



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO E004 OF 2020

EDWARD OWINO OKONG'O.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner herein was tried and convicted of the offence of gang defilement contrary to Section 10 of the Sexual Offences Act No 3 of 2006. He was sentenced to serve (15) fifteen years imprisonment.

2. On 29th September 2020, he filed an application for review of the sentence. In his Affidavit that he swore in support of his application, he stated that he had undergone rehabilitation and reformation programmes in theology and bible studies and would not indulge in crime again.

3. He contended that he was remorseful and pointed out that he had acquired discipleship training on growth and maturing in Christ which he would use to promote peaceful co-existence if given a second chance to reintegrate back to the society, He added that he was sole breadwinner of a young family who depended on him and that he had left behind aged parents. He asked this court to consider that he was a first offender and to have mercy on him because from the time of his incarceration, he had learnt his lesson.

4. He invoked Section 333(2) of the Criminal Procedure Code and relied on the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR** where the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.

5. The State did not oppose his Petition for review of sentence. It pointed out that in the case of **Francis Karioko Muruatetu & Another vs Republic Petition No 15 of 2015**, the Supreme Court set out the following as mitigating factors for re-sentencing, which it urged this court to consider:-

- 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**

6. It further pointed out that the Petitioner was sentenced to serve fifteen (15) years imprisonment on 22nd October 2014 and that he had already served six (6) years and six (6) months to date. It appreciated that he had prepared himself for integration with the public by doing dome courses.

7. It was persuaded that he had reformed and urged this court to re-sentence him to ten (10) 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 fourteen (14) 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 fifteen (15) years to ten (10) years as was recommended by the State.

11. This would give the Petitioner a new lease of life. He had already spent six (6) years and six (6) months behind bars and had had sufficient time to reflect on his actions.

DISPOSITION

12. For the foregoing reasons, the court found that the Petitioner's Petition for review of the sentence that was filed on 29th September 2020 was merited and the same be and is hereby allowed. Accordingly, the court upholds the Petitioner's conviction for the offence of gang defilement but reduces the sentence of fifteen (15) years to ten (10) years imprisonment with effect from the date of the sentence.

13. The period the Petitioner spent in custody shall be taken into account when computing the sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

14. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JUNE 2021.

J. KAMAU

JUDGE