



**Kathithu v Republic (Criminal Petition E099 of 2023)
[2024] KEHC 2141 (KLR) (27 February 2024) (Reasons)**

Neutral citation: [2024] KEHC 2141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL PETITION E099 OF 2023
EM MURIITHI, J
FEBRUARY 27, 2024**

BETWEEN

NAFTALLY MATHIU KATHITHU PETITIONER

AND

REPUBLIC PROSECUTOR

REASONS

1. The petitioner herein aged 91 years and who was the paternal grandfather of the victim, a girl aged years at the time of the offence but is now deceased, was convicted and sentenced to imprisonment for life for the offence of defilement contrary to section 8(1) and 8(2) of the Sexual Offences Act by Githongo Senior Principal Magistrate’s Court in SOA Case No. 926 of 2016, and he unsuccessfully appealed to the High Court and subsequently to the Court of Appeal.
2. He has now petitioned the court for a declaration that the mandatory life sentence under section 8(2) of the Sexual offences Act infringes on the right to fair trial under Article 25 (c) of the Constitution by inhibiting the consideration of an accused’s mitigation as envisaged under Article 50 (2) as read with section 216 and section 329 of the Criminal Procedure Code.
3. This matter was considered by the Meru GK Prison Dispensary in charge who by letter dated 18/1/2024 reported as follows:

“ 18/1/2024

Re: Medical Report.

Naftally Mathiu, 91yrs, Male, Merj208/2016/LS

Above named patient, an elderly man is being treated for chronic hypertension, peptic ulcer disease, and asthma.



Client was diagnosed with hypertension at Meru General Referral Hospital in 10yrs ago, put on treatment and he has a follow up clinic at the Meru hospital.

At our clinic he is on weekly monitoring and daily medication for fore said chronic illness.

Peptic ulcer disease requires special diet, daily esomeprazole, and the prison environment he finds it difficult to adhere to his medical and nutrition advice.

Currently the client medical status is very poor, client is not mobile, needs assistance while moving around, cleaning/bathing/feeding and even using the toilet.

Bearing in mind the client's debilitating conditions which is also expensive to manage, my client having served long sentence already, we feel considering his medical status his treatment and follow up would be better and fair from home.

Please assist him where possible,

Edwin Ileri,

RCO

Meru GK Dispensary

Meru Prison.”

4. The Probation Officer, Githongo in a socio-inquiry dated 6/2/2024 reported on the matter urging release of the petitioner as follows:

“Conclusion

Your honour, the inmate is a senior citizen at the age of 91. His stay in the prison has been having challenges due to his old age. The secondary victims who are family members are ready to receive him back and live with him as they used to do.

His family including secondary victims who are part of it and the community members are positive towards receiving him back if the court releases him noting that his past conduct prior to this offence is plausible.

The home and neighbourhood are conducive for him since there is not any acrimony established.

Mwenda Kiriinya

Probation Officer

Githongo Station

06/02/2024”

5. At the hearing of the case, the petitioner who had had written submissions filed together with his petition merely urged the court to “I am 91 years old. I pray that court to release me for the remaining days.”
6. Counsel for the DPP conceded the petition in submissions set out in full below:

“Mr. Masila for DPP

Petitioner faced the offence of defilement in SOA 926 of 2016 Githongo Law Courts. He was convicted and sentenced to imprisonment for life. He appealed in Meru HCCRA 113



of 2016 which was dismissed. He further appealed to Court of Appeal No. 90 of 2017 and Appeal was dismissed.

Petitioner has been in custody for 8 years.

Looking at the *Sentencing Policy Guidelines, 2023* in respect to elderly offenders, the court needs to consider the 2 dimensions as to whether the petitioner's old age or illness will cause the offender to experience undue hardships while in custody and whether the conditions in custody would be termed inhuman bearing in mind the offender's state of health and lastly whether the offender's condition is one that would cause undue burden on other offenders and prisons officers taking care of him.

This has been confirmed by Medical Officer of the Meru GK Prison by letter of 18/1/2024. Life imprisonment was in Pet E009 of 2022, *Hesbon Kiruja Murithi v. DPP* interpreted as a term of 30 years.

The Petitioner is 91 years old and looking at the remission, he would serve 20 years imprisonment and considering that he has already served 8 years, he remains with 12 years to serve. His expedited date of release will be 2036. The petitioner will be 103 years.

Looking at Article 50 (6) of *Constitution*, there is new information, which dictates review of the sentence. The mitigating factors set in *Muruatetu case* looks at the age of the offender, his status as first offender, offender's health states, including physical and mental health at the time of re-sentence, and offender's behavior in prison and likelihood of reform.

Petitioner has been in custody for 8 years, he has already achieved the sentencing objectives of rehabilitation, deterrence and retribution, Community protection and denunciation. In addition, under Article 57, the right of elderly persons to live dignity, respect and free from abuse with reasonable care from family and state.

Medical Report of GK Prison, Petitioner is not receiving adequate care considering that the Prison authorities are facing challenges in addressing is daily needs.

The sentence should not amount to excessive punishment in view of the extent of the illness and age of the Petitioner, as well as in light of the offence that he committed. Additionally, the sentence should not amount to cruel, inhuman and degrading treatment in view of illness on age of offender.

It is for these reasons that my prayer to court is to reduce the sentence imposed on the Petitioner to the period already served.

I also urge that there is a Social Inquiry Report dated 6/2/2024 and filed on 15/2/2024, which is positive in respect of the petitioner's release."

7. The *Sentencing Policy Guidelines 2023*, Gazette Notice No. of September 1, 2023 in relevant parts provides as follows:

“3.3 Terminally Ill And Elderly Offenders And Offenders With Chronic Illness

- 3.3.1 As with the case of offenders with disability the consideration should be whether in view of the illness or age, the sentence rendered is excessive. There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed



inhuman bearing in mind the offenders' state. Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them.

- 3.3.2 Article 57 of *the Constitution* affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

Situational Analysis

- 3.3.3 The Kenya Prisons Service has made a good attempt at addressing the needs of HIV/AIDS positive offenders. However, other offenders with terminal illnesses such as those in need of chemotherapy for cancer treatment; hypertension; diabetes or other chronic illnesses, are not adequately catered for and face undue hardship while in custody.

Policy Directions

- 3.3.4 When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender.

- 3.3.5 Non-custodial sentences – or suspended sentences - should be considered unless, in light of the nature and seriousness of the offence committed and other factors, justice would demand the imposition of a custodial sentence.”

8. As pointed by the DPP, this court has, by its decision in *Hesbon Kiruja Mureithi*, Meru HC Cri. Petition No. E009 of 2022 of 31/1/2024, found the indeterminate nature of the life sentence unconstitutional and, following the Court of Appeal, translated the life sentence to a sentence of imprisonment for thirty (30) years, as follows:

“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 December 8, 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.”



9. The Court readily accepts that serious nature of the charge of defilement c/s 8(10 and 8(2) of the *Sexual Offences Act* and the commission of the obnoxious act by a grand-father on his grand-daughter called for a deterrent custodial sentence.
10. In the circumstances of this case, however, the court considers that the mandate and grounds for Resentencing is conceded by the DPP under Article 50 (6) of the *Constitution*.
11. The Court further considers that the Petitioner, having served 8 years of his sentence - equivalent to imprisonment for 20 years with remission - must be taken to have substantially served his sentence for purposes of retribution and deterrence. At his advanced age of 91 years, the object of reformation and rehabilitation, if possibilities, are not the key drivers of sentencing.
12. In addition, when the sentence of imprisonment for life, translating to 30 years imprisonment, is balanced against the need properly to care for the elderly and the cost of providing for such care, in custody, it is clear that such a sentence on the petitioner herein is excessive, inhuman and degrading treatment, at an unreasonable cost on the facility of the GK prison and the goodwill and energy of other inmates.
13. The petitioner would 103 years at earliest completion of his sentence. The court should agree that it is inhuman and degrading treatment to hold a convicted person until that age when, if he lives that long, he would on release from prison no longer be able to care for himself, not to mention the necessary cost on the prison authorities for the care and support required to keep him that long. No objective of penal treatment will be served by such eventuality.
14. The Court should, therefore, revise and reduce the sentence of imprisonment for life to such sentence for a term as would allow the petitioner to be released from custody forthwith.

Orders

15. It is on the basis of the reasons set out above, that the Court upon hearing the application made an order as follows:
 1. Upon hearing the Applicant and the counsel for the DPP, the court accepts the request by DPP to reduce the sentence of the Petitioner to the period already served so that he is released from custody unless he is otherwise lawfully held.
 2. Full reasons of the decision shall be delivered on 27/2/2024.
 3. Release order to issue forthwith.”
16. Order accordingly.

REASONS FOR THE JUDGMENT DELIVERED ON 27TH DAY OF FEBRUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Masila for DPP

Petitioner in Person

