10. The Court of Appeal in M K v Republic [2015] eKLR considered the question as to whether this section provides for “mandatory minimum” or not and wherein the court after comparing the wording of section 20(1) of the Act with the wording of other sections providing for minimum sentences held as follows: -

*“.....16. Our reading of the Sexual Offences Act shows that whenever a minimum sentence is imposed, the phrase not less than is used.*

*17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the Sexual Offences Act. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?*

*18. The first observation to note is that the phrase “not less than” has not been used in the proviso to Section 20 (1) of the Sexual Offences Act. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.”*

11. The Court interpreted the meaning of the phrase “shall be” as used in Section 20(1) of the Sexual Offences Act and proceeded to hold as follows: -

*21. Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment....”*

12. As such, it is my considered view that pursuant to the above decision where a person is convicted of incest whereas the female victim is under the age of eighteen years, he is liable to a term of imprisonment between ten (10) years and life imprisonment depending on the circumstances of each case. The section does not provide for mandatory minimum but bestows the court with discretion in sentencing.

13. The jurisdiction of this court in hearing mitigation and sentence is donated by the law developed by the Supreme Court petition of Francis Karioko Muruatetu & Another –vs- Republic (supra) and subsequent application of the said decision to other offences where discretion of the court in sentencing was found wanting. Upon finding that the sentence was not hampered by the mandatory minimum and that the court exercised its discretion while sentencing then such sentence ought not be disturbed.

14. The petitioner herein had appealed against the decision of the trial court to this court vide Embu HCCA No. 24 of 2012- Jacob Kariuki Kimotho –vs- Republic (Jacob Kariuki Kimotho v Republic [2015] eKLR). As such, would be limited to the constitutionality of the sentence. Any attempt to consider the excessiveness of the sentence would be tantamount to revision of its own decision and which action the court is bereft of jurisdiction.

15. It is my considered opinion that the sentence imposed on the petitioner was lawful and was not unconstitutional. It is my view that the petitioner ought not to be resentenced by this court on the basis of the unconstitutionality of the said sentence should it be found to exist. The instant petition does not qualify for resentencing on the basis of Muruatetu’s decision.

16. The petitioner stated that he has an appeal pending in the Court of Appeal. It is my view that the issues of resentencing ought to be addressed on appeal against this court’s decision alongside the grounds of appeal by way of filing an amended petition of appeal.

17. I find the petition before me incompetent and misconceived and that this court lacks jurisdiction to entertain it.

18. The petition is accordingly struck out.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9<sup>TH</sup> DAY OF JULY 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for the Respondent**

**Petitioner through Video Link**