



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL PETITION NO. 50 OF 2020**

**PHILIP OCHIENG OWINO.....PETITIONER**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Petitioner, **PHILIP OCHIENG OWINO**, was convicted for the offence of **Gang Rape** contrary to **Section 10** of the **Sexual Offences Act**. He was then sentenced to 20 Years Imprisonment.

1. He has now lodged this Petition by invoking the provisions of **Article 50 (2) (p)** of the **Constitution**.
2. He said that he had spent a total of 7 years in jail, from the time when he was arrested. Having been arrested when he was 22 years old, the Petitioner was now 29.
3. He pleaded with the Court to grant him an opportunity to shape up his future, which would otherwise be ruined by long incarceration.
4. The Petitioner told the Court that he had reformed and had been rehabilitated through the rehabilitation programs which are run by the Prison Services.
5. The Officer-In-Charge at the Kisumu Maximum Prison wrote a letter of recommendation dated 2<sup>nd</sup> July 2020, indicating that the Petitioner had been promoted to the special stage of a Trustee, among the inmates.
6. The In-Charge said that the Petitioner had been given the responsibility of training and supervising other inmates at the workshop.
7. In answer to the Petition, Ms Maurine Odumba, learned Prosecution Counsel, submitted that the Petitioner had failed to demonstrate any basis for the review of the sentence of 20 years imprisonment.
8. As far as the Respondent was concerned, the circumstances of the offence rendered the sentence reasonable, because the victim was forced to undergo a traumatic experience.
9. The evidence on record shows that the victim, who was 14 years old, was detained by the Petitioner and his accomplice for a period of 6 days.
10. During that whole period, the Petitioner and his accomplice defiled the victim, repeatedly.
11. Pursuant to the provisions of **Section 10** of the **Sexual Offences Act** a person who was convicted for the offence of **Gang Defilement** could be sentenced to a maximum of Life Imprisonment. At the lower end of the scale, the person was liable to not less than 15 years imprisonment.
12. By specifying the minimum sentence below which the court ought not to go, when determining the appropriate punishment, the statute has an element of compulsion in it.
13. In the decision of the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**, it was declared that the mandatory nature of the death sentence for persons convicted for the offence of murder, was unconstitutional.

14. The ratio decidendi in that case has now been applied to other statutory provisions which impose mandatory sentences.
15. It is worth reiterating that the said sentences, of themselves are not unlawful or illegal; in the sense that the court may still sentence a person to death, if the person was convicted for the offence of Murder.
16. The most important question is whether or not the court had taken into account the factors governing the imposition of an appropriate sentence, in the circumstances of the particular case.
17. In this case, the Petitioner failed to provide this court with the record of the proceedings before the trial court. In the circumstances, the Petitioner has deprived this court of records which could have enabled me to verify whether or not the trial court gave to the Petitioner an opportunity for mitigation prior to sentencing.
18. Consequently, I am unable to establish whether or not the court took into account the mitigation, if any.
19. My considered opinion is that it is the responsibility of the person seeking re-sentencing to provide the court with all the requisite records, from which the court would be able to first ascertain the factors which the trial court took into account prior to sentencing; and secondly, if there was any factors which would warrant a review of the sentence.
20. Meanwhile, I consider the fact that the Petitioner and his accomplice, detained the 14 year old girl for 6 days, (during which they defiled her repeatedly), to be an aggravating factor. I so consider it because during that period, the parents and family of the victim were seriously traumatized, whilst searching everywhere for the young girl.
21. And considering that prescribed sentence could extend up to Life Imprisonment, I find that the trial court did not make any mistake in sentencing the Petitioner to 20 years imprisonment.
22. The Petitioner has not made out a case to warrant the review of the sentence.
23. Accordingly, the Petition is dismissed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MAY 2021**

**FRED A. OCHIENG**

**JUDGE**