



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 73 OF 2019

HEZBON AURA NGUTU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **HEZBON AURA NGUTU**, has invoked the provisions of **Article 50 (2) (q)** of the **Constitution**.

1. He was convicted for the offence of **Defilement** contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. He was then sentenced to 20 Years Imprisonment.
2. He says that because he was a teacher by profession, he ought to have been charged with **Sexual Offences** relating to **Position of Authority and Persons in Position of Trust** contrary to **Section 24 (4)** of the **Sexual Offences Act**. Therefore, because he was charged with the offence of Defilement, the Petitioner submitted that the Charge Sheet was defective.
3. Secondly, the Petitioner submitted that the evidence of the Medical Expert was unfair and ought not to have been the basis for a conviction.
4. Thirdly, the Petitioner expressed the view that the Baptismal Card which was used to confirm the age of the Complainant was invalid, because it did not have a rubber stamp and it was not embossed.
5. When canvassing the Petition, the Petitioner urged this Court to review the evidence, to ascertain if the same was merited and sound as a basis for his conviction and also as to the legality of the mandatory sentence of 20 Years Imprisonment.
6. **Section 24 (4)** of the **Sexual Offences Act** provides as follows;

“Any person who being the head-teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.”

7. In my considered opinion, the offender shall only be liable to conviction for an offence under this section if the offence he or she committed did not amount to the offence of rape or defilement.
8. Therefore, the fact that the Petitioner was a teacher did not imply that he could not be charged with the offence of defilement. Teachers do not enjoy any immunity from being charged with the offence of rape or of defilement, by virtue of their position as teachers.
9. It would add insult to injury if, as the Petitioner asserts, an offence or rape or defilement,

“..... shall not be called rape or defilement.....”

when the person who committed it was a teacher.

10. As regards the assertions that;

“(a) The case was not investigated, as confirmed by PW3;

(b) The complainant was not in school at the alleged date of offence;

(c) The owner of the alleged house was not summoned by the prosecution nor warrant of arrest issued against him;

(d) The teacher who first got report was not a witness; all these failure was a miscarriage of justice and the petitioner do pray that this court consider the defect incurable and allow the petition;”

I hold the considered opinion that those ought to have been grounds of appeal, after the Petitioner was convicted.

11. Similarly, if the evidence tendered by the Prosecution was contradictory, it was open to the Petitioner to have taken up that as a ground of appeal.

12. As regards the evidence about the age of the victim, the Petitioner describes the same as invalid and incredible. It was open to the Petitioner to have raised that concern either during trial or during appeal.

13. The Petitioner did file **Criminal Appeal No. 130 of 2012**. In the Judgment dated 10th March 2014, A.O. Muchelule J. noted that the Petitioner had, in his appeal, submitted;

“..... that the prosecution case was incredible and contradictory and not sufficient to prove the charge as required.”

14. In effect, some of the issues which the Petitioner has raised before me, had already been canvassed before Muchelule J. As the learned Judge gave due consideration to the said issues, and because I hold a jurisdiction that is concurrent to his, I cannot sit on an appeal over his judgment. By asking me to re-evaluate the same issues again, is equivalent of an appeal arising from the judgment of my learned Brother. This court lacks jurisdiction to sit on an appeal over a decision of another Judge of concurrent jurisdiction.

15. On the issue of the sentence of 20 Years imprisonment, the Petitioner asked this court to review the same, and to set him at liberty.

16. However, the Petitioner did not provide the court with any reasons why he ought to be set at liberty. He failed to discharge the onus of justifying his plea for re-sentencing.

17. In the result, the Petition is dismissed.

DATED, SIGNED and DELIVERED at KISUMU This 16th day of March 2021

FRED A. OCHIENG

JUDGE