



**Vurache v Republic (Constitutional Petition E006 of 2023)  
[2024] KEHC 1782 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CONSTITUTIONAL PETITION E006 OF 2023  
AC MRIMA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**TIMOTHY VURACHE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein, Timothy Vurache, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#), No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a Child contrary to Section 11(1) of the [Sexual Offences Act](#), No. 3 of 2006.
2. He denied the offences and a trial was held where he was found guilty of the offence of defilement, convicted and sentenced to a term of 20 years in prison.
3. The Petitioner appealed against both the conviction and sentence to the High Court. That was in Criminal Appeal No. 26 of 2015. The appeal was, however, wholly dismissed. Thereafter, the Petitioner filed several sentence review applications without any success. He eventually filed this Petition.
4. The gravamen of the Petition is that the trial Court erred in handing down an unconstitutional sentence for taking the position that it was bound by the minimum and mandatory sentences provided for under the [Sexual Offences Act](#).
5. The State affirmed that the sentence was lawful.
6. In his submissions, the Petitioner claimed that the sentence was both unconstitutional and harsh. very harsh. He prayed that the custodial sentence be set-aside and he be accorded a non-custodial sentence. He also referred to several decisions.



7. The State did not file any written submissions.
8. This Court has carefully considered the record. The trial Court partly stated as follows in sentencing the Petitioner: -

I have considered the mitigating factors of the accused, noted that he is a first offender. I have also considered that he is a family man, balancing of with the dictates of Section 8(3) of the *Sexual Offences Act*, the same leaves no discretion to the Court...

9. It is the case that the Court was guided by the provisions of Section 8(3) of the *Sexual Offences Act* in passing the sentence. The Court, therefore, handed down the minimum sentence of 20 years' imprisonment.

10. Section 8(3) of the *Sexual Offences Act* states as follows: -

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

11. The above provision apparently provides a minimum sentence of not less than 20 years imprisonment on conviction.

12. The constitutionality of minimum sentences has been considered by Courts and it is now well settled that such sentences, just like mandatory sentences, do not pass the constitutional muster under Article 50(1) of *the Constitution* for they infringe on the right to fair trial by interfering with the discretion of a sentencing Court. I will consider some few decisions to that end.

13. The Supreme Court in Petition No. 15 of 2015 Francis Karioko Muruatetu & another v Republic [2017] eKLR addressed the issue of mandatory sentences in Section 204 of the Penal Code, Cap. 63 of the Laws of Kenya in the following manner: -

- (47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
- (48) 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 the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right.
- (49) With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.



- (50) We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
- (51) The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.
- (52) We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst *the Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.
- (53) If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

14. In *S vs. Mofokeng* 1999(1) SACR 502 (W) at 506 (d), Stegmann, J had the following to say: -

..... For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases.

15. The Court in *S vs. Jansen* 1999 (2) SACR 368 (C) at 373 (g)-(h), Davis, J stated that: -

... mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused.



16. The High Court (Ogola, J.) in *Yusuf Shiunzi v Director of Public Prosecution* [2020] eKLR discussed the matter in the manner hereunder: -
21. It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences. This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
- “Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”
22. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S vs. Malgas* 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:
- “What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.”
17. Deriving from the foregoing, the sentencing Court ought not to have been bound by the minimum sentence in Section 8(3) of the *Sexual Offences Act*. Instead, the Court ought to have considered the matter on its own merit and exercise its discretion in arriving at its own sentence.
18. The upshot is, therefore, that the sentence imposed, with tremendous respect to the sentencing Court, remains unconstitutional.
19. The Petition is, hence, successful.
20. Deriving from the above, the following final orders of this Court do hereby issue:
- a. A Declaration hereby issue that the sentence of 20 years' imprisonment handed down to the Petitioner in Kapenguria Principal Magistrates Court Criminal Case No. 473 of 2015 Republic vs. Timothy Vurache on 2<sup>nd</sup> December, 2015 is unconstitutional since the Court handed down a mandatory and minimum sentence as provided for under Section 8(3) of the *Sexual Offences Act* thereby failing to exercise discretion in sentencing.
  - b. The sentence of 20 years' imprisonment rendered on 2<sup>nd</sup> December, 2015 is hereby quashed and set-aside.
  - c. The Appellant shall be re-sentenced by the trial Court.
  - d. A Pre-Sentence Report be availed before the trial Court.
  - e. The Hon. Deputy Registrar of this Court to transmit the trial Court file and a copy of this judgment to the trial Court forthwith.
  - f. This file is hereby marked as closed.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2024.**



**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

Timothy Vurache, the Petitioner in person.

Mr. Majale, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Juma– Court Assistants.

