



REPUBLIC OF KENYA



KENYA LAW

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**Ominde v Republic (Criminal Petition E005 of 2022)
[2022] KEHC 13203 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION E005 OF 2022
RE ABURILI, J
SEPTEMBER 23, 2022**

BETWEEN

GEORGE OTIENO OMINDE PETITIONER

AND

REPUBLIC RESPONDENT

(Being a Petition Application for Resentencing against the sentence meted out on the Petitioner/convict in Criminal Case No. 33 of 2017 at the Principal Magistrate's court at Ukwala delivered on 07/08/2018 by Hon. G. Adhiambo, Senior Resident Magistrate)

JUDGMENT

1. The petitioner is George Otieno Ominde. He was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* by hon GA Adhiambo in Ukwala PM Sexual Offence No 33/2017. He also faced the charge of incest. He was only sentenced on the defilement charge and sentenced to serve 15 years imprisonment. He appealed to this court *vide* Siaya HCRA 38/2018 which appeal was voluntarily withdrawn by the petitioner on 26/6/2019 upon the petitioner's own application.
2. It is important to note that the petitioner was also charged with incest but the trial court forgot to sentence him on that count so the appellant feared that this court might revisit that charge and convict him on it so he withdrew his appeal against conviction and sentence on 26/6/2019. Furthermore, the mandatory minimum sentence under section 8(1) (3) of the *Sexual Offences Act* is 20 years imprisonment.
3. In sentencing the petitioner herein to serve 15 years imprisonment, the trial court considered his mitigation and this was after the muruatetu I decision of 2017 hence she did not sentence him to the mandatory minimum sentence. The petitioner is therefore lying to this court blatantly when he claims that he was sentenced to serve 20 years imprisonment which is not the case.



4. In addition, he escaped being sentenced on the second court of incest. The trial court having exercised discretion and leniency in sentencing the petitioner herein, he cannot be resented under the guise of unconstitutional sentence, I find his petition for resentencing mischievous and misplaced. It is hereby dismissed.
5. On whether I should consider section 333(2) of the *Criminal Procedure Code*, on the period spent in custody pending trial, I have perused the trial court record. The petitioner was arrested on December 18, 2017 according to the charge sheet in SO case No 33/2017. He was presented to court for plea on December 22, 2017. He pleaded not guilty and on the same day, he was granted bond of Shs 200,000/= plus one surety of similar amount.
6. On December 27, 2017, he was released from prison custody, after his surety Kevin Opwapo Owino was approved by the trial court upon presenting his original title deed for Land Parcel No Alego/Mahola/Ulawe/623.
7. Upon his conviction on 7/8/2018, on both counts, the petitioner mitigated and the court after considering those mitigation, sentenced him to serve 15 years imprisonment for defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.
8. It follows that the petitioner was in custody for 9 days before being released on bond, from date of arrest. For the above reasons, I hereby order as follows:
 1. The petition for resentencing is hereby dismissed.
 2. The request for consideration of section 333(2) is allowed to the extent that the sentence of 15 years imprisonment which was discretionary shall be calculated less nine (9) days that the petitioner was in custody from December 18, 2017 to December 27, 2017 when he was released on bond, after he was arrested.
9. I so order.
10. This file is closed.

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

R.E. ABURILI

JUDGE

