Mureithi v Director of Public Prosecution (Petition E009 of 2022)
[2024] KEHC 695 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

PETITION E009 OF 2022

EM MURIITHI, J

JANUARY 31, 2024

IN THE MATTER OF ARTICLES 2(4), 10(2)(B), 19, 22(1), 23(1)(3)(D)(F), 25 (C), 27(1), 28, 29(F), 50(1)(2), 159(2)(A) AND 165(3)(D)(I)(II) OF THE CONSTITUTION

AND

IN THE MATTER OF INTERPRETATION OF THE MINIMUM MANDATORY

PROVISIONS UNDER THE SEXUAL OFFENCES ACT NO. 3 OF 2006

AND

IN THE MATTER OF SECTION 216 AND 329 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF KENYA JUDICIARY SENTENCING POLICY GUIDELINES

BETWEEN

HESBON KIRUJA MUREITHI ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

1. The petitioner herein filed a petition dated 19/7/2022 seeking:

    1. A declaration be made under the provisions of Article 23(3)(d) of *the Constitution* that Section 8(2) of the *Sexual Offences Act* is unconstitutional to the extent that it provides for the mandatory life imprisonment sentence to accused person convicted of Defilement which infringes the inherent right of every accused person to a fair trial as envisaged under Article 25(c) of *the Constitution*.

2. This court be pleased to issue a declaration that the minimum – maximum sentencing provisions under the *Sexual Offences Act* are unconstitutional in so far as they infringe on the inherent right of every accused person to have his/her mitigating factors considered as envisaged under Article 50 (2) of *the Constitution* as read with Section 216 and Section 329 of the *Criminal Procedure Code*.

3. A declaration be made subject to prayer no. 1 and 2 that the petitioner herein be remitted back to his respective trial for rehearing on sentence only so that his mitigating factors can be considered and appropriate sentence awarded.

4. A declaration be made that inmates subjected to the mandatory life imprisonment sentence under the provisions of Section 8(2) of the *Sexual Offences Act* be entitled to the right to file petitions at their respective trial courts for rehearing on sentence alone."

2. The petitioner in his affidavit in support of the petition avers that he was arrested on 11/03/2008 and charged with defilement contrary to section 8(2) of the *Sexual Offences Act* vide Nkubu Cr. Case No. 363 of 2008. After his conviction and subsequent sentence to life imprisonment, he lodged Meru High Court Criminal Appeal No. 11 of 2013 and Nyeri Court Appeal Criminal Appeal No. 58 of 2019, which were both dismissed and the sentence upheld. Having exhausted his appellate right, he now seeks to challenge the constitutionality of section 8(2) of the *Sexual Offences Act*, in view the Supreme Court's directive in *Muruatetu decision*.

3. According to him, the mandatory sentence of imprisonment for life provided under section 8(2) of the *Sexual Offences Act* fails to conform with the tenets of fair trial that accrue to accused persons under Article 25(c) of *the Constitution*. The said section deprives the court the use of judicial discretion in matters concerning the life of an individual. The trial court's failure to take into consideration his mitigating factors and appropriate sentence is against his right to equal protection and equal benefit of the law under Article 27(1) of *the Constitution*.

4. It is urged that this court has judicial powers under Articles 23(1) and 165(d)(i)(ii) of *the Constitution* to hear and determine application for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom and to hear and determine a question whether any law is inconsistent with or in contravention of *the constitution*.

5. Directions were taken that the petition be heard by way of written submissions which were duly filed on 21/3/2023 and 13/9/2023 respectively.

6. The petitioner urged that the mandatory life imprisonment, which should only be imposed only in the most deserving cases, robbed him an opportunity for an individualized sentence that would have taken into consideration his personal information, mitigation and the circumstances surrounding the offence committed, thus infringing his right under Articles 25(c), 27(1), 28 and 50(2)(p) of *the Constitution*.

7. The respondent urged that *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu 1) decision did not invalidate minimum mandatory sentences in the *Sexual Offences Act*. It urged that sexual violence victims also enjoy their rights to equality and non-discrimination, dignity and have effective remedy to continue to live with the aftermath of the violations. It urged that the mandatory minimum sentences in the *Sexual Offences Act* adhere to the principles underpinning the sentencing process as set out in the Sentencing Policy Guidelines. It urged that in as much as Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* imposes a life imprisonment to the perpetrators, the same achieves the uniformity principle that all accused persons charged under the said section are given the same sentence without discrimination.

Analysis and Determination

Indeterminate Life sentence & Indignity of the life sentence

8. As regards the sentence of life imprisonment imposed on the appellant by the trial court, the Supreme Court of Kenya in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR said the following as regards the asserted unconstitutionality of the life sentence:

> " a) Whether the indeterminate life sentence should be declared unconstitutional?
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> (73) Counsel for the 1st Petitioner raised two issues with regard to the 'indeterminate' or 'indefinite' life sentence, as follows: whether the indeterminate nature of a life sentence is unconstitutional and whether this Court should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment. We will address the two questions separately.
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> (74) The 1st petitioner submitted that the indeterminate life sentence is contrary to Articles 28 (right to dignity) and 29 (d) and (f) of *the Constitution* (protection from physical or psychological torture and protection from cruel, inhuman and degrading treatment or punishment) and it also does not provide the prisoner with an avenue for review of the sentence. The 2nd petitioner has argued that the indeterminate life sentence which is devoid of judicial input is contrary to Article 50 of *the Constitution*, which provides for the right to a fair trial. The respondent, the DPP, did not provide substantive submissions on this question.
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> (75) On the other hand, counsel for the amici curiae urged the Court not to determine 'the constitutionality of any aspect of life imprisonment', as it has not as yet been canvassed in the High Court or the Court of Appeal. He also argued that because of the complexity of the issue, the Court should avoid pre-judging any future challenge. In the event that the Court chose to determine this issue, he argued that a lack of provision in legislation for remission or parole for persons serving life imprisonment is contrary to amongst other sections, Article 27 of *the Constitution* (discrimination).
>
> (76) We have perused and analyzed the Petition and the written submissions and it is clear that the petitioners have not sufficiently argued and illustrated the particulars of why the indeterminate life sentence should be declared unconstitutional. Indeed, counsel for the 1st petitioner upon being asked by the Court to elaborate on this issue was not able to provide adequate submissions. A critical issue such as this, where legislation is to be examined is deserving of the reasoned and well-thought arguments of the petitioners, the Director of Public Prosecution and other interested parties or amicus curiae and input of the High Court and the Court of Appeal. This will allow this Court to benefit from the reasoning of these superior Courts and the parties will not be disadvantaged by this Court's holding which will in effect make this Court a court of first and

last instance. It is therefore our view that the submissions made did not canvass the issue to our satisfaction. Consequently we will not make a determination on it.

(77) Similarly we note that counsel for the amici curiae asked this Court to declare Section 46 of the *Prisons Act*, Chapter 90 of the Laws of Kenya (*Prisons Act*) unconstitutional because it excludes prisoners serving life sentences from being considered for remission. We wish to restate our finding in an earlier ruling dated 28th January 2016, in Francis Karioki Muruatetu & another v. Republic & 5 others Petition No. 6 of 2016; [2016] eKLR where the Court limited the role and function of the amici curiae as follows:

> [43] ... Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of *the Constitution*, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions...."

(78) Based on the above pronouncement, we will not delve into the issue of the unconstitutionality of Section 46 of the *Prisons Act* because none of the primary parties to the dispute have raised it. This issue has also not been properly canvassed at the High Court and Court of Appeal. We reaffirm this Court's decision in *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*, Supreme Court Petition No. 2 of 2012, [2012] eKLR, where this Court declined to assume jurisdiction and address issues that have not gone through the hierarchy of courts.

c) Whether this Court should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment?

(79) Counsel for the 1st Petitioner submitted that the petitioners are serving an indefinite life sentence and invited the Court to fix a definite number of years to constitute a life sentence even though counsel admitted that ordinarily this is a legislative function. He urged that other countries usually enact legislation that provides for the different time periods in a life sentence, which the prisoner must serve before review or parole. In the alternative, the 1st petitioner prays that this Court remits the trial record to the High Court to undertake a sentence hearing for the purpose of determining an appropriate definite sentence.

(80) The Attorney-General submitted that a life sentence ought not be equated to the natural life of the convicted person and a judge should be accorded the opportunity to set a date when parole could be considered.

(81) Counsel for the amici curiae argued that in effect, the petitioners are challenging the irreducible life sentences, where the offender has no prospect of release on parole or remission. He urged that globally, in a majority of countries that have life sentences they provide a degree of 'tailoring to fit': either the Court has some discretion as to whether to impose a life sentence at all, or there are procedures that allow for a review of the prisoner's case.

(82) We have looked at foreign case law from the European Court of Human Rights, and legislation from the United Kingdom in which the indeterminate life sentence has been examined, in order to draw valuable lessons.

(83) In the case of *Kafkaris v. Cyprus* (Application No. 21906/04), the European Court of Human Rights had to determine whether the applicant's mandatory life sentence was an irreducible sentence and contrary to Article 3 of the European Convention of Human Rights. This provision provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". The Court found that there was no violation of Article 3 because although prospects of release of prisoners serving life sentences in Cyprus was limited, it did not mean it was irreducible. It also held that:

> " 98. In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release.... The Court has held, for instance, in a number of cases that, where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, it could not be said that the life prisoners in question had been deprived of any hope of release .... The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited .... It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible."

(84) In the case of Vinter and others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10) three applicants who served the whole life sentence in the United Kingdom challenged whether the whole life sentence which only accorded them a release at the discretion of the justice secretary on compassionate grounds such as a terminal illness was compatible with Article 3 of the European Convention on Human

Rights. The Court held that the sentences against the three applicants were incompatible with Article 3 because the Criminal Justice Act of 2003 was unclear as to the review mechanism provided by the justice secretary and the earlier set review by the Minister after the prisoner serving a life sentence served 25 years was removed in the 2003 Act. The Court further held that?

> " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
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> 112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment
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> ...
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> 120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing (see paragraphs 104 and 105 above), it is not its

task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it shows clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter ...." (Emphasis added.)

(85) The European Court of Human Rights also issued an order against Hungary in the case of *László Magyar v. Hungary* Application No. 73593/10 in which it held that Hungary should reform its legislation dealing with life sentences. In the 2014 decision, the Court held that—

> "71. The present case discloses a systemic problem which may give rise to similar applications. The nature of the violation found under Article 3 of the Convention suggests that for the proper execution of the present judgment the respondent State would be required to put in place a reform, preferably by means of legislation, of the system of review of whole life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions.
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> 72. ... The mere fact that a life sentence may eventually be served in full, does not make it contrary to Article 3 of the Convention. Accordingly, review of whole life sentences must not necessarily lead to the release of the prisoner in question."

(86) In light of the above decision, Hungary introduced a new legislation in 2015 in which it afforded a mandatory pardon procedure for prisoners serving life sentences after they had served a 40 year term. However, the 40 year term was challenged for being contrary to Article 3 in the case of *T.P and A.T v Hungary* (Applications Nos. 37871/14 and 73986/14). In that case, the Court held that the 40 year term before review of whole life sentences was too long and a violation of Article 3.

(87) In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole-life sentence and it is only handed down to those who have committed heinous crimes.

(88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the *Kenya Judiciary Sentencing Guidelines*, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

(89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of *the Constitution*, which reads:

> "51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
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> (3) Parliament shall enact legislation that—
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> (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
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> (b) takes into account the relevant international human rights instruments."

(90) It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of *Jackson Maina Wangui & Another v. Republic* Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

> "As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.
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> 76. .... As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine

for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

(91) Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."

(92) The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

> " Sentences are imposed to meet the following objectives:
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> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
> 5. Community protection: To protect the community by incapacitating the offender.
> 6. Denunciation: To communicate the community's condemnation of the criminal conduct."
>
> The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.

(93) In addition, and in accordance with Article 2(6) of *the Constitution*, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". In 1972, Kenya ratified the *International Covenant on Civil and Political Rights* of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

(94) We recognize that although the Judiciary released elaborate and comprehensive *Sentencing Policy Guidelines* in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

(95) We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

(96) We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

(97) We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of *the Constitution* which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya."

9. In exhorting Parliament to make law to clarify the number of years making the life sentence and its amenability to parole/remission, the Supreme Court in the meantime left a window open for "the relevant judicial officer" to set "a minimum or maximum time" or number of years to be served under a 'life sentence' having regard to "established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

10. In my view, it is an affront to the offender's right to human dignity protected under Article 28 in terms that "every person has inherent dignity and the right to have that dignity respected and protected" and inhuman and degrading treatment to hold him in an indeterminate prison sentence with no benefit

of remission for good conduct making any notions of penal objectives of reform and rehabilitation illusory, because no amount of reform of the offender suffices anything and good conduct does not accrue any beneficial results, and of course, there is no rehabilitation of the offender into society with other humans in his community. Apart from, perhaps, retribution and deterrent benefit in utilitarian rather than personal terms, the life sentence has no rehabilitative value to the offender and his society.

Need for a determinate sentence.

11. The need for a determinate sentence was adverted to by the Supreme Court of Kenya in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR in its discussion on life sentence when considering the question "Whether the indeterminate life sentence should be declared unconstitutional":

12.

> (95) We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

13. The Court stopped short of declaring the construction of life sentence as a natural life sentence unconstitutional, and directing that a life sentence should be construed to mean a certain minimum or maximum to be set by the trial court.

Resentencing of the applicant

14. The petitioner would at first sight appear not eligible to re-sentencing in view of the Supreme Court's directives issued on 6/7/2021 to the effect that the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR is only applicable to the offence of murder.

15. I would respectfully note the decision of the court (J. Kamau J) in dismissing a petition for re-sentencing in *James Osiro Liech v Republic* [2021] eKLR expressed itself thus:

16. "This court had due regard to the case of *Ali Abdalla Mwanza v Republic* (2018) eKLR and noted that the case was not applicable herein as the same related to a murder case where courts have power to re-sentence convicted persons by virtue of the case of Francis Karioko Muruatetu & Another v Republic (Supra). The Petitioner herein had been sentenced to the mandatory sentence of life imprisonment for an offence under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2016. Unless the issue of re-sentencing in defilement cases is heard by the High Court, then escalated to the Court of Appeal and eventually heard by the Supreme Court resulting into a similar conclusion like in Francis Karioko Muruatetu & Another v Republic (Supra), this court is bound and court's hands would remain tied. It did not therefore deem it prudent to consider the question of life expectancy at this juncture. In the mind of this court, the finding in the case of Dismas Wafula Kilwake v Republic [2018] eKLR in which the Court of Appeal had held that the court could not be constrained by Section 8 of the *Sexual Offences Act* to impose the provided sentences if the circumstances did not demand it had now been preceded by the case of Francis Karioko Muruatetu & Another v Republic (Supra) which has now clarified the offences that courts could entertain in re-sentencing hearings."

17. The Court in *James Osiro Liech* was obviously acting on the Directions dated 6th July, 2021 given in in *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16

of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the sequel to Muruatetu I, the Supreme court has giving guidance as follows:

> " It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
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> 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.
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> 16. To the extent directly relevant to the matters under review in these directions, we note the Attorney General in his Report, together with the Task Force recommended, that:
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> a) Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.
>
> b) All offenders, subject to the mandatory death penalty, including those convicted and sentenced prior to 2010, who are serving commuted sentences, will be eligible for re-sentencing, including all offenders sentenced to death as at the time of the decision which was made on December 14, 2017.c)Where an appellant has lodged an appeal against a conviction and/or sentence, the appellate court must, at any stage before judgment, remit the case to the trial court for re-sentencing.We note that the other recommendations in the Task Force report go beyond the terms of the orders of December 14, 2017, and deal, for example, with matters that are in the legislative province of Parliament or in the courts' exclusive jurisdiction and judicial discretion.
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> 17. The appellants in this matter, we have since learnt, were presented to the High Court and heard on their plea for re-sentencing; therefore, we make no further comment on them.
>
> 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.iv.Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code*, as well as those of the victims before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court; (a)Age of the offender;(b)Being a first offender;(c)Whether the offender pleaded guilty;(d)Character and record of the offender; (e)Commission of the offence in response to gender-based violence;(f)The manner in which the offence was committed on the victim;(g)The physical and psychological effect of the offence on the victim's family;(h)Remorsefulness of the offender;(i)The possibility of reform and social re-adaptation of the offender; (j)Any other factor that the court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu."

18. This Court has also noted the observation of the Court (F. Gikonyo J.) in *Joseph Lodiaka v Republic* (2022) eKLR which is cited by the respondent, in applications and petitions like the one before court, "the applicant must show violation of his right to fair trial. Thus, despite prescription of minimum sentences, it is necessary to establish that the court failed to exercise discretion in passing sentence or, passed sentence solely on servile obedience to some law which fettered its discretion, thus, occasioning prejudice to the accused. I doubt, where the court has exercised discretion, a sentence would be said to be illegal or unlawful simply on the basis that a minimum sentence was prescribed."

19. If there is no power for re-sentencing, the fact that the petitioner herein is a reformed, remorseful and a rehabilitated person would be immaterial. Besides, it was said that the petitioner defiled the complainant, aged only 8 years, in the forest and when she screamed for help, he covered her mouth and threatened to cut her with a panga he had in his possession. The trial court duly considered the petitioner's mitigation that he had lost his parents and he had 3 children in school, but opted for a deterrent sentence due to the seriousness of the offence. This Court does not fault the imposition of the deterrent sentence of life imprisonment, save for its indeterminate nature. What is unconstitutional is the indeterminate nature of the life sentence. The sentence is valid when understood and clarified in terms of a number years of prison custody.

Emerging binding jurisprudence

20. However, this court has considered the emerging jurisprudence from the Court of Appeal in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) which has frowned upon the imposition of the mandatory indeterminate life sentence, as follows:

> " ...We are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved...We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

Life sentence equated to imprisonment for thirty years

21. The Court of Appeal in its most recent pronouncement in Kisumu Criminal Appeal No. 22 of 2018 Evans Nyamari Ayako V R. (okwengu, Omondi & Joel Ngugi, JJ.A) of 8th December, 2023, a similar case of offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act*, has equated the life imprisonment sentence to a jail term of thirty (30) years, as follows:

> "25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate

would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.

26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

22. These decisions are binding on the High Court, and before the issue may be clarified by the Supreme Court, the proper course in my view for the High Court is to take it that life sentence is unconstitutional for its indeterminate nature and where it was imposed before the said judicial pronouncement, the sentence may be reviewed to one of a determinate sentence of thirty years or such lower sentence as the circumstances of the case may dictate.

23. In so holding, this Court is mindful of the duty of the court to do justice in accordance with the law and spirit of the principle that the accused is entitled to the lesser sentence, in terms of Article 50 (2) (q) of *the Constitution* on the accused's right:

> "(q) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

24. At the time when this matter comes up for a decision on the reference for resentencing, the court is aware of the above-mentioned decisions of the Court of Appeal proscribing the indeterminate nature of the life sentence, understood as the natural life of the offender, and of value-weighting of the life sentence at imprisonment for a term of 30 years.

25. Although resentencing was a special procedure devised by court in cases where Muruatetu I on capital sentence in murder cases applies, it would be improper and unjust to leave the sentence of life imprisonment standing in this matter which has been brought up before the Court on a plea for resentencing when the life sentence has been impugned by at least two decisions of the Court of Appeal which are binding on this court, and this court being aware of the two authorities.

26. The procedure under Article 50 (6) of *the Constitution* which permits the High Court to reopen and examine cases which have exhausted the appeal machinery, in case of discovery of new and compelling evidence, may be adopted for the curing the sentence of imprisonment for life to clarify and set a sentence of imprisonment for a definite term.

27. Although, the Supreme Court in Muruatetu I left to the Attorney General and Parliament the making of "legislation on the definition of 'what constitutes a life sentence'; [which] may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences", it did not shut out the organic growth of jurisprudence which might render statutory provision otiose, unnecessary, or at least inform such law-making. Such is the role played by the Manyeso and Ayako cases, supra.

28. This court considers that the applicant is entitled to a reduction, or clarification, of his sentence on the policy of consistent criminal penalties as well as the principle of right to the benefit of a lesser sentence at the time of sentence under Article 50 (6) of *the Constitution*.

29. Consequently, in the interests of justice encapsulated in the right to lesser sentence, deference to the emerging jurisprudence from higher courts and the policy of consistent judicial decisions in like cases, this Court will direct that the sentences of life imprisonment in the case subject of the present petition shall be reduced to imprisonment terms for thirty (30) years.

Orders

30. Accordingly, for the reasons set out above, the sentence of imprisonment for life is set aside and substituted with a sentence of imprisonment for thirty (30) years commencing, pursuant to section 333 (2) of the Criminal Procedure Code, from the date of sentence in the case, or where directions were given in the trial court for commencement on any other date, from that other date.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Petitioner/Appellant/Applicant in person.

Mr. Masila, Principal Prosecution Counsel for the DPP.