



REPUBLIC OF KENYA



**Gichui v Republic (Constitutional Petition 7 of 2023)
[2024] KEHC 8048 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CONSTITUTIONAL PETITION 7 OF 2023**

J WAKIAGA, J

JUNE 26, 2024

BETWEEN

JULIUS MAHURU GICHUI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner was initially charged with the offence of defilement of a girl contrary to the Provisions of Section 8(1) of the *Sexual Offences Act* No 3 of 2006 at the Kangema PM Court Cr Case No 196B of 2007 where he was convicted and sentenced to life imprisonment.
2. He then filed an appeal to this Court in High Court Criminal Appeal No 44 of 2014 at Muranga which appeal was by a judgement dated February 10, 2014 dismissed both on conviction and sentence and the trial Courts findings affirmed.
3. On the 8th day of February 2020 the Petitioner filed a Chamber Summons application where he sought for an Order of retrial under the decision of *Karissa Chengo v Republic* [2017] eKLR decision which application was dismissed by this Court on the ground that his appeal was heard and determined by a Judge of this Court (Ngaah J).
4. In the meantime, Muruatetu came, leading to the filing of this petition at the high Court of Kenya at Voi, which was on June 6, 2023 transferred to this Court for determination.
5. The petition was founded on the fact that he was sentenced to a mandatory sentence prescribed under section 8(2) of the *sexual offences Act* which has been declared by the superior Courts as unconstitutional. in support of the petition the Petitioner relied on the case of *Edwin Wachira & 9 Others v Republic*.



6. The State in response to the petition filed a replying affidavit sworn by Ann Penny Gakumu Senior Principal Prosecution Counsel in which it was deposed that this Court having pronounced itself on the Appeal by the Petitioner, became *factus officio* and therefore could not hear the same clothed as a petition.
7. It was contended that the Court should look at the aggravating circumstances and in particular the age of the victim should the Court find that it has jurisdiction to entertain the petition.

Submissions

8. The Petitioner submitted that the Court is possessed with jurisdiction to resentence him arising from the jurisprudence from the superior Court, having declared the mandatory nature of the sentences as unconstitutional. He relied on the case of *Philip Mueke Maingi & 5 others v DPP* where the minimum mandatory sentence provided for in the *Sexual Offences Act* were declared unconstitutional and further in the case of *Manyeso v Republic* [2023] KECA 827 (KLR) where the Court declared life sentence unconstitutional.

Determination

9. The jurisprudence on mandatory sentences in Kenya is still not very clear since *Muruatetu 1* and *2* were issued by the Supreme Court and shall continue being so until the same is clarified either by legislation and or a pronouncement by the Supreme Court.
10. After the decision in *Muruatetu 1*, Superior Courts applied the ratio thereon to almost all penal legislations which provided for mandatory maximum and minimum sentences leading to the clarifications by the Supreme Court that the decision on *Muratetu* was in respect of the offence of murder and not any other offences but failed to provide guidelines on what to do with those decisions from the Superior Court.
11. The Court of Appeal has now pronounced itself in the cases of *Munyeso v Republic* (*supra*) that the ratio of *Francis Karioko Muratetu & another v Republic* applies to the imposition of mandatory indeterminate life sentence, namely that such sentence denies the convict facing life imprisonment the opportunity to be heard in mitigation and to that extent unconstitutional and therefore proceeded to interfere with the Court's discretion on sentence.
12. This Court on the basis of the doctrine of *stare decisis* is bound by the holding of the Court of Appeal which has proceeded to substitute life imprisonment with term sentences in many cases that have appeared before them and since the Supreme Court has not pronounced itself on the legality of these sentence save for the holding in *Muratetu 2*, it is the finding of this Court that I have jurisdiction to determine this petition herein which though indicated as a Constitutional Petition is basically a resentence hearing.
13. From the proceedings herein and without the benefit of the trial Courts file, I have noted that the complainant was aged eleven years with mental challenges at the time of the commission of the offence, which was confirmed by the Psychiatrist and that the Appellant was placed together with her by PW2. The Petitioner's main contention is on the imposition of the life sentence noting that he has been in custody for a period of 17 years during which period he has undergone prison rehabilitation programs and is currently 53 years old.
14. Whereas the issues raised by the Petitioner are in the domain of the Power of Mercy Committee, my view on resentencing is that the Court is placed in the position of the trial Court and the only question the Court has to answer is, what sentence would have been imposed had the law not provided for the



mandatory sentence? As regards this petition, now that the Court of Appeal has declared interminate life sentence unconstitutional, what appropriate term sentence should the Court impose?

15. Having looked at the circumstances of this case and considering the fact that the Petitioner was aged 37 years as at the time of the commission of the offence I have concluded that the life sentence herein be substituted with a term sentence of forty-three (43) years with effect from August 27, 2007 when he first appeared in Court.
16. And it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 26TH DAY OF JUNE 2024

J. WAKIAGA

JUDGE

In the presence of;

Accused present at Manyani – virtual

No appearance by DPP

Jackline – Court Assistant

