



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 190 OF 2019

HKK.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **HKK** was charged with the Offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No 3 of 2006 in Criminal Case No 1667 of 2012. The particulars were that, “**on the night of 9/8/2008 and 10/8/2008 at [Particulars withheld] area in Mombasa, the Petitioner unlawfully and intentionally committed an Act which caused his penis to penetrate the anus of MA, a child aged 11 years.**” He was sentenced to life imprisonment. His Appeal was partially successful in Mombasa High Court Criminal Appeal No. 95 of 2014, since, the Court substituted the sentence of life imprisonment with a 20-year jail sentence.

2. The Petitioner is now in this Court pursuant to the Supreme decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. 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.**

**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 include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”**

3. The Petitioner submitted that the Court sitting on Appeal resented him to 20 years to run from the date of his sentence by the trial Court. However, it is the Petitioner’s submission that his sentence ought to run from the date he took plea in 2008, by dint of the provisions of Section 333(2) of the Criminal Procedure Code. He further submitted that he has fully reformed, he is remorseful and asks for forgiveness.

4. **Ms. Wanjohi** the learned prosecutor submitted that the Petitioner committed a heinous offence which has psychological effects on the victim who was a child aged 12 years. Therefore, the Petitioner deserves the deterrent sentence of 20 years meted by the trial court.

5. I have considered the petition, the submissions by the Petitioners and the D.P.P. Sentencing is a discretion of the trial court. In **Ambani v Republic [1990] KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral

blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

6. I have also considered the mitigating and aggravating circumstances in the case. It is noteworthy that the victim who was sodomized was only aged 12 years old at the time. Considering psychological impact, the unlawful act would have on the victim, I find that the aggravating factors outweigh the Petitioner's mitigating factors. Consequently, I see no reason of disturbing the sentence of 20 years meted by the Court.

7. Nevertheless, Section 333 (2) of the Criminal Procedure Code requires a sentencing court to take into account the period spent in custody awaiting trial.

8. In the upshot I render Judgement as under:

**(i) I hereby uphold the Court's discretion in sentencing the Petitioner to 20 years' imprisonment.**

**(ii) I hereby jail the Petitioner to serve the term of twenty (20) years in jail from the date of arrest.**

That is the Judgment of the court.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF APRIL, 2021**

**E. K. O. OGOLA**

**JUDGE**

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Mr. Mohamed Court Assistant