



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 108 OF 2019

NDM.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **NDM** was charged in **Kwale CR. 1262 of 2014** with two counts of the offence of incest contrary to Section 20 (1) of the Sexual Offences Act. He was convicted and sentenced to serve a minimum sentence of 10 years imprisonment for each count, and the sentences were to run consecutively. His appeal in **Mombasa HCCA 39 of 2019** was dismissed and he is now in this Court for resentencing in light of the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex court found that the mandatory nature of the death sentence is unconstitutional.

2. The particulars of the offence were that: -

“On 18 June 2013 at [particulars withheld] Vilage, Godi location in Kwale County within Coast Region being a male person caused his penis to penetrate the female genital organ namely vagina of NM(herein referred to as the complainant in count 1/NM) a girl aged 15 year and on the same day and place as in Count 1 did the same thing to MM(herein referred to as the complainant in Count 2/MM) a girl aged 16 year who to his Knowledge were his daughters.”

3. The Petitioner on his part submitted that the trial magistrate sentence of 10 years imprisonment for the two counts to run consecutively really prejudiced him, since the trial court failed to consider the pre-trial custody pursuant to Section 333(2) of the Criminal Procedure Code and Section 7.13 of the Judiciary Sentencing Policy Guideline 2016 which provides: that **“where the offence emanates from a single transaction, the sentences should run concurrently.”** He further submitted that he regretted the offence, he is reformed, and that he has undertaken several courses while incarcerated and he has attained carpentry skills.

4. **Ms. Wanjohi** learned counsel for the State submitted that the Petitioner took away the innocence of his own daughters leaving the children scarred for life. It is in the interest of the public that a deterrent sentence 15 years on each count be meted upon the Petitioner, to prevent the commission of this offence by other people to their children.

5. Counsel referred the Court to **Yusuf Shiunzi v Director of Public Prosecution [2020] eKLR**, where it was stated: **“It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences applies with equal force to minimum sentences.”** This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

“Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of Courts, sometimes resulting in grave injustice particularly for juvenile offenders.”

6. I have considered this petition especially in the light of the aforesaid **Muruatetu** case. I am of the view that this petition is an abuse of the Court process. The Petitioner appealed the trial court conviction and sentence, which was 10 years on each count to run consecutively. The High Court on 17/11/2019 considered his Appeal on sentence, and while exercising its discretion, upheld the trial court finding and dismissed the appeal. There is now nothing that this Court can do since the trial court exercised its discretion and sentenced the Petitioner herein to the minimum sentence of 10 years on each count to run consecutively after considering the aggravating circumstances of the Petitioner’s offence. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under **the 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...”

7. In the premise, I have no reason to interfere with the trial Court’s discretion on sentence of 10 years imprisonment on the two counts, which are to run consecutively from the time of his arrest. The Petition is hereby dismissed.

Right of appeal in 14 days.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF JUNE, 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