



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC CRIMINAL APPLICATION NO 9 OF 2020

DAVID OUMA ABAYO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant herein was tried of the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No 3 of 2006. He was also charged with the offence of indecent assault of a woman contrary to Section 141(1) of the Penal Code Cap 63 (Laws of Kenya). He was convicted of the offence of defilement and was sentenced to serve (20) twenty years imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal in **Kisumu High Court Criminal Appeal No 6 of 2012**. In his Judgment dated 25th November 2013, Chemitei J upheld the conviction and sentence. Having been convinced that the Prosecution's case was overwhelming, the Applicant opted not to appeal the said judgment.
3. On 10th February 2020, the Applicant filed an application for review of the sentence. The said application was supported by his Affidavit in which he stated that he had undergone several rehabilitation and reformation programmes in carpentry, joinery and upholstery while in prison and having been reformed and having maintained high standards of discipline, he was ready to be integrated into the society.
4. He pleaded with this court to consider that he still had time to shape his future, that he was sole breadwinner of a young family and that he had so far spent eight (8) years in prison from the time that he was arrested. He added that he was a first offender and was remorseful.
5. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person. He also placed reliance on the case of **Christopher Ochieng vs Republic [2019] eKLR** where it was held that minimum mandatory sentences are unconstitutional.
6. On its part, the State agreed that in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the Supreme Court declared the mandatory sentence for murder unconstitutional. It pointed out that the Supreme Court set out the following as mitigating factors for re-sentencing and that the same were applicable in cases of defilement:-

- a. Age of the offender;
- b. Whether he was a first offender;
- c. Whether he had pleaded guilty to the offence;
- 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 factors the court would consider relevant.

7. The State pointed out that the Applicant was sentenced to serve twenty (20) years imprisonment on 23rd January 2012 and that he had already served nine (9) years to date. It appreciated that he was middle aged and had prepared himself for integration with the public. As he had reformed, the State recommended that he be re-sentenced to fifteen (15) years imprisonment, taking into account the period that he spent in custody as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

8. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under Sexual Offences Act. It observed as follows:-

[W]e 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. This progressive decisional law now requires courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the court can impose a different sentence.

10. Although the Complainant is now an adult, the psychological trauma she suffered when she was aged twelve (12) years cannot be underestimated. Having said so, the court had due regard to the cases of **Dismas Wafula Kilwake v Republic** (Supra) and **Solomon Limangura vs Republic [2019] eKLR** and **The Sentencing Policy Guidelines, 2016** of the Judiciary and was satisfied that this was a suitable case for it to exercise its discretion to review the mandatory sentence of twenty (20) years to fifteen (15) years as was recommended by the State.

11. This would give the Applicant a new lease of life. He had already spent nine (9) years behind bars and had had sufficient time to reflect on his actions. Indeed, vide his letter dated 24th February 2020 and filed in court on 12th March 2020, the officer in charge Kisumu Maximum Prison had vouched for his good conduct.

12. Notably, although these proceedings ought to have been brought by way of a Petition, this court heard and determined the same bearing in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities.

DISPOSITION

13. For the foregoing reasons, the court found that the Applicant's application for review of the sentence that was filed on 19th February 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the conviction of the Applicant for the offence of defilement but reduces the sentence of twenty (20) years to fifteen (15) years with effect from the date of the sentence. The period the Applicant spent in custody shall be taken into account when computing the sentence in accordance with Section 333(2) of the Criminal Procedure Code.

14. It is so ordered.

DATED and DELIVERED at KISUMU this 27th day of April 2021

J. KAMAU

JUDGE