



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 230 OF 2019**

**JEREMIAH GECHIKO ITEKE.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGMENT ON RESENTENCING**

1. The Petitioner herein JEREMIAH GECHIKO ITEKE was charged with three counts. The first two charges were of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. He was convicted and sentenced to 35 years. The alternative charge was committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

2. The particulars were that, “**on diverse dates between May 2009 and 6<sup>th</sup> July 2011 in Kisauni District of Coast Province caused his penis to penetrate the vagina of KC a child aged 14 years. The second count alleged that on diverse dates between October, 2010 and 13<sup>th</sup> July 2011 in Kisauni District of Coast province caused his penis to penetrate the vagina of NM a child aged 13 years. The alternative charge was based on the same facts.**

3. He was sentenced to 35 years’ imprisonment. On appeal to the High Court his sentence was reduced to 20 years with regards to the first count while the sentence on the second count was affirmed.

4. The Petitioner is now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional.

5. The Petitioner avers his sentence was reduced to the mandatory sentences under the sexual offences Act, and that the nature of the mandatory sentences was considered unconstitutional in the **Muruatetu Case** (Supra).

6. **Ms. Wanjohi** the learned prosecutor submitted that the Petitioner defiled two children and one of the victims was found to have been infected with a venereal disease, a scar that she has to bear all her life. Counsel submitted that such an offense cannot go unpunished as the need to protect young girls from such predatory behavior is paramount. Counsel submitted that during appeal, Petitioner’s sentence was reduced from 35 years to 20 years therefore exhausted his chance and cannot return to this court for a review of the sentence imposed. Counsel prayed that this Court does confirm the sentence already imposed on the Petitioner.

7. The Petitioner on his part submitted that during his appeal to the High Court, his sentence was reduced to 20 years’ imprisonment. The issue of the Petitioner is that the 20years term is the mandatory minimum sentence under Section 8(3) of the Sexual Offences Act. That the nature of minimum mandatory sentences was declared unconstitutional.

8. In mitigation the Petitioner stated he has spent 10 years in prison. During that period he has lived peacefully with fellow inmates and prison authorities. That he has transformed by acquiring a KCPE Certificate, and other courses. He states that he is reformed and remorseful and has promised not to repeat his crimes if given a chance to reunite with his family and society. He states that he is a first offender.

9. This Honorable court in **Yusuf Shiunzi v Director of Public Prosecution [2020] eKLR** stated that, “It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences applies with equal force to minimum sentences. This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

***“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.”***

10. I have carefully considered the Petition. This Court has the jurisdiction to interfere with the mandatory sentence of 20 years imposed on

the Petitioner.

11. That reasoning was adopted in **Dismas Wafula Kilwake v R [2018] eKLR**, where 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.*

12. 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 in this matter are that the Petitioner committed sexual offence on two children, one of those children contracted a venereal disease. The mitigating factors are that he is remorseful and has reformed.

13. It is my considered view that the aggravating factors outweigh the mitigating factors. The Petitioner cannot defile young children and hope to get away with it. His double crime deserves double punishment. If I was able to do that I would have jailed the Petitioner to 40 years. He is so lucky he only got 20 years.

14. The Petition is dismissed. The Petitioner shall serve the 20 years from date of arrest.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of April, 2021.**

**E.K. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for the DPP

Mr. Mohamed Court Assistant