



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 120 OF 2019

ROBERT MAGANGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner was convicted on his own plea of guilty of the offence of

defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act and sentenced to life in prison. His appeal to the High court was dismissed on 8/3/2019.

2. The circumstances of the case were that on 3/1/2014 at [particulars withheld] area within Kisauni Sub-County in Mombasa he intentionally and unlawfully caused his penis to penetrate the vagina of PL a child aged 11 years.

3. The Petitioner is now in this court to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex court found that the mandatory nature of death sentence was unconstitutional. This principle was applied by the Court of Appeal in **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

4. **Ms. Balongo**, learned prosecutor, submitted that in light of above cited case this court has the jurisdiction to interfere with the sentence. Counsel submitted that the Petitioner committed a grave offence and should be sentenced to serve 35 years in prison.

5. On his part the Petitioner submitted that he has fully reformed and that he has been forgiven by the complainant and her mother. The Petitioner further submitted that he has been in jail for 7 years.

6. In my view this court has the jurisdiction to interfere with the life sentence imposed upon the Petitioner in light of the Francis Muruatetu case above.

7. The issue now is what kind of sentence is adequate to reflect the life sentence imposed on the Petitioner. The Petitioner was 38 years old when he committed the offence. He is now 43 years old. The offence committed was grievous and this court is obligated to send a clear message to would be such offenders that if found guilty they shall be punished. I have considered the mitigating circumstances given by the Petitioner, together with aggravating circumstances pointed out by the prosecution. Having done that I now sentence the Petitioner to serve Twenty Four (24) years in prison from the date of conviction.

8. I therefore hereby set aside the life imprisonment imposed on the Petitioner by the trial court, and in place thereof I jail the Petitioner for a term of 24 years from the date of conviction.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 28th day of January, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person via video link

Ms. Balongo for DPP

Ms. Peris Court Assistant