



**AOO v Director of Public Prosecution (Criminal Miscellaneous Application
E118 of 2022) [2024] KEHC 384 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E118 OF 2022**

**HM NYAGA, J
JANUARY 25, 2024**

BETWEEN

AOO APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The Applicant, Austine Otieno Oginga through an undated application moved this Court for sentence rehearing.
2. The facts as contained in the application indicate that the Applicant was charged, convicted and sentenced to 15 years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* in Molo C.M. Court Criminal Case No. E170 of 2021.
3. The applicant states that he did not prefer an appeal against the said conviction and sentence. Instead he has made the present application.
4. The Applicant argues that this Court is bound by the decision of the Supreme Court of Francis Karioko Muruatetu & another vs Republic [2017] eKLR under Article 163(7) of *the Constitution*. He further avers that the court in Petition No. E017 of 2021 Philip Mueke Maingi & others vs Republic, held that those convicted of the sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.
5. The Applicant contended that this court in resentencing will be discharging its constitutional obligation pursuant to Article 20(3), (a) and (b) of *the Constitution*.
6. The Respondent opposed the application. Miss Murunga for the State opted to submit orally. The Application filed his written submissions.



Applicant's Submissions

7. The Applicant submitted that the recent law developments have shown that courts can divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*. In support of this proposition, he relied on the following cases;
 - a. Philip Mueke Maingi & 5 others vs Director of Public Prosecutions & another (supra);
 - b. Dismas Wafula Kilwake vs R [2018] eKLR,
 - c. S vs Malgas 2001 (2) SA 1222 SCA 1235 , eKLR
 - d. Reagan Otieno Okello vs Republic [2016] eKLR,
 - e. Evans Wanjala Wanyonyi, HCCR Appeal No. 174 Of 2015, Jared Koita Injiri vs Republic [2019] eKLR
 - f. Paul Ngei vs Republic [2019] eKLR,
 - g. Sammy Wanderi Kugotha vs Republic [2021] eKLR.
8. On sentencing, the Applicant submitted that at the time of conviction he was a young school going man and a first offender. He stated that he is remorseful and pleaded for another chance so that he could support his extended family which is suffering after his incarceration.
9. He also submitted that he has fully embraced the rehabilitative programmes offered while in custody.
10. Citing Article 50 (2) (p) (q) of *the Constitution*, the applicant prayed for lenient sentence.
11. He further submitted that this court should take into account the time spent under Section 333(2) of the Criminal Procedure Code. To buttress his submissions, he relied on the case of Ahamad Abolfathi Mohammed & another vs Republic [2018] eKLR.

Respondent's Submissions

12. The prosecution counsel submitted that pursuant to the court's dicta in Philip Mueke's case (supra) she is not opposed to resentencing. However, she stated that the circumstances of this case demand stern sentence as the victim was in need of protection yet the Applicant waylaid and defiled her, and passed a venereal disease to her.
13. She posited that the victim was traumatised as a result and thus proposed that the sentence should not be interfered with.

Analysis & Determination

14. The only issue that arises for determination is whether the Applicant's plea for resentencing is merited.
15. In this case the applicant was charged under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The said provisions states:
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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..."



16. The Applicant was sentenced 15 years' imprisonment. The trial court did state that it was the mandatory sentence.
17. The issue of mandatory sentences was addressed in Francis Karioko Muruatetu & others vs Republic (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

“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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of *the Constitution*; an absolute right.”

18. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

“Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –

- i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 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 victim 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 respect of 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. Possibility of reform and social adaptation of the offender.
 - j. Any other factor the court considers relevant.
 - k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
 - l. 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*.”
19. The applicant has stated that he did not appeal against the sentence. The registry did confirm that there is no pending appeal before any court in regards to this matter. For this reason, I am of the opinion that this court is clothed with jurisdiction to determine this application.
20. Subsequent to the decision *Francis Muruatetu (supra)* a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.
21. For instance, in *Jared Koita Injiri vs Republic [2019] eKLR* the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that;
- “if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”
- The court further stated:
- “The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
- Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”
22. The Court of Appeal in *Dismas Wafula Kilwake vs R (supra)*, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.
23. *Odunga J (as he then was), in Philip Mueke Maingi & 5 others vs Director of Public Prosecutions & another (supra)* held as follows;
- “Taking cue from the decision in *Francis Karioko Muruatetu* directed that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial



Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.”

24. In the case of Fappyton Mutuku Ngui vs Republic [2019] eKLR the court directed the trial court to rehear the Applicant’s sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.
25. The court in Hashon Bundi Gitonga vs Republic [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.
26. In Samuel Achieng Alego vs Republic [2018] eKLR the court stated as follows;

“It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

Such sentences, in my view, 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 as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates...”
27. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the Sexual Offences Act takes away a court’s discretion to impose a sentence it considers appropriate in any given circumstances.
28. In this case the trial magistrate stated that she had taken into consideration the fact that the accused pleaded guilty to the offence, the law under which the accused was charged under, the nature of the offence and the exhibits adduced by the prosecution, the fact that the accused was HIV positive and the violent nature of the offence and proceeded to sentence the accused to 15 years imprisonment as per the law.
29. It is evident that the learned magistrate proceeded on the footing that her hands were tied by the minimum sentence, and is deemed by the applicant to have failed to exercise her discretion in sentencing.
30. From the authorities cited hereinabove, it is now settled law that the provisions of mandatory minimum sentences have been declared unconstitutional. Thus the trial court had a discretion to mete out a shorter sentence if it saw it fit and just to do so.
31. In cases of death sentences the issue is quite straightforward. There cannot be a more severe sentence than a death sentence.
32. A problem arises when it comes to penal provisions that provide for a minimum and no maximum imprisonment sentences . The question to be answered is whether when a court is faced with an offence that is couched to carry a minimum sentence, can it lawfully mete out the same minimum sentence or even a longer sentence?



33. The assumption is that a court will mete out a sentence which is less than the minimum sentence prescribed.
34. In my opinion there is nothing unlawful if the court, despite finding that it has a discretion to mete out a lesser sentence, finds circumstances that exist call for such a sentence.
35. Having stated the above, I will now go to the circumstances of this case.
36. The applicant was found to be HIV positive, a factor that was duly considered by the court. He did not use any protection when he had sexual intercourse with the complainant. He thus knowingly exposed the complainant to the said disease.
37. I have looked at other authorities on similar cases of defilement. For instance, in Patrick Mutyangulu Muia vs Republic [2021] eKLR & Louis Kaugi Nyaga vs Director of Public Prosecutions [2020] eKLR the courts dealt with accused persons who had been charged under the same section as the Applicant herein and they revised the sentences downwards from 15 years to 10 years' imprisonment.
38. It is thus apparent that the trend has been to mete out sentences less than the "mandatory" sentence, unless there are aggravating circumstances.
39. In this case there are aggravating circumstances in that the applicant used an unfair advantage to secure and satisfy sexual desires on the minor. He used force while defiling the minor and despite knowing that he was HIV positive he defiled the minor without using protection.
40. This Court considers that the offence was quite an egregious act on an innocent child. The court cannot overlook the trauma it caused the victim.
41. In the circumstances of the case I find that even though the trial court had a discretion in sentencing, the sentence cannot be said to be manifestly unjust or excessive.
42. I therefore proceed to dismiss the application for re-sentencing and I uphold the sentence of 15 years imposed by the lower court on 10th February, 2022.
43. Under section 333(2) of the Criminal Procedure Code the said will run from the date the applicant was first remanded in lawful custody i.e. 21st December, 2021.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 25TH DAY OF JANUARY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Wanjiku for state

Applicant present

