



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 79 OF 2020

BALAK NAMAYO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner (**BALAK NAMAYO**) filed the petition seeking resentencing. He was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act and sentenced to serve life imprisonment on 6th December 2010 in **Criminal Case Number 3350 of 2010**.

2. The offence occurred on 19th May 2010, and involved a minor identified by the acronym XYZ who was then aged 8 years had been sent by her mother to go and collect milk. She passed by the appellant’s home, and asked her to accompany him to the posho mill, before buying her a sweet then requesting her to accompany him to his house. He then told her to remove her underpants, and had sexual intercourse with her after removing his clothes. She described the experience as painful. The appellant again went with her to the shops, bought her sweets, and urged her not to tell her mother.

3. The appeal against the conviction and the sentence was heard and dismissed by the High Court on 24th July 2015 in **Eldoret HCCRA No. 73 of 2013**. What the appellant is seeking is a resentencing hearing based on the grounds that pursuant to the Supreme Court of Kenya decision in **Petition no. 15 of 2015 – Francis Muruatetu & Anor vs Republic**, the courts below were duty bound to make appropriate sentence with ending period.

The Supreme Court of Kenya Petition in the Muruatetu decision (supra) examined the purpose of sentencing and the intended to serve the objectives of sentencing including;

- a) To punish the offender for his misdeeds**
- b) Communicate a community’s condemnation and denunciation of criminal conduct.**
- c) Rehabilitation of the offender as well as protection of the citizens**
- d) That he has been in custody since 2010 and during the trial period and this period of confinement has served to punish him for his misdeeds as well as communicate a community’s denunciation of criminal conduct and he has had a long time to reflect on his fate.**
- e) In the spirit of the Supreme Court of Kenya he deserves a remedy in the form of resentencing being extremely remorseful.**

4. In the affidavit supporting the petition the petitioner deponed that he is a team leader in the prison protestant church and given the opportunity of discharge under the mercies of the courts’ discretion he shall replicate good Christian teaching achieved at prison back home wide re-integration.

The petitioner pled with the court that instead of life he be given a number of years, saying he has reformed.

RESPONDENT’S CASE

5. Ms. Okok on behalf of the DPP points out that the minor was 7 years, and the petitioner was known to her as a neighbour. That the petitioner betrayed the trust of the child and took advantage of the child, and caused psychological trauma and physical harm. She also contends this court to take note that defilement has become rampant and given the age of the minor she urges the court to find it is merited as a sentence.

ISSUES FOR DETERMINATION

1. Whether the appellant's petition for a resentencing hearing should be granted.

WHETHER THE APPELLANT'S PETITION FOR A RESENTENCING HEARING SHOULD BE GRANTED

With regards to mandatory minimum sentences, the Court of Appeal had occasion to express itself in Jared Koita Injiri vs. Republic [2019] eKLR, thus:

Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

In this case the appellant 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.”

In David Esokon Samwel v Republic [2020] eKLR the court in analysing the application the Muruatetu decision held;

It therefore follows that the *Muruatetu* decision applies *mutatis mutandis* to the provisions of Section 8(2) of the Sexual Offences Act which imposes the mandatory life imprisonment for the offence of defilement.

The court of appeal in Christopher Ochieng -v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri -v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act and stated: -

“In this case, the appellant 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. Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another -v- Republic (supra)*, we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.”

6. The principles underlying sentencing are set out in the judiciary sentencing policy guidelines to include-

Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.

Deterrence: Prevent crime and reduce crime rate-based on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct

7. From the foregoing I take judicial note of the rampant incidences of defilement, and the purposes of sentence. Of course, there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. From the foregoing I set aside the life sentence and substitute to 25 years' imprisonment to take from date of conviction.

Delivered and dated this 17th March 2021 at Eldoret

H. A. OMONDI

JUDGE