



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 119 OF 2019

JJM.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **JJM** was charged with the Offence of defilement contrary to section 8(1) as read with Section 8 (4) of the Sexual Offences Act No 3 of 2006 in Criminal Case No 602 of 2014. He was convicted and sentenced to serve 15 years' imprisonment.

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.”

Brief Circumstance of the offence

3. The particulars of the offence are that between the months of August 2013, at Ngathini village in Vanga Location Kwale County, the Petitioner unlawfully and intentionally caused his penis to penetrate the vagina of N.P, a child aged 17 years who was under his care, since he had expressed his willingness to help her pursue her education.

4. It was the Petitioner's submission that, the mandatory minimum sentence meted out to him was unconstitutional. In mitigation, the Petitioner submitted that he regretted what he did and asked this Court for forgiveness. He further submitted that he was a family man and his incarceration has left his family destitute since he was the sole breadwinner.

5. **Ms. Anyumba** the learned prosecutor submitted that this Court should consider that at the time of committing of the offence, the Petitioner was a person of authority, had power over the victim, was held in high regard by the community and trusted by parents of the victim since he was their pastor. Therefore, he took advantage of the victim by luring her into staying with his family, while he repeatedly

defiled her. Consequently, Counsel urged this Court to uphold the deterrent sentence of 15 years, which in her view was commensurate to the offence.

6. I have considered the petition, the Prisoner's Progress Report, the submissions by the Petitioner and the D.P.P. Section 8(4) of the Sexual Offences Act provides that:

“(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

7. I find that Section 8(4) provides for a mandatory minimum sentence. However, 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.

8. This Court has the discretion to impose any sentence over and above the minimum sentence, and the Court confirms the trial Court indeed considered the Petitioner's mitigation and gave its reasons of sentencing the Petitioner for a term of 15 years as follows:

“Offender was a respected member of the community, as a pastor and he took advantage of a minor who was placed under his custody.”

9. It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** pronounced itself thus: -

“To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

10. While this Court finds that indeed the trial Court after considering the Petitioner's mitigation exercised its discretion in sentencing the Petitioner to a term of 15 years' imprisonment, mitigation was of no consequence since the mandatory sentence was still 15 years. In my view the 15 years imposed was excessive in today's consideration after Muruatetu. I therefore sentence the Petitioner to serve 10 years in prison from the date of arrest.

11. In the upshot I hereby uphold the trial's discretion in sentencing the Petitioner to 15 years' imprisonment.

The Petition on resentence is hereby dismissed

That is the Judgment of the court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL,

2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for State

Ms. Peris Court Assistant