



REPUBLIC OF KENYA



**Ochuo v Republic (Criminal Petition E004 of 2022)
[2022] KEHC 13202 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION E004 OF 2022
RE ABURILI, J
SEPTEMBER 23, 2022**

BETWEEN

MAURICE JUMA OCHUO PETITIONER

AND

REPUBLIC RESPONDENT

(Being an Application for Resentencing against the sentence meted out on the Applicant in Criminal Case No. 10 of 2019 at Principal Magistrate's court at Ukwala delivered on 01/08/2019 by Hon. G. Adhiambo, Senior Resident Magistrate and Siaya High Court Criminal Appeal No. 60/2019)

JUDGMENT

1. The petitioner herein is Maurice Juma Ochuo. He was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* vide Ukwala PM's Court SO 10/2019 and sentenced to serve 15 years imprisonment which was below the mandatory minimum sentence stipulated in section 8(3) of the *Sexual Offences Act*. This was on August 1, 2019.
2. Aggrieved by that conviction and sentence, he appealed to this court vide Siaya HCRA No 60/2019 which appeal was heard and determined vide judgment delivered on November 16, 2021.
3. There is no indication that he has appealed to the Court of Appeal.
4. He is now before this court petitioning for resentencing claiming that he was sentenced to an unconstitutional sentence and wants the court to reduce that sentence. He also seeks orders that this court should consider section 333(2) of the *Criminal Procedure Code* on the period spent in custody prior to his being sentenced.
5. I have considered the petition filed on July 21, 2022 and the supporting affidavit.
6. I have perused the High Court CRA No 60 of 2019.



7. In that appeal, I observe that the prosecution had filed a notice of enhancement of sentence imposed on the appellant on the ground that the trial court imposed a lesser sentence than the mandatory 20 years imprisonment stipulated in section 8(3) of the *Sexual Offences Act*, as the child who was defiled was aged 13 years old.
8. However, in my judgment delivered on November 16, 2021 at page 40, I declined to enhance sentence imposed on the appellant/petitioner herein on account that the Supreme Court's Francis Muruatetu II directions of July 6, 2021 were issued by the Supreme Court after the appellant had already been sentenced to a lesser prison term than the mandatory sentence under section 8(3) of the *Sexual Offences Act* hence the directions could not operate retrospectively to the prejudice of the appellant. I found that the trial magistrate exercised discretion in sentencing the appellant applying the *Muruatetu I v Republic* [2017]eKLR case principles which had been widely applied even by the Court of Appeal and which this court as a High Court followed religiously through the doctrine of precedence, with the consequence that mandatory minimum sentences had been found to be unconstitutional to the extent that they deprived the trial court of discretion in sentencing having regard to the mitigations and circumstances of each case and denied the convict an opportunity to mitigate.
9. Therefore, having found that in this case the petitioner's sentence was not the mandatory minimum, and which discretionary sentence this court upheld on appeal, I find this petition to be mischievous and an abuse of court process.
10. On the other hand, I have perused the trial court and appellate records and I observe that the trial court record shows that the petitioner herein was first taken to court on April 25, 2019 for plea and on May 8, 2019, he was released on surety bond of Kshs 250,000/= granted by the trial court.
11. The charge sheet dated April 25, 2019 shows that he was arrested on April 23, 2019 and presented to court on April 25, 2019 meaning he was in custody for 2 days prior to being presented to court and upon taking plea on April 25, 2019, he was released on bond when his surety was approved 14 days later.
12. For that reason, I would calculate the days that the petitioner spent in custody to be 10 days and order as follows:
 1. The petition for resentencing is hereby found to be misconceived and lacking in merit. It is hereby dismissed.
 2. The 15 years imprisonment imposed on the petitioner shall be calculated less 10 days that the petitioner Maurice Juma Ochuo was in custody after arrest and before he was released on bond on May 8, 2019.
 3. This file is closed.
13. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF SEPTEMBER, 2022

R.E. ABURILI

JUDGE

