



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: Odunga, J)

PETITION NO. 16 OF 2020

IN THE MATTER OF: INTERPRETATION OF SECTION 39 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

AND

IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(2), 19, 22(1), 25(a), 27(1),(2),(4),

28, 29(a),(f), 50,159(2)(a), 165(3)(b)(d) OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 3 & 4 OF THE PROBATION

OF OFFENDERS ACT CAP 64 LAWS OF KENYA

AND

IN THE MATTER OF: SECTIONS 33 & 35 OF THE PENAL CODE

AND

IN THE MATTER OF: SENTENCING POLICY GUIDELINES 2016

AND

IN THE MATTER OF: CRIMINAL APPEAL NO. 193 OF 2014 AT NAKURU – JOEL WAWERU GATHONI

AND

IN THE MATTER OF: IN CRIMINAL APPEAL NO. 155 OF 2013 AT ELDORET – FRED OTIENO ODHIAMBO

BETWEEN

NATHAN KHAEMBA MAKOKHA

PHILIP MUEKE MAINGI & OTHERS.....PETITIONERS

VERSUS

THE HONORABLE ATTORNEY GENERAL.....1ST RESPONDENT

AND

JUDGEMENT

1. The 1st to 5th petitioners herein, according to the petition, are all prisoners at Kamiti Maximum Prison having been convicted for various offences and therefore serving different sentences. The petition further discloses that the said Petitioners are a group of lawyers and law students providing legal aid to indigent prisoners within Kamiti Prison under the sponsorship of the **Justice Defenders-** (registered Non-Governmental Organization whose objective is to bridge access to justice of defenceless communities in Africa and beyond).
2. According to the petition, the 1st Petitioner, **Nathan Khaemba Makokha**, aged 35 years was arrested and charged with the offence of defilement Contrary to Section 8(1)(2) of the **Sexual Offences Act** No. 3 of 2006 on the 26th July 2010 and upon full trial a special finding was made on 7th October 2011. He appealed to the High court vide Criminal Appeal no. 199 of 2011 and the appeal was dismissed. His further appeal to the Court of Appeal vide Criminal Appeal No. 149 of 2017 at Eldoret was dismissed.
3. The 6th to 27th petitioners, according to the petition, are all inmates who were arrested and charged under various categories of the **Sexual Offences Act** No. 3 and sentenced to a varied number of sentences ranging from life sentences to definite number of years.
4. The 1st Respondent, the Attorney General, is the legal adviser to the Government while the 2nd Respondent, the Director of Public Prosecutions, is the one constitutionally mandated to undertake criminal prosecutions.
5. This Petition raises the concerns on interpretations of provisions of Section 39 of the **Sexual Offences Act** No. 3 of 2006 which gives the procedure which is to be taken where upon an accused person has been declared a dangerous sexual offender by the court and convicted with no option of a fine, the court shall order as part of the sentence for the offender to be released after serving part of the sentence of imprisonment imposed by the court. The release thereof will entail placing the offender under long term supervision by an appropriate person.
6. It is contended that the above wording that has received varied interpretations by the Courts thereby leaving the proviso laced with latent ambiguity. The petitioners now approach this court seeking for a constitutional interpretation which will give regard to the overall intention of parliament at the time of formulation of the Act.
7. According to the petition, the Petitioners are **Nathan Khaemba Makokha, Philip Mueke Maingi, Isaac Ndegwa Kimaru, Hesbon Onyango Nyamwaya** and **Peter Nthanga Kago** are long term prisoners held at Kamiti Maximum Security Prison and herein acting in the interests of Petitioners 6 to 27 who are detained at Kamiti Main Prison and are serving life sentences from a conviction under the various categorizations under section 8 of the **Sexual Offences Act** No 3 of 2006.
8. According to the Petitioners, Section 39 of the **Sexual Offences Act** should be interpreted in such a way as to give the court the powers to order for the release of an offender after satisfying itself that he or she has been sufficiently reformed and rehabilitated to be re-integrated back into the society within the confines of long term supervision. In support of their position the Petitioners relied on the case of **Fred Otieno Odhiambo vs. Republic [2019] eKLR**. The Petitioners also relied on the case of **Joel Waweru Gathoni vs. Republic [2020] eKLR**, where the Court reasoned that section 8 of the **Sexual Offences Act** should not be construed to have taken away the sentencing discretion of a court and that a Court was free to move away from the strict adherence if the circumstances demanded it. This, it was argued, coupled with the powers of the High Court under section 354 of the **Criminal Procedure Code** on review then the court could grant a remedy in appropriate cases.
9. It is thus contended by the petitioners that that the qualifying trigger to a court's invocation of section 39 is for the offender to have served a substantial part of his or her sentence. Secondly, the proviso is used as tool to promote the well-being of the offender and thirdly; to ensure that he or she is properly integrated back to the society so that he or she cannot be harm to the family and community as a whole. The petitioners therefore argue that all offenders regardless of whether they are the appellate stage or have exhausted all their appeal avenues qualify for a remedy under section 39 of the Act as way of ensuring their protection from an indefinite stay in prison. The petitioners therefore humbly plead that the law confers powers on this court to call for and examine the individual workings of the Act and give effect to the real intent of parliament at the time of its enacting.
10. Reference was made to the case of **Vinter and Others vs. The UK (Application Nos. 66069/09, 130/10 and 3896/10)** and the decision of the Privy Council decision in **Spencer vs. The Queen. Hughes vs. The Queen (Spencer & Hughes) Unreported (2nd APRIL 2001)**. According to the Petitioners, the Supreme Court decision in **Francis Karioko Muruatetu & Ano vs. Rep (2017) eKLR**, in declaring the mandatory nature of the death penalty unconstitutional has brought significant development in the sentencing regime for capital offenders. Under sections 216 and 329 of the **Criminal Procedure Code**, it was contended, the court may before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.
11. While making reference to the Judiciary of Kenya sentencing Policy Guidelines at paragraph 4.1 it was argued that the interpretation of section 39 alongside the above sentencing guidelines are very explicit that the legitimate aim of sentencing offenders will rest on rehabilitation as much as other factors may be interrogated.
12. It is therefore the Petitioners' case that the continual detention of offenders who have already served a substantial part of their sentences and therefore qualify for a release order within the confines of the Act is unconstitutional in so far as it subjects them to continual stay in penal institutions. This amounts to subjecting them to degrading treatment and therefore denies, violates, infringes and threatens the rights and fundamental freedoms in the Bill of Rights and is not justified under Article.

13. It was their contention that the notion of equality springs directly from the oneness of human family and is linked to the essential dignity of an individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment or mistreatment because of its perceived superiority/inferiority. It is impermissible to subject human beings including offenders/ prisoners to differences in treatment. This is inconsistent with the Constitution.

14. The Petitioners asserted that the Respondents are under an obligation to justify the continued limitation under the impugned provision as a reasonable and justifiable limitation on certain convicts' rights is in accordance with the law, legitimate and necessary, in the interests of the reformation and rehabilitation of the prisoner or in the interests of public security or public order.

15. It was contended that a biased and or selective interpretation of the provisos under the **Sexual Offences Act** which in essence means an offender remaining in prison for the rest of his or her natural life is contrary to a number of international legal instruments ratified by Kenya including the **International Covenant on Civil and Political Rights** (ICCPR), **United Nations Standard Minimum Rules for the Treatment of Prisoners** (the Mandela Rules) and the **African Charter on Human and Peoples' Rights** (ACHPR).

16. According to the Petitioners, Article 7 of the ICCPR and Article 5 of the ACPHR both provide that no one should be subjected to torture or to cruel, inhuman order grading treatment or punishment. Article 10 of the ICCPR and Article 5 of the ACHPR both provide that in the event one is deprived of liberty, one shall be treated with respect and humanity. Rule 2 of the **Mandela Rules** provide that there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.

17. The Petitioners therefore prayed for:

a) A declaration that Section 39 of the Sexual Offences Act No. 3 of 2006 allows a Court of law to release a dangerous sexual offender after he or she has served a substantial term of the imprisonment so as to be consistent with Articles 25, 27(1), (4), 28, 29, 50, 54, and 160 (1) of the Constitution of Kenya, 2010

b) A declaration that all offenders sentenced under the sentencing provisos of section 8 of the Sexual Offences Act qualify to be termed dangerous sexual offenders and thus are eligible to be referred back to their respective trial courts for further review or direction in their cases.

c) The Court be pleased to order that all petitioners in this petition who have since undergone extensive reform and rehabilitation while in their period of custody be immediately considered in under section 39 of the Sexual Offences Act.

d) The Court be pleased to make such other order(s) as it shall deem just.

2nd Respondent's Response

18. On behalf of the 2nd Respondent, it was contended that all Petitioners were originally arrested, charged and convicted with sexual offences falling under various provisions of the **Sexual Offences Act** No. 3 of 2006 and hence serving different categories of sentences under the Act. It was contended that some of the Petitioners have exhausted all the avenues of their specific appeals while others have not.

19. In this Petition, it was contended that the Petitioners are seeking interpretation of the Applicability of Section 39(2) of the **Sexual Offences Act** (SOA). It was contended that Clause 39(3) gives long term supervision to mean it is supervision of a rehabilitative nature for a period of not less than five (5) years while Section 39(4) states that a court can only make an order under Sub-Section (2) after it has had regard to a report from a probation officer, social worker or any person designated by the court for the purpose of this Section.

20. While conceding that this Court has jurisdiction to hear this Petition it was noted that the Petitioners' contention is that their continual detainment in custody whilst there are alternatives provided for under the Constitution and statutory provisions like in the present case, amounts to a violation of this guiding principle. It was submitted that the provisions of Section 39(2) of the **Sexual Offences Act** are not a mandatory hence the Petitioners' rights were not violated under Article 29 of the Constitution as alleged in light of the fact that the Petitioners have appealed their cases up to different levels, some High Court others up to Court of Appeal and that none of the appellants has demonstrated before this court that they placed in their appeals a ground under this Section for determination by the Superior Courts.

21. It was therefore submitted that this Petition is a mere afterthought that cannot be sustained, and should be dismissed.

22. According to the 2nd Respondent, Section 39(2) of the **Sexual Offences Act** can be applied where a trial court included its provisions in its judgment; where on appeal, the appellant has included it as a ground of appeal; and where a convicted person has moved the High Court on an individual petition upon serving a substantial term of his sentence. Each application shall then be heard on its own merit by the presiding court and the court will then make a finding as per the requirements enumerated in Section 39(3) of the **Sexual Offences Act**.

23. As regards what constitutes a substantial "term" of a sentence, reliance was placed on the **Oxford Learner's Dictionary** which defines the term to mean "large in amount, value or importance". According to the 2nd Respondent, a substantial term of a sentence cannot be equated to substantial injustice since a term has a period of fixed time. It was therefore submitted that there has been no unfair application of laws envisaged in all cases of the Petitioners herein. The Petitioners are properly serving the terms of the sentences as properly stipulated in law. It was averred that none of the Petitioners have served half of their jail sentences and the 2nd Respondent opined that anything less of three-quarter of the jail term cannot be considered "a large amount" hence substantial.

24. It was further noted that serving a substantial jail term is not the only issue for consideration, and that all the factors itemized in Section 39(4) must be fulfilled. Reliance was placed on the decision of **Muriithi, J** in the case of **Moses Musa Cheptum vs. Republic (2019) eKLR**

25. It was submitted on behalf of the 2nd Respondent that since the Petitioners have different offences committed under different circumstances, each Petitioner ought to file their respective petitions or applications individually for consideration by the presiding courts.

Determination

26. I have considered the issues raised hereinabove.

27. It is clear that this petition revolves around the interpretation of Section 39 of the **Sexual Offences Act**, which Section the Petitioners contend violates their rights under Article 29 of the Constitution. That section provides s hereunder:

(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has -

- (a) more than one conviction for a sexual offence;**
- (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or**
- (c) been convicted of a sexual offence against a child.**

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.

(3) For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

(4) A court may not make an order referred to in subsection (2) unless the court has had regard to a report by a probation officer, social worker, or other persons designated by the court for the purposes of this section as such, which report shall contain an exposition of –

- (a) the suitability of the offender to undergo a long-term supervision order;**
- (b) the possible benefits of the imposition of a long-term supervision order on the offender;**
- (c) a proposed rehabilitative programme for the offender;**
- (d) information on the family and social background of the offender;**
- (e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and**
- (f) any other matter directed by the court.**

(5) An order referred to in subsection (2) shall specify –

- (a) that the offender is required to take part in a rehabilitative programme;**
- (b) the nature of the rehabilitative programme to be attended;**
- (c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and**
- (d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.**

(6) An order referred to in subsection (2) may specify that the offender is required to –

- (a) refrain from visiting a specified location;**
- (b) refrain from seeking employment of a specified nature; and**
- (c) subject himself or herself to a specified form of monitoring.**

(7) A long-term supervision order made by a court in terms of this section shall be reviewed by that court within three years from the date on which the order was made or within such shorter period as the court may direct upon referral by the Commissioner of Prisons of such an order to that court for review.

(8) Upon making a long-term supervision order in terms of this section, the court shall explain to the victim, including the next

of kin of a deceased victim, that they have the right to be present at the review proceedings referred to in subsection (7) and may make representations.

(9) A court which has granted a long-term supervision order in terms of this section may, upon evidence that a dangerous sexual offender has failed to comply with the order or with any condition imposed in connection with such order, direct that such an offender be –

(a) ordered to appear before that court or another court of similar or higher jurisdiction at a specified place and on a specified date and time; or

(b) arrested and brought before such court.

(10) Upon the appearance of a dangerous sexual offender at a court pursuant to the provisions of subsection (9), the court shall direct the accused person to show cause for failure to comply with a long-term supervision order or with any condition imposed in connection with such order and the court may –

(a) confirm the original order and any conditions imposed in connection with such order;

(b) vary or withdraw such order or any conditions imposed;

(c) impose an additional condition or conditions; or

(d) make any other order as the court deems fit.

(11) If a court has directed that a dangerous sexual offender is required to take part in a rehabilitative programme contemplated in this section, the court may order that the offender, upon being found by the court to have adequate means, shall contribute to the costs of such programme to the extent specified by the court.

(12) A person who has been declared a dangerous sexual offender and who does not comply with a supervision order in accordance with this section is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both.

(13) A register for convicted sexual offenders shall be maintained by the Registrar of the High Court and any person who has reasonable cause to so examine it may examine the register.

28. It is important to dissect some of these provisions. In summary, where a convict is found to have more than one conviction for a sexual offence; been convicted of a sexual offence which was accompanied by violence or threats of violence; or been convicted of a sexual offence against a child, the court may declare him to be a dangerous sexual offender. Where, upon such declaration, the convict is sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by the court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence. My understanding is that where a dangerous sexual offender is given an option of a fine, the long-term supervision does not apply. Similarly, where the offender serves the full term, the long-term supervision is not applicable.

29. Where the conditions for long-term supervision applies, it is the trial court that makes an order that in the event that the offender is released after serving part of the sentence, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence. The next provision is however, not without some difficulty. It says that long term supervision means supervision of a rehabilitative nature for a period of not less than five years. A literal reading of this provision would imply that even where the convict's remaining period is less than five years, he would still be subjected to a long term supervision of a rehabilitative nature for a period of not less than five years. Let's take a person whose was sentenced to 10 years and is being released after serving 4 years. That person would then be placed under supervision for say 6 years which equals the remainder of his sentence and is also not less than 5 years. However, where the person has served seven years, his remaining sentence would be 3 years but he would also be subjected to supervision for another 5 years.

30. Considering sections 39(2) and 39(3) of the *Sexual Offences Act*, it is clear that the two sections are patently conflicting and may in certain circumstances amount to discriminatory and disproportionate sentencing hence violating Article 51 of the Constitution. Since the principle of legality dictates that a convict ought to be subjected to the least sentence prescribed by the law where two sentences are prescribed, I declare that the period of long term rehabilitation, where the remainder of the sentence is less than 5 years, can only be for the remainder of the term notwithstanding that the remainder of the term may be less than five years.

31. The Petitioners however seek a declaration that Section 39 of the *Sexual Offences Act* No. 3 of 2006 allows a Court of law to release a dangerous sexual offender after he or she has served a substantial term of the imprisonment so as to be consistent with Articles 25, 27(1), (4), 28, 29, 50, 54, and 160 (1) of the Constitution of Kenya, 2010. With due respect, that is not what the section provides. The section merely provides that where a convict is declared to be a dangerous sexual offender and is sentenced to imprisonment without an option of a fine and, as part of the sentence, the court orders that in the event that such offender is released, for any reason, before serving his full term of imprisonment imposed by a court, the prisons department to ensure that the offender is placed under long-term supervision. The section does not oblige a Court of law to release a dangerous sexual offender after he or she has served a substantial term of the imprisonment. This Court cannot read into the section an obligation on the part of the Court to direct release of a person declared to be a dangerous sexual offender upon serving a substantial term of imprisonment since such a term is neither provided for nor is it defined.

32. The Petitioners further seek a declaration that all offenders sentenced under the sentencing provisos of section 8 of the *Sexual Offences Act* qualify to be termed dangerous sexual offenders and thus are eligible to be referred back to their respective trial courts for further review or direction in their cases. The decision whether or not a convict is a dangerous sexual offender is exercised under section 39(1) of the *Sexual Offences Act*. Whereas one of the situations where a convict may be declared a dangerous sexual offender is where the convict has been convicted of a sexual offence against a child, the provision does not state that in these circumstances, the convict must be declared to be a dangerous sexual offender. It is for the trial court to consider the circumstances of the offence and decide whether or not to declare the offender a dangerous sexual offender. Therefore, where in this case the discretion is given to the trial court, this Court cannot declare that all offenders sentenced under the sentencing provisions of section 8 of the *Sexual Offences Act* do qualify to be termed dangerous sexual offenders as to do that would amount to fettering statutory discretion granted to the trial Courts to make appropriate decisions depending on the circumstances of each case. It is on that basis that I agree with the decision in **Fred Otieno Odhiambo vs. Republic [2019] eKLR** where the Court expressed itself as hereunder; -

“[9] It is for the foregoing reason that I find that, in the absence of an order of the trial court, made as part of the Appellant's sentence, Section 39 of the Sexual Offences Act there would be no basis for an order that the Appellant be released on probation or placed on community service for the remainder of his imprisonment term. To my mind, Section 39 aforementioned would only kick in were it to be demonstrated that the Appellant, say after having earned remission, is due for release soon before serving the full term. There is no such indication herein, save the assertion that he has served a substantial part of his sentence.”

33. The Petitioners further seek an order that all petitioners in this petition who have since undergone extensive reform and rehabilitation while in their period of custody be immediately considered in under section 39 of the *Sexual Offences Act*. Rehabilitation under section 39 aforesaid only kicks in where an offender is released after serving part of a term of imprisonment imposed by a court. The issue of serving substantial part of the sentence does not therefore arise. I therefore associate myself with the views of **Muriithi, J** in **Moses Musa Cheptum vs. Republic (2019) eKLR** where he expressed himself as hereunder:

“Section 39(2) of the Sexual Offences Act...is a provision for the continued supervision of an offender upon his release when it happens earlier than upon completion of a sentence. It is not a substantial portion of a sentence. It is a provision for imposition of additional penal consequence of supervision for a dangerous sexual offender and even imposes further sanction under sub-section for breach of the supervision order.”

34. There is no evidence before me that any of the Petitioners have been released or are being considered for release after serving part of their terms of imprisonment.

35. Having considered the issues raised in this petition, I have no basis for finding that the Petitioners' rights under Article 29 of the Constitution have been violated. I however, declare that the period of long term rehabilitation, where the remainder of the sentence is less than 5 years, can only be for the remainder of the term notwithstanding that the remainder of the term may be less than five years. Save for that declaration, this petition fails and is otherwise disallowed.

36. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF FEBRUARY, 2022.

G.V. ODUNGA

JUDGE

In the presence of:

The Petitioners

Mr Ngetich for Ms Njeru for the 2nd Respondent

CA Susan