



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 175 OF 2019

HADSON ALI MWACHONGO.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioner herein **Hadson Ali Mwachongo** was arraigned before the Voi Principal Magistrate's Court on a charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that in June 2010 at [particulars withheld] village, Taita Taveta County, the Petitioner defiled a girl aged 15 years.
3. The Petitioner entered a plea of '*not guilty*' and his trial began. At the end of his trial, the learned trial magistrate found him guilty, convicted him of the offence of defilement, and sentenced him to serve 20 years in prison.
4. Being aggrieved by the said conviction and sentence, the Petitioner filed Mombasa High Court Criminal Appeal No. 249 of 2011, which the Court dismissed. Thereafter, the Petitioner filed Mombasa Court of Appeal Criminal Appeal No. 65 of 2015, which was also dismissed vide a judgment delivered on 27/5/2016.
5. The Petitioner is seeking a re-sentence in the instant petition pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where the court decided that the mandatory nature of the death sentence is against the constitution.
6. Section 8(3) of the Sexual Offences Act No. 3 of 2006 reads as follows:

“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 of not less than twenty years.”

7. Ms. Wanjohi, the learned prosecutor submitted that the Petitioner has been in prison for 8 years and has undertaken several training and courses as a means of rehabilitation. The prison authorities have also prepared a favourable report on the Petitioner's conduct during the time he has been in prison. Nevertheless, counsel submitted the offence he committed was a heinous one and its physical and psychological effect on the victim, who was a child aged 15 years cannot be underestimated. It is therefore in the interest of the public that a deterrent sentence be meted upon the Petitioner to act as a deterrence. Counsel urged this Court to confirm the sentence of 20 years meted by the learned trial magistrate upon the Petitioner.
8. I have considered the petition. The sentence under Section 8(3) of the Sexual Offences Act is mandatory minimum sentence, which this Court has the jurisdiction to interfere with under **Muruatetu** (supra).
9. The Petitioner has submitted that he was remorseful and has reformed since he was imprisoned. He urged the Court to sentence him to 10 years.
10. I have considered both mitigating and aggravating factors. To defile a child of 15 years is most detestable a crime. The Petitioner cannot claim that he has reformed. He is in prison and so he has no opportunity to commit the offence again. That notwithstanding, the sentence of 20 years was very severe. I herewith resentence the Petitioner to serve a term of 15 years calculated from the date of arrest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant