



**Kiprop v Republic (Criminal Petition E026 of 2021)
[2023] KEHC 25138 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E026 OF 2021
JRA WANANDA, J
NOVEMBER 10, 2023**

BETWEEN

VINCENT YATICH KIPROP PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Petition seeks setting aside of a life imprisonment sentence and therefore, re-sentencing.
2. The Petitioner was charged in Kabarnet Magistrates Court Criminal Case No. 596 of 2010 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was convicted and on 8/03/2011 sentenced to serve life imprisonment. Aggrieved by the sentence and conviction, he lodged an appeal vide Eldoret High Court Criminal Appeal No. 48 of 2011. In the Judgment delivered on 28/11/2013 by Kimondo J, the Appeal was dismissed in its entirety and the Court affirmed the conviction and life imprisonment sentence.
3. Being again dissatisfied with the decision of the High Court, the Petitioner lodged a second appeal at the Court of Appeal, namely, Eldoret Criminal Appeal No. 46 of 2014. This, too, was dismissed in its entirety in the Judgment delivered on 14/06/2016.
4. The Petitioner has now returned to this Court with the present Application, the Notice of Motion dated 18/02/2021. In a nutshell, he now seeks orders for resentencing on grounds that the sentence of life imprisonment was unconstitutional.
5. The Petitioner filed his written Submissions on 2/06/2021 and the Respondent (State), through Senior Prosecution Counsel Emma Okok, filed on 11/07/2023.



Petitioner's Submissions

6. The Petitioner submitted that the emerging jurisprudence from the Supreme Court case of *Francis Karioko Muruatetu and Anor v Republic* (2017) eKLR paved the way for persons serving mandatory sentences to have their sentences re-heard and imposed afresh as appropriate. He cited the cases of *Jared Koita Injiri v Republic* (2019) eKLR and *David Esokon Samuel v Republic* (2020) eKLR.
7. He submitted that the principles applicable in sentencing are set out in the *Judiciary Sentencing Policy Guidelines* to include; proportionality; the sentence meted out must be proportionate to the offending behaviour, the punishment must not be more or less than is merited in view of the gravity of the offence; proportionality of the offending behaviour is weighed in view of the actual foreseeable and intended impact of the offence as well as the responsibility of the offender; deterrence: prevent crime and reduce crime rate - based on the notion that everyone understands that certain conduct constitutes crime which carries a severe penalty, and because of the this, the public will desist from the targeted conduct.
8. He added that while in prison, he took the imprisonment positively and took advantage of the opportunities therein to reform and gain skills which will help him impact society positively, these included a theological course, tailoring and masonry amongst others and that he will be beneficial to his family and the society while out of prison. He maintained that he deserves a remedy in the form of resentencing.

Respondent's Submissions

9. Learned Counsel for the State submitted that life imprisonment is the minimum sentence provided for by law for an accused person who has been charged with defiling a child below the age of 11 years. She conceded that recent jurisprudence reveals a trend whereby Courts are now moving away from imposing the minimum mandatory sentences prescribed under the *Sexual Offences Act* on the ground that the same are unconstitutional. She added that in the case of *Philip Mueke Maingi & 5 Others v the Director of Public Prosecutions and the Attorney General* (High Court of Kenya at Machakos Petition No. E071 of 2021, faced with the same question, the Court gave the following orders:
 - i. To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.
 - ii. Taking cue from the decision in *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR (Muruatetu 1) 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.
 - iii. Save for the foregoing, the other reliefs are declined since this Court cannot grant a blanket order for resentencing in the manner sought.
10. Counsel submitted that from the foregoing, it is evident that each case should be determined on its own merits during resentence hearing, looking at the circumstances of this case, the Petitioner defiled a child aged 10 years old, the complainant lived with her grandmother and on the material night, her grandmother was away from home, the Petitioner who was well known to the complainant lured her with honey to his house, he defiled her twice and released her the following morning, the Petitioner



took advantage of a vulnerable person, a child aged 10 years, he abused the trust bestowed upon him by the society as an adult and instead of protecting the complainant, turned out to be her tormentor and that his actions caused psychological torture to the complainant and scarred her for life.

11. She urged that retribution and deterrence are some of the objectives of sentencing, that taking into account the evidence adduced by the prosecution, the age of the complainant and the circumstances of the case, the sentence of life imprisonment meted out on the Petitioner was a sufficient and deterrent sentence and urged the Court not to interfere with the same.

Analysis & Determination

12. Upon considering the Petition, Submissions and the authorities cited, I find the issue that arises for determination to be

“whether the Court should interfere with the sentence of life imprisonment”.

13. I now proceed to determine this issue.

14. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) which provides as follows:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

15. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the case of [Francis Karioko Muruatetu & Another v Republic](#) [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision was authority to the effect that, just like in cases of murder, 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 sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

16. However, in [Francis Kariuki Muruatetu & Another v Republic: Katiba Institute & 5 Others \(Amicus Curiae\)](#) (2021) Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as Muruatetu 2), the Supreme Court subsequently clarified that its directions given in [Muruatetu \(1\)](#) regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also [Juma Abdalla v Republic](#), Court of Appeal Criminal Appeal No. 44 of 2018 (2022) KECA 1054 (KLR) (7 October 2022).

17. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the [Sexual Offences Act](#), nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained to impose the provided sentences if the circumstances do not demand it.

18. For the above proposition, I refer to the Court of Appeal decision in [Joshua Gichuki Mwangi Mwangi v R](#), Criminal Appeal No. 84 of 2015, Nyeri in which the Court quoted its earlier decision in [Dismas Wafula Kilwake v Republic](#) [2019] eKLR and stated as follows:

“..... Being so persuaded, we hold that the provisions of section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing.



Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing

19. Further, there is also emerging jurisprudence questioning the constitutionality of life imprisonment. In the case of *Julius Kitsao Manyeso v Republic* – Criminal Appeal No. 12 of 2021, the Court of Appeal expressed itself as follows;

“We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim. App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, 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.

20. The upshot of the foregoing is that the higher Courts having now released Courts from the yoke of being confined to imposing mandatory minimum and maximum sentences without discretion and the higher Courts having also now outlawed the imposing of the life sentence, I find that this Court has the mandate to interfere with the sentence imposed.

21. In the said case of *Julius Kitsao Manyeso* (*supra*), after finding that the life sentence imposed upon the Appellant was unconstitutional, the Court of Appeal went to state as follows:

“The appellant also did not say anything in mitigation after conviction by the trial court, which he attributes to his young age at the time. 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.”

22. Applying the above reasoning to the facts of this case, I, too, have considered the mitigation of the Petitioner and equally the circumstances of the case. The victim herein was 10 years old at the time of the offence and will equally be traumatised for the rest of her life. Whereas the Petitioner claims that he has been rehabilitated, the objectives of sentencing, specifically deterrence, remain pertinent when the Court is imposing a sentence. It is therefore upon this Court to impose a sentence that is proportionate to the offence committed.

Final Orders

23. In the premises, the Application dated 18/02/2021 partially succeeds. Accordingly, I issue the following orders:
- i. The sentence of life imprisonment is hereby set aside and substituted with a sentence of 40 years imprisonment.
 - ii. The sentence shall run from the date of the Judgment of the trial Court, 8/03/2011.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 10TH DAY OF NOVEMBER 2023

WANANDA J. R. ANURO

JUDGE

