



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO 111 OF 2020

AMOS MBUGUA.....PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL PROSECUTIONS.....RESPONDENT

JUDGEMENT ON RESENTENCING

1. **Amos Mbugua** the Petitioner herein was tried vide **Mariakani Criminal Case No 529 of 2012** and convicted of the offence of defilement contrary to section 8(3) as read with section 8(4) of the Sexual Offences Act and sentenced to the mandatory fifteen (15) years imprisonment. The Petitioner appealed the lower court's decision vide **Mombasa HC CR APP No 107 of 2013** but the High Court dismissed the said appeal. The Petitioner is now before this court for resentencing pursuant to the supreme court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

2. In his written submissions filed on 11th December 2020 the Petitioner stated that the mandatory nature of the sentence denied the trial court the opportunity to put into consideration his mitigation which included;

- a) That he had no one to turn to.
- b) That his property would be lost.

3. The Respondent on the other hand submitted that the trial court offered the Petitioner the chance to mitigate before sentencing but he only mitigated on losing his property and did not express any remorse for committing the offence; that no favourable report had been prepared on his behalf by the prison authorities and emphasized that the aggravating circumstances in the case outweighed the mitigating factors. Reliance was placed on **Simon Kipkurui Kimori Vs Republic [2019] eKLR**.

4. The court of appeal in **Dismas Wafula Kilwake v R [2018] eKLR** had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act;

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we 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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

5. In his mitigation the Petitioner states that he is a first time offender, that he left behind a wife and three kids who are now living in

destitute situation and that he sincerely regretted his actions. The Petitioner further avers that the prison authority had issued a favourable report on his conduct. He placed reliance on several authorities which the court has had the chance to look at.

6. I have carefully considered the petition and the provisions of the law in terms of this Court's jurisdiction to interfere with the mandatory 15 year's sentence. In so doing it is trite law that the court must look at the mitigating factors vis a vis the circumstances of the case and in this particular case the impact that the offender's actions might have had on the victim. A look at the lower court judgement in this case has shed light on the circumstances under which the offence took place. The Petitioner threatened to cut the victim with a panga which he used to repair sufurias when she attempted to resist the attack. The level of harm and psychological damage on the minor was indeed severe.

7. Having considered the mitigation and aggravating circumstances, and having found that this Court has the jurisdiction to interfere with the mandatory nature of the trial court's sentence, I hereby resentence the Petitioner to serve thirteen and one half (13 ½) years in jail from the date of arrest.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha for DPP

Ms. Peris Court Assistant