



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. E017 OF 2021

(From Original Criminal case No.77 of 2011 at Kaloleni)

**THE CONSTITUTION OF KENYA 2010(SUPERVISORY JURISDICTION AND PROTECTION
FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTICE RULES 2013.**

AND

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 23 (1) OF THE CONSTITUTION

IN THE MATTER OF ARTICLE 19,20,21,22,23,24,25,27,28,48,50,258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 8 (1) AS READ WITH 8 (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

BETWEEN

KAZUNGU YAA MWERI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Kazungu Yaa Mweri – Petitioner

Director of Public Prosecutions

R U L I N G

The Petitioner has approached this Court by way of a Petition expressed to be brought under Article 19,20,21,22,23,24,25,28,48,50,258 and 259, seeking a review of the life imprisonment imposed by the trial court and later confirmed by the High Court for the offence of defilement contrary to section 8 (1) and subsection (2) of the Sexual Offences Act.

From the brief summary the Petitioner was charged, tried and convicted of defilement of a child contrary to section 8 (1) as read with subsection (2) of the Act. The particulars of the charge were that on 15.3.2011 at [Particulars Withheld] village, the Petitioner committed an act which causes penetration of a male genital organ, anus of TJ, a child aged 6 years.

In the petition, the petitioner relies on Article 50(2) (a) of the Constitution for that sentence to be reviewed.

Determination

Essentially, for the petitioner to succeed in this petition, he must demonstrate that seized of the matter exceeded their jurisdiction and acted contrary to the provisions of the law in detailing which denied him a right to a lesser sentence. Besides, these grounds the law calls upon the petitioner to demonstrate that both the trial court and subsequent decision of the High Court were tainted with non-compliance and other material procedures calculated at prejudicing his rights under the Constitution, except in clearest of cases, the High Court is not required to re-evaluate the evidence in a decision on sentence which has been conclusively determined by the same court sitting at different locations and time.

He has exhausted his right of appeal to the Apex Court. Secondly, in absence of the Doctrine of exhaustion there is existence of new and compelling evidence to warrant review of the final Judgment.

On second review it is sufficient to decide whether the High Court on appeal approaching its task applied or failed to apply the settled principles.

From the record, none of those defects or errors apparent on the face of the judgement pronounced has been shown by the petitioner whereas, it is settled that the **Supreme Court in Francis K. Muruatetu V R[2017]eKLR** struck down the mandatory clause on sentence under section 204 of the Penal Code, it did not in any way invalidate the sentences under the Sexual Offences Act. Therefore, if a specific case is assessed on its own circumstances and the applicant ought to benefit for to some degree to a lesser sentence in that context, the court is at liberty to review the sentence.

In the instant case the petitioner’s argument is under the canons of constitution Article 50 (6) (a) (b). In my view, the constitution and the features necessary to justify imposition of a life imprisonment sentence.

There is no compelling evidence affecting the petitioner’s sentence to impact on the fairness, integrity or public interest. This court rejects the petitioner’s argument to review the sentence for lack of jurisdiction under Article 50 (6) (a) (b) of the constitution based on lack of material that he has exhausted his right of appeal to the Court of Appeal. Secondly, the petitioner case is ineligible for a sentence review because his plea lacks new and compelling evidence to interfere with the settling.

Applying the frame work under the constitution, the petition as filed is unconstitutionally vague for the Court to alter the sentence as prayed. Moreover, the court finds, continued interference with those sentences without sufficient material would undermine the goals of equality, evenhandedness, predictability and consistency served by the state decisions. As a result the petition is denied.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of

Mr. Mwangi for the state

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.