



REPUBLIC OF KENYA



**Ongere v Republic (Criminal Petition E012 of 2023)
[2024] KEHC 607 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION E012 OF 2023
DO OGEMBO, J
JANUARY 30, 2024**

BETWEEN

JOSEPH MUERE ONGERE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Joseph Muere Ongere, has moved this court by way of a notice of motion application dated March 6, 2023 and filed on March 21, 2023. The application seeks revision of his sentence. The applicant has deponed that he was sentenced to serve 20 years imprisonment on April 24, 2016 and his subsequent appeal was dismissed on April 9, 2018. Also that he is 72 years old. He pleads for a lighter sentence on ground that the Supreme Court has declared mandatory minimum sentences to be unconstitutional.
2. The prosecution has not made any substantive response to the application of the applicant.
3. I have considered the application of the applicant. Same is for revision of sentence. I have also perused the record of proceedings of the lower court and also of the High Court on appeal.
4. The applicant was charged with defilement contrary to section 8 (1) (3) of the Sexual Offence Act, No 3 of 2006.
5. He was tried, convicted and sentenced to serve 20 years imprisonment. The sentence was passed on 22.4.2016. he thereafter filed an appeal, High Court Criminal Appeal No 132 of 2016. The same was dismissed by the court on April 18, 2018.
6. This application is based on the ground that the Supreme Court (Muruatetu case) and indeed the Court of Appeal and even the High Court, has held severally that mandatory minimum sentences are unconstitutional. The applicant has cited the case of Jared K Injiri v R, Criminal Appeal No 93/2014.



7. It must be noted that the courts have only declared the mandatory nature of the minimal sentences to be unconstitutional. Sentences as provided for in the statutes, ranging from death sentences, life sentences, imprisonment terms etc, remain constitutional and legal. The issue that the Supreme Court (*Muruatetu case*) resolved is that sentencing is a judicial function and the discretion of the court in apportioning sentence must be maintained and protected. It is for this reason that the Supreme Court directed that in all cases, the subjects ought to be accorded the opportunity to make and express their mitigation and for the court to consider the same before passing the sentence accordingly.
8. In this matter, I have noted that the court accorded the applicant the opportunity to mitigate. He did so and stated through his counsel as follows:

“The accused is 66 years old. He has a wife and four children. The accused has eye problem and suffers constant headaches. The accused has been a Bishop for New Israel Church since 2005 to date. The accused is a clan elder of Ndati village for a period of 4 years. The accused and the complainant live on the same parcel of land. The accused is a peaceful man. Accused is a Christian. I pray that the court considers the accused person's age and failing health. We request for a non-custodial sentence, I request that the court discharges the accused person under section 35 of *Penal Code*.”
9. In sentencing the applicant, the court indicated that it had taken into account the mitigation of the accused but that its hands were tied by the mandatory sentence imposed by the Act. It is the same sentence that the High Court (Justice JA Makau) upheld.
10. It is therefore clear that the sentence of the trial court and the judgment of the High Court were both passed before the decision of the Supreme Court in the *Muruatetu case*. Had the decision come later, the trial court would not have held that its hands were tied on the issue of sentence. The court on appeal would probably have held otherwise on its finding on sentence.
11. With the hands of the court not tied by the mandatory nature of the minimum sentence provided under section 8(3) of the *Sexual Offences Act* and considering the mitigation of the applicant, particularly his age, the court would have probably merited out a less severe sentence.
12. Now that the hands of the court are not tied with the mandatory minimum sentence as declared by the Supreme Court, and considering the mitigation of the applicant, who now stands at 72 years old, I find this case fit for resentencing. I accordingly allow the application for revision of the applicant's sentence. I revise and set aside the sentence of the applicant. I order that the applicant shall serve 15 years imprisonment. This sentence shall run from April 22, 2016, the date of sentence by the trial court in view of the fact that the applicant had been out on bond with a surety during the pendency of his case. It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JANUARY, 2024

D.O. OGEMBO

JUDGE

30/1/2024

Court:

Ruling read out in presence of applicant and Ms. Mumu for State.

D.O. OGEMBO

JUDGE



30/1/2024

