REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 40 OF 2019

PAUL MWENJI KOMU.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT ON SENTENCE

Background

1. In my judgment dated 3rd May, 2021, I set aside the sentence imposed on the Appellant in this matter following appeal. The appellant had been sentenced to 15 years imprisonment for defilement of LNK a child aged sixteen (16) years.

2. The reasons for setting aside the sentence are stated in paragraphs 28 - 32 of the said judgment which are set out as under:

"[28] The appellant has urged that the sentence of fifteen years imprisonment by the lower court was harsh and inappropriate. The appellant has relied on the principles of sentencing in respect of mandatory sentences as established by the case of Francis Karioko Muruatetu & Another v. Republic [2017] eKLR.

[29] On this issue, the DPP conceded that sentencing was improper and stated that the state has no objection to resentencing.

[30] I have perused the proceedings and note as follows in respect of post-conviction proceedings:

"State : No records. Accused was an adult at the Counsel time of the offence.

Mitigation : My parents rely on me. I pray for non- custodial sentence.

Sentence : Mitigation record duly noted. My hands are tied with Section 8 (3) of the Sexual Offences Act. Accused is sentenced to 15 years in jail."

[31] The trial court fell into the error identified under the Muruatetu principles of treating a mandatory minimum sentence as disentitling her to exercise her judicial discretion in sentencing. As a result she held that she was bound to award the mandatory sentence and no other. Judicial discretion cannot be fettered by statute if it results in an unconstitutional act, or

to prejudice or violation of the fundamental rights of an accused.

[32] Accordingly, the sentence meted was improper and the appeal succeeds on that issue."

3. This Court directed that a fresh sentence will be meted after a sentence hearing was fixed. The file then came up for mention on 22nd July, 2021 for mitigation, and parties were directed to file submissions. A date was fixed for 14th October, 2021 for highlights of mitigation submissions. However, I was transferred from the station before then.

4. It is clear from the foregoing that in setting aside the sentence, this court relied on the jurisprudence apparently emanating from the **Muruatetu No. 1 case** (**Francis Karioko Muruatetu & Another v Republic [2017] eKLR**). Since the date of this court's judgment, the Supreme Court in Muruatetu 2 (**Francis Karioko Muruatetu & Another v Republic** and **Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR**, categorically stated that the application of the **Muruatetu 1** Principles in defilement cases was not in accord with its decision.

5. Parties agreed by consent that submissions be filed on the proper position that the court should take. The Appellant's submissions were filed on 4th November, 2021. The DPP filed their submissions on 21st February, 2022.

Appellant's Submissions

6. The Appellant through Mr. Gichuki laid forth two prongs in his submissions urging that this court should nevertheless re-sentence the Appellant. The first prong concerns Non-retrospectivity of new law; and the second prong is on legitimate expectation.

7. Under the first prong Mr. Gichuki submitted that:

"Before the restated judgment/Ruling of the Supreme Court (Muruatetu 2) <u>it was law</u> that accused persons or appellants facing long prison sentences in various cases <u>were entitled to re-sentence</u> in which the superior court reconsidered and reduced sentences of appellants to reasonable prison periods." (Emphasis added)

8. Further he argued that a new legal position cannot be retrospective. He cited thecases of **Duncan Otieno Wage v Hon Attorney General [2011] eKLR** Paragraph 39 which held that even the constitution is not retrospective and cannot what was otherwise legal during the currency of the constitution.

9. He also cited **Said Hemed Said v Emmanuel Karisa Maitha & Another Mombasa HCEP No. 1 of 1998** which, while citing the case of **John Mwangi v Francis Mwangi Njuguna Civil Application No. 96 of 1997** and **Hutchunson Maurices [1950] 1 KB 574**, opined that the general rule is that:

"When the law is altered during the pendency if an action or proceeding, the rights of the parties are to be decided according to the law as it existed when the action or proceeding was begun unless the new statute shows a clear retention to vary or affect such rights……."

10. Accordingly, he argues on this prong that the appellant is entitled to re-sentencing, and further that such resentencing should be the least severe punishment prescribed pursuant to **Article 50 (2) (p)** of the **Constitution**.

11. On the second prong, counsel argues that the accused person on account of the precedent set out in **Muruatetu 1**, acquired a legitimate expectation to benefit from re-sentencing. He pointed out the description of legitimate expectation set out in Paragraph 186 of **Constitutional Petition 377, 395** and **Judicial Review 295 of 2015, Nairobi, Kevin Mwiti & Others v Kenya School of Law & 2 Others**.

12. Further reliance was placed on **R v. Devon County Council ex parte P Baker [1955] 1 All ER** where it was stated:

"...[the legitimate] expectation arises not because the claimant asserts any specific right to a benefit but rather because <u>his</u>

interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied)" (Emphasis added)

13. The case of **R. v Attorney General Exparte Waswa & 2 Others [2005] 1 KLR 280** was also cited in support of the principle that a legitimate expectation extends to a future promise or benefit yet to be enjoyed since the principle has its roots in the fundamental principle of law namely the principle of legal certainty.

Respondent's Submissions

14. The state submits that this court is bound by precedent from the time it is pronounced.

15. Further, the state argues, referring to paragraphs 10 - 15 of the Supreme Court's direction in **Muruatetu 2**, that the superior courts' practice of applying the principles of **Muruatetu 1** in offences other than murder, namely sexual offences and robbery with violence was *"wrong and a misinterpretation of the judgment by the courts."* As such, the Appellant cannot purport to rely on that misinterpretation.

16. The state further argues that since **Muruatetu 2**, the superior courts had dismissed applications and cases for re-sentencing, and there was no basis for treating the present appellants any differently.

17. Ms Maingi for the state also argued that the unfortunate misinterpretation of **Muruateu 1** by the Superior courts amounted to a misapplication of **Muruatetu 1**. There was thus no basis for re-sentencing and the doctrine of retrospective application does not apply.

18. As for legitimate expectation the state's position is that it is not enough for an expectation to exist: it must be legitimate. On this point reliance was placed on **HWR Wade & CF Forsyth on Administrative Law page 449 - 450** where the court pointed out that six considerations must be taken into account is establishing legitimate expectation. In particular it was noted by the authors that:

"An expectation whose fulfilment requires that a decision maker should make an unlawful decision, cannot be a legitimate expectation. It is internet in many decisions and express in several, that the expectation must be within the powers of the decision maker before any quotation of protection arises." (Emphasis supplied)

Determination

19. I have carefully considered the opposing submissions of counsel and the authorities cited.

20. The only issues to be determined are as follows:-

a. Whether **Muruatetu 2** constitutes new law that cannot be applied retrospectively, and

b. Whether **Mururatetu 1** created a legitimate expectation for the appellant that must be applied herein to allow re-sentencing.

Retrospectivity

21. I have carefully considered the Supreme Court's Directions in **Muruatetu 2**. I replicate paragraphs 10 - 15 as here under:

"[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right".

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

[11] The ratio decidendi in the decision was summarized as follows;

"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.

[12] Likewise, our orders set out in the previous paragraphs specifically directed the Attorney General to prepare a detailed professional review "in the context of this judgment…. with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein", and no other case.

We stated fairly clearly too, at Paragraph 111 of the Judgment, the extent to which our holding was applicable as follows:

"It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."

[13] Further, at paragraph 71 of the Judgment, the Court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the Judgment in question, those paragraphs were no longer applicable.

[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.

[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

22. Three points are important to highlight from **Muruatetu 2**.

23. First, it is important to point out that Supreme Court did not in **Muruatetu 1** make reference to any provision of any other

statute other than the **Penal Code Section 204**. That decision dealt with the death penalty in respect of Murder cases.

24. Secondly, the Supreme Court categorically stated that **Muruatetu 1** did not invalidate the mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.

25. Thirdly, that **Muruatetu (1)** cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution; and that any party desiring to achieve such a position would have to challenge to constitutional validity of the mandatory death penalty or other mandatory or minimum sentence in the High Court is a case fully argued.

26. From the foregoing, it is abundantly clear to me that **Muruatetu 1** cannot and did not constitute any legal position on offences of robbery with violence or sexual offences. Therefore the Appellant's argument that he is entitled to the benefit of the position of the Supreme Court in **Muruatetu 1** is untenable, as the Supreme Court reached no such conclusions.

27. Muruatetu 2 is, clearly, not a precedent establishing "new law" in that context. All that **Muruatetu 2** does is to clarify that **Muruatetu 1** did not ever create a category of law or precedent that allowed for resentencing of offenders in robbery with violence or sexual offences cases.

28. I therefore reject the view propounded by the Appellant's counsel that **Muruatetu 2** was a new legal position implanted upon an existing legal regime that existed for the benefit of the accused and now being retrospectively supplied.

Legitimate Expectation

29. On the issue of legitimate expectations, the foregoing position of the view I have expressed concerning **Muruatetu 2**, clearly leads me to the finding that this court cannot apply a position in law that has been deemed by the Supreme Court to have been a misinterpretation and misapplication of the law.

30. In that regard, therefore, no legitimate expectation can arise for the benefit of the accused because this court, as a decision maker, is not entitled to make an unlawful decision namely, a decision based on a misinterpretation of **Muruatetu 1**. No legitimate expectation could accrue to the accused as a legitimate expectation must be founded on something that is inherently legitimate. The misinterpretation or misapplication by the superior courts of **Muruatetu 1** could not create a legitimate expectation beneficial to the accused. I decline to accept the Appellant's counsel's submission on legitimate expectation.

Disposition

31. For all the foregoing reasons, I determine that this court has no jurisdiction to apply the **Muruatetu 1** principles of re-sentencing in respect of the sexual offence committed by the appellant.

32. Accordingly, due to lack of jurisdiction, the fifteen (15) years sentence that was set aside by this court on appeal is hereby reinstated.

33. For avoidance of doubt, the Appellant shall serve the sentence imposed by the trial court.

34. It had been decided that the outcome of this determination on resentencing would guide this court in respect of the following other matters awaiting sentence: HCCRA No. 1 of 2018, HCCRA No. 42 of 2017, HCCRA No. 14 of 2018, HCCRA E126 of 2021, HCCRA No. 63 of 2015 and Miscellaneous Criminal Application No.. E116 of 2021. This decision shall apply to the said matters.

35. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA THIS 25TH DAY OF FEBRUARY, 2022

R. MWONGO

JUDGE

In the presence of:

1. Ms Maingi for the State

2. Gichuki for the Appellant

3. Paul Mwenji Komu - Appellant - in person

4. Court Assistant – Kamau