



Kariuki v Republic (Petition E003 of 2023) [2024] KEHC 10065 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E003 OF 2023

RN NYAKUNDI, J

AUGUST 8, 2024

**IN THE MATTER OF ARTICLE 22(1), 23(1), 25(C), 27, 28, 50(2)(P)(Q),
159(2), 160(1) AND 165 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE COURT OF APPEAL IN MWANGI VS REPUBLIC
(CRIMINAL APPEAL 84 OF 2015) 022] KECA 1106 (KLR)**

AND

**IN THE MATTER OF EDWIN WACHIRA & 9 OTHERS VS REPUBLIC
PETITION NO 97 OF 2021 CONSOLIDATED WITH PETITION NO 88 OF
2021 AND PETITION NO 57 OF 2021 AT MOMBASA HIGH COURT**

AND

**IN THE MATTER OF SECTIONS 216, 329, AND 333(2) OF THE
CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA**

BETWEEN

NEWTON KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Petitioner herein was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No 3 of 2006 in Criminal Case No 2428 of 2007 at Eldoret CM's Court and sentenced to life imprisonment.



2. The Petitioner lodged an appeal to the High Court at Eldoret in HCCRA No. 24 of 2008 whereby the same was dismissed in its entirety; conviction and sentence affirmed. The Petitioner further lodged his second and final appeal to the Court of Appeal at Eldoret vide C.O.A No. 417 of 2010 whereby the same was dismissed in its entirety; conviction and sentence affirmed hence the Petitioner has no pending appeal.
3. The Petitioner stated that he was sentenced to a mandatory sentence as prescribed by section 8(2) of the *Sexual Offences Act* No 3 of 2006 without consideration of the mitigation or unique facts and circumstances of his case.
4. The Petitioner stated that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition to the High Court for resentencing.
5. The Petitioner sought the following prayers:
 1. That, the Honourable Court Be Pleased to review my sentence and grant me a definite lenient sentence as per the mitigation that I shall tender during the hearing of this application and pursuant to Article 50(2)(p)(q) of *the Constitution* of Kenya 2010.
 2. That, the period spent in remand and custody be computed into the eventual sentence to be awarded pursuant to the provisions of section 333(2) of the Criminal Procedure Code and also pursuant to *Jona & 87 others vs Kenya Prison Service & 2 others (Petition 15 of 2020)* [2021] KEHC 457(KLR).
6. The Petitioner filed an application vide undated Chamber Summons supported by the annexed Affidavit sworn by Newton Kariuki stating that:
 - a. That, the Honourable Court be pleased to certify this application as urgent and be heard on priority basis.
 - b. That, I am the applicant herein seeking re-hearing of sentence pursuant to the decision in Edwin Wachira & 9 Others vs Republic Petition No 97 of 2021 at Mombasa High Court.
 - c. That, the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared that the impugned provisions of the *Sexual Offences Act* No 3 of 2006 prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused person's individual circumstances and mitigation, such sentences fall foul out of the right to a fair trial guaranteed under Article 50 of *the Constitution* of Kenya because mitigation and sentencing are part of a fair trial process.
7. The Application is supported by the grounds on face of it and by the annexed supporting Affidavit of Newton Kariuki. The Applicant states that the directions issued by the Supreme Court on 6th July 2021, in Francis Karioko Muruatetu & Another Vs Republic (2017) eKLR left it open to the High Court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination and that the Supreme Court did not hold that the High Court ought not to apply the reasoning in Francis Muruatetu & Another Vs Republic (2017).



8. The Applicant herein states that he was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the [Sexual Offences Act](#) No 3 of 2006 in Criminal Case No 2428 of 2007 at Eldoret CM's Court and sentenced to life imprisonment.
9. The Applicant states that he lodged an appeal to the High Court at Eldoret in HCCRA No. 24 of 2008 whereby the same was dismissed in its entirety; conviction and sentence affirmed. The Petitioner further lodged his second and final appeal to the Court of Appeal at Eldoret vide C.O.A No. 417 of 2010 whereby the same was dismissed in its entirety; conviction and sentence affirmed hence the Petitioner has no pending appeal.
10. The Applicant states that he was sentenced to a mandatory sentence as prescribed by section 8(2) of the [Sexual Offences Act](#) No 3 of 2006 without consideration of the mitigation or unique facts and circumstances of his case.
11. The Applicant states that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition to the High Court for resentencing and hence the reason for his application.
12. The Applicant also states that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared that the impugned provisions of the [Sexual Offences Act](#) No 3 of 2006 prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused person's individual circumstances and mitigation, such sentences fall foul out of the right to a fair trial guaranteed under Article 50 of [the Constitution](#) of Kenya because mitigation and sentencing are part of a fair trial process.
13. Further, the Applicant states that the Court of Appeal's decision in [Mwangi Vs Republic \(Criminal Appeal 84 of 2015\)](#) is relevant to the application herein and that the courts should as far as possible, have the unfettered discretion in relation to sentencing. He also states that sentencing discretion permits balanced and fair sentencing which is a hallmark of enlightened Criminal justice and the absence of this crucial discretion is potentially prejudicial to the accused person.
14. The Applicant further states that the impugned mandatory minimum sentences are discriminatory in nature because they give differential treatment to a convict under the impugned provisions distinct from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences, so, mandatory minimum sentences violate an accused person's rights under Article 27 of [the Constitution](#) of Kenya 2010. Further, he contended that the High Court issued an order that persons convicted and imprisoned under the [Sexual Offences Act](#) No 3 of 2006 are at liberty to petition to the High Court for mitigation and resentencing.
15. The Applicant also states that the period spent in remand and custody be computed into the eventual sentence to be awarded pursuant to the provisions of section 333(2) of the Criminal Procedure Code and also pursuant to [Jona & 87 others vs Kenya Prison Service & 2 others \(Petition 15 of 2020\)](#) [2021] KEHC 457(KLR).
16. The Petitioner submitted, in his view, the sentence is harsh given that the prison environment does not offer him proper medical care, which he submitted that it is in contrary to Art 43 of [the Constitution](#).



17. Further, he submitted that Justice G.V. Odunga in Philip Mueke Maingi and 5 others interpreted the provisions of the *Sexual Offences Act* as not to take the discretion of the court in sentencing. That the learned judge went ahead to state as follows:

“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 sentences are at liberty to Petitioner the High Court for orders of re-sentencing in appropriate cases.”

18. The petitioner argued that the sentence does not live up to the objectives of sentencing. He stated his mitigation measures to be that the Honourable Court finds that he was convicted as a first offender; that the Honourable court be pleased to find that he is family man whose life is greatly affected by the imprisonment and that the Honourable Court acknowledges the fact that while in prison, he has taken full advantage of the rehabilitative programs offered in the correctional facility as evident in the attached documents together with a prison report. He stated that the court should consider a lesser sentence for the said sentence has achieved rehabilitation. He equally urged the court to consider the provisions of Section 333(2) of the Criminal Procedure Code.

Analysis and determination

19. In deciding this application, I have perused and considered the judgment in Court of Appeal at Eldoret vide C.O.A No. 417 of 2010 and High Court at Eldoret in HCCRA No. 24 of 2008 which relate to the same case which started in the Magistrates Court. I have also considered the application and the mitigation submissions by the applicant. The issue manifest for determination is:

Whether the sentence review is merited, cognizant of the fact that his appeal was summarily dismissed by this court and the Court of Appeal.

20. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

21. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution*, A further leapfrog development; under article 50(2)(p) of *the Constitution*:

50(2) Every accused person has the right to a fair trial, which includes the right —(p)to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

22. The applicant has approached the court on the basis of the decisional law in Philip Mueke Maingi & Others Vrs Rep, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. It stated;

There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes



sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.

23. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga v Republic* [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.
24. In *Michael Kathewa Laichena & Another v Republic* [2018] eKLR Majanja J. stated: "by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".
25. Further, the Court of Appeal sitting in Malindi in *Manyeso v Republic Criminal Appeal No. 12 of 2021* [2023] kECA 827 (KLR) held that mandatory life sentences are unconstitutional and are "an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the constitution*. The said decision is supported by the case of *Vinter and others v UK*, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.
26. Article 50(6) of *the Constitution* of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.

Sentencing

27. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Mahareshttra* at paragraph 70-71 where the court held the following on sentencing:

"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

28. Also in the case of *Francis Karioko Muruatetu & Another v Republic* (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.



29. I am in full agreement with the decision of Mativo, J (as then was) in *Edwin Wachira & Others Versus Republic*; Mombasa High Court Petition No. 97 of 2021 that “To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of *the Constitution* of Kenya, 2010.”
30. A glimpse of the Petitioner’s application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows:
- Every accused person has the right to a fair trial, which includes the right—
- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
31. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.
- (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
- a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
- b. New and compelling evidence has become available.
32. The foregoing provisions are instructive in matters brought before the high court for a new trial. The application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.
33. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the *Muruatetu* case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).
34. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court’s decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner’s counsel offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.
35. The offence of defilement contrary to the provisions of Section 8(1) and 8(2) attracts life imprisonment. I am of the considered view that life imprisonment is such indeterminate sentence that deprives one off humane treatment and courts are now embracing sentences that will achieve the



objectives of sentencing. The Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR)

“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.

36. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

“The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”.

37. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused’s balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system.

38. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

39. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e 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.

40. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

41. Section 333(2) of the Criminal Procedure Code provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

42. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused’s balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system. This is what the court emphasis in the case of Justus Ndun’gu vs Republic and laid down the basic principle on life imprisonment and what it connotes as follows: “A life sentence is a sentence sui generis. In that, whereas it is philosophically supposedly imprisonment for a duration of time only, it is in actual sense imprisonment that is indeterminable, indefinite, incompletable, mathematically incalculable, and therefore quantifiable only for the convict’s entire remainder of his lifetime.

43. Life sentence need not be imposed against an accused person who did not appear to present a continuing danger to the public. The court notes that there is no dispute that the sentence imposed on the Applicant comply substantively and procedurally with the *Sexual Offences Act*. However, the Court of Appeal in Kitsao case observed that the Applicant’s claim non- the less discloses arbitrariness for essentially it is based on the non-discretionary nature of the sentence which is fixed buy law in respect of the offence. *The constitution* of Kenya in its pre-ample expresses that and acknowledges that we the people of Kenya are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. This is recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The right of the individual to life in Article 26 is protected and guaranteed except in exceptional circumstances in a statement of *the constitution* in sub section 3 of Article 26. This pursuit of the right to life is afforded to all by *the constitution* regardless of race, color, ethnical origin, sex, religion, creed, birth or social or economical status. A sentence of life without parole sometimes cannot be divorced from the violation of Art. 25(a) of *the Constitution* which states that: every citizen has a right to enjoy freedom from against torture, cruel, inhuman or degrading treatment or punishment. Applying this Article in connection with the life imprisonment sentence in any particular circumstance such incarceration with its punitive component constitutes a violation of the right which cannot be limited by the state. It suffices to say the issues herein which are properly addressed have also regard to the international jurisprudence which is part of our source of laws as provided for in Article 2 (5) & (6) of *the Constitution*. The question is, is the sentence of life imprisonment imposed upon the Applicant unconstitutional on the facts of the present case. Whatever the approach one takes in appraising the facts of this case the mandatory life imprisonment which is being challenged by the petition cannot be allowed to stand. This is as a consequence of Article 5 (2) (p) & (q) as read with 50 (6) (a) & (b) of the same constitution. There is something disproportionate about it given the fact that following



the Supreme Court dicta in Muruatetu case and subsequent decisions by the court of Appeal like the Kitsao case, any such sentence imposed without judicial discretion exercised is unconstitutional.

44. I have considered the application and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the life sentence imposed and substitute it with a lesser sentence of 25 years imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the CPC the substituted sentence comes with a credit period of 2 years and 3 months served in pre-trial detention awaiting trial and determination of the Applicant's case.
45. Orders accordingly

DATED AND SIGNED AT ELDORET THIS 8TH DAY OF AUGUST, 2024

R. NYAKUNDI

JUDGE

