



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 228 OF 2019

SAMUEL KILALE MAGHANGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **SAMUEL KILALE MAGHANGA** was charged with the Offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

2. The particulars were that, “on the 1st of December 2009 at [particulars withheld] village unlawfully and intentionally caused his penis to penetrate the vagina of DM a child aged 12 years old”. He was sentenced to 20 years imprisonment. His appeal to the High Court and to the Court of Appeal did not succeed, his conviction and sentence was upheld.

3. The Petitioner is now in this court pursuant to the Supreme 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.

4. The Petitioner avers that the mandatory nature of the sentence denied the trial court the opportunity to consider mitigating circumstances. Section 8 (3) of the Sexual Offences Act reads thus:

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

5. **Ms. Wanjohi** the learned prosecutor submitted that the Petitioner is the uncle to the child. The Petitioner knowing the victim to be a child forcefully defiled her inflicting severe pain and injuries to her. The Petitioner’s act violated the child’s right to protection. Counsel urged this court to confirm the conviction and sentence meted by the trial court.

6. In mitigation the Petitioner stated that he was a first offender; that he left behind his wife and 4 children who have been living as destitutes since he was locked up. He has been in custody for 10 years. He averred that he has reformed and has been of good conduct in the prison. He prayed this Court to review his sentence.

7. 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.”

8. In **Dismas Wafula Kilwake v R [2018] eKLR**, 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.”

9. I have carefully considered the Petition. This Court has the jurisdiction to interfere with the mandatory sentence of 20 years imposed on the Petitioner. The Petitioner has demonstrated reformation and has registered his remorsefulness. However, the term he has served is not sufficient punishment for defiling a child he was meant to protect.

10. **Daniel Otieno Oracha v Republic [2019] eKLR**, the Petitioner therein who had defiled a 13-year old was resented to 12 years' imprisonment.

11. I hereby sentence the Petitioner to 17 years in prison from the date of arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Mr. Mohamed Court Assistant