



**PNG v Director of Public Prosecution (Petition E009A of 2022)
[2024] KEHC 773 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E009A 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

PNG PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

1. The petitioner herein filed a petition dated 19/7/2022 seeking:
 - a. A declaration be made under the provisions of Article 23(3)(d) of the *Constitution* that Section 20(1) 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*.



- b. 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](#).
 - c. 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.
 - d. A declaration be made that inmates subjected to the mandatory life imprisonment sentence under the provisions of Section 20(1) 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 27/03/2010 and charged with incest contrary to section 20(1) of the [Sexual Offences Act](#) vide Chuka Cr. Case No 373 of 2010. After his conviction and subsequent sentence to life imprisonment, he lodged Meru High Court Criminal Appeal No 141 of 2011 and Nyeri Court Appeal Criminal Appeal No 136 of 2014, which were both dismissed and the sentence upheld. Having exhausted his appellate right, he now seeks to challenge the constitutionality of section 20(1) of the [Sexual Offences Act](#), in view of the Supreme Court’s directive in [Muruatetu](#) decision. According to him, the mandatory sentence of imprisonment for life provided under section 20(1) 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](#). 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](#).
 3. Directions were taken that the petition be heard by way of written submissions which were duly filed on 18/9/2023 and 13/9/2023 respectively.
 4. The petitioner urged that the mandatory life imprisonment curtails the sentencing discretion of courts by disallowing them from imposing lesser or alternative sentences after considering mitigating circumstances, diverse character of the convict and the circumstances of the crime committed. He urged that treating all persons convicted under section 20(1) of the [Sexual Offences Act](#) the same way at the sentencing stage by imposing the mandatory life imprisonment is arbitrary and oppressive, as it violates one’s constitutional rights to be free from cruel, inhuman and degrading treatment.
 5. The respondent urged that [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.



Determination

6. The trial court duly considered the petitioner's mitigation that he was an orphan with children who depended on him and that he was a first offender before handing him the life sentence. The High Court and the Court of Appeal dismissed his appeal and confirmed that the sentence was "within the law". Of course, the imposition of a lawful legal sentence of imprisonment for life on the applicant cannot be deemed to be a violation of his rights. The only question to be resolved as sought in this petition is, therefore, whether the sentence of imprisonment for life is constitutional.
7. As regards the validity of sentence of imprisonment for life, this court has in [Hesbon Kiruja Mureithi v R](#), Meru HC Cri. Pet. No E009 of 2022 decided following Court of Appeal decisions therein discussed that in its indeterminate nature, the sentence of life imprisonment is unconstitutional and it must, therefore, be clarified in terms of a jail term for a number of years, and following the guidance of Kisumu Court of Appeal Criminal Appeal No 22 of 2018 [Evans Nyamari Ayako v R.](#), respectfully agreed that the life sentence may be equated with an imprisonment for thirty years.

Orders

8. 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.

