



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 146 OF 2019

MORRIS MUTIE THOMAS.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 in Taveta Cr. Case No. 106 of 2013 and was sentenced to life imprisonment. His Appeals to the High Court in HCCRA No. 76 of 2013 and his second appeal to the Court of Appeal in Criminal Appeal No. 114 of 2014 were both dismissed.

2. The Petitioner having exhausted his appeals, has now petitioned this court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another v Republic SCK Pet. No. 15 of 2015 [2017] eKLR*, which decided that mandatory nature of any sentence is unconstitutional.

Brief Circumstance of the offence

3. The particulars are that on 14/2/2013 the Petitioner intentionally caused his penis to penetrate the vagina of SJ who was a child aged (7) years. The Petitioner now prays for a review of the life sentence citing aforesaid case of *Muruatetu*. The Petitioner in his submission filed on 18/9/2019 seems to be challenging the findings of the trial magistrate. Unfortunately, this is not the right forum. However, the Petitioner orally submitted in court that he is fully reformed having undertaken a course in Bible studies, and he has learnt plumbing, which skills he believes will make him a useful person in the society. The Petitioner further submitted that he is sickly and diabetic. Therefore, the court ought to sentence him to a term of 10 years since he has already served 7 years.

4. **Ms. Wanjohi** learned counsel for the prosecution submitted that discretion of this court is based on circumstances of the case and the extent of the injuries, age of the child and the relationship to the petitioner. Therefore, in this instance, the petitioner deserves the sentence meted by the trial court. Counsel further urged this court to uphold the trial court's finding on the sentence.

5. In this case the Petitioner was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

6. The reasoning in *Muruatetu Case* was also extended to sentences imposed by the Sexual Offences Act – and possibly all other statutes prescribing minimum sentences. 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.*”

7. In *Francis Karioko Muruatetu & Another v Republic (Supra)* the Supreme Court stated the following guidelines as mitigating factors

in a re-hearing sentence for the conviction of a murder charge: -

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of defilement.

8. I have considered the principles of sentencing set out above. I have considered the mitigation by the Petitioner, and all the surrounding circumstances of the case. The Petitioner defiled a child aged 7 years. At the tender age of 7 years, the victim has to live with bad memories of the ordeal throughout her life.

9. This Court has the Jurisdiction to review the sentence herein since it is a mandatory sentence under the Section 8(1) of the Sexual Offences Act. However, the offence for which the Petitioner was convicted is a serious offence. That the Act requires the offence to be punished by life in prison attests to that seriousness. Accordingly therefore, while I set aside the life sentence, the same must be replaced by a sentence which reflects the gravity of the offence.

10. In consideration of the premises herein, I hereby jail the Petitioner to serve a jail term of 30 years from the date of the arrest.

That is the Judgment of the court.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for DPP

Mr. Kaunda Court Assistant