



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 81 OF 2019

ALEX WAMBUA MAKUTHU.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **ALEX WAMBUA MAKUTHU** was charged with the Offence of Defilement contrary to 8 (1) (2) of the Sexual Offences Act.
2. The particulars of the offence were that *“on the 17th August, 2009 at [Particulars withheld] Village, likoni division, Mombasa District unlawfully and intentionally caused his penis to penetrate the anus of MD (name withheld) a boy aged 9 years.”*
3. He was convicted and sentenced to 20 years’ imprisonment. His Appeal to the High Court was dismissed and sentence was upheld.
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 declared all mandatory sentences to be unconstitutional. That reasoning was adopted in **Constitutional Petition of Yusuf Shiunzi Kenani, Petition No.24 of 2019**, where the court made a declaration that the mandatory penal laws in the sexual offences act are also unconstitutional.
5. When the matter came for resentencing, Ms. Anyumba learned counsel appeared for the State. Counsel submitted that the victim was severely injured. The victim is related to the petitioner; the petitioner should have been protecting the child rather than subjecting him to barbaric act of inhuman nature which violated the victim’s human rights. Counsel prayed this court to confirm the sentence meted out by the trial court.
6. The Petitioner on his part submitted that he was reformed and remorseful and has acquired a good moral behavior. He asked for forgiveness and vowed to be an ambassador of peace and of protection for the interests of children. He prayed to be set free.
7. The Petitioner has argued that a mandatory sentence was imposed on him and therefore the sentence is unconstitutional.
8. The petitioner was charged under section 8 (1) (2) of the Sexual Offences Act. Section 8(2) provides that *“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”*
9. The wording of this section does not make the sentence mandatory. However, despite the provision of life imprisonment, the petitioner was sentenced to 20 years. There is no explanation why the trial court gave him 20 years instead of life imprisonment.
10. Therefore, since the trial court already reduced the sentence and also considering the circumstances of the case and the aggravating factors, I shall not interfere with the trial court’s sentence upon the petitioner.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Anyumba for the DPP

Ms. Peris Court Assistant