



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 191 OF 2019

ANDREW ABONG'O OTIENO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006, in Mombasa Cr. Case No. 2813 of 2013 and was sentenced to 10 years' imprisonment.

2. The Petitioner has now petitioned this court for review of sentence in view of the Supreme Court declaration in **Francis Karioko Muruatetu & Another vs. Republic SCK Pet. No. 15 of 2015 (2017) eKLR**, which decided that mandatory nature of any sentence is unconstitutional.

3. The Petitioner avers that the mandatory nature of the sentence denied the trial court the opportunity to consider his mitigation of being a first offender with a young family and that he was remorseful and deeply regretted the incident. Currently, the Petitioner states that his wife passed on and his children are all alone.

4. **Mr. Fedha** Learned Counsel for the Director of Public Prosecution submitted that the offence committed by the Petitioner was heinous and its psychological effect on the victim cannot be underestimated. Therefore, the deterrent sentence meted herein to the Petitioner was to prevent the commission of the offence by other people to other children.

5. Section 11(1) of the Sexual Offences Act provides that:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

6. Section 11 provides for a mandatory minimum sentence. However, this Court has the Jurisdiction to review the sentence herein since it is a mandatory minimum sentence. Such a sentence does not meet the constitutional test in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015**, since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.

7. Courts have always frowned on mandatory sentences that place a limitation on judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b)**, the South African Court of Appeal (Corbett, CJ) held that:

“the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court’s normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.”

8. The trial Court in this matter considered the mitigating submissions of the Petitioner, but sentenced him to a mandatory 10 years in prison. I have also considered the Petitioner’s mitigation. However, with that in mind, it must be heard that the Petitioner committed a grievous beastly act on a child of 15 years. In my view the 10 years imprisonment meted out to the Petitioner is a good estimate for the offence. I am therefore reluctant, and hereby refuse to interfere with the sentence meted out by the trial court.

9. For the foregoing reasons, the petition herein lacks merit and is dismissed.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha for DPP

Ms. Peris Court Assistant