



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 176 OF 2019

KHAMISI MTWANA CHOMBO.....PETITIONER

VERSUS

THE DIRECTOR OF CRIMINAL PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. **Khamisi Mtwana Chombo** the Petitioner herein was on 22/9/2015 sentenced to 20 years imprisonment for defilement contrary to Section 8[1] as read with section 8[3] of the Sexual Offences Act No 3 of 2006. The particulars were that on diverse dates between the months of December 2013 and February 2014 at Rabai Sub-County, Kilifi County he unlawfully and intentionally committed an act which caused penetration of the vagina of TKMM a child aged 12 years who was his daughter. The complainant conceived and gave birth to a daughter whose DNA test confirmed that there was 99.9% chance that the Petitioner was the father.

2. The Petitioner is now before this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where the supreme court found the mandatory nature of the death sentence to be unconstitutional.

3. The Petitioner submits that the sentence imposed on him was way too harsh. That he had interacted well with his fellow prisoners while in prison and had reformed. He asked the court to consider the period during which he had been in custody pending trial pursuant to section 333[2] of the penal code. In his oral submissions the petitioner confirmed to have defiled his own daughter.

4. Mr. Fedha learned prosecutor opposed the petition and submitted that the Petitioner had defiled a 12 year old who happened to be his child. The Petitioner's actions had caused the minor physical and psychological injuries and further the minor conceived and gave birth. Counsel urged the Court to reject the petition.

5. In mitigation the Petitioner stated that he was a first time offender, that he had a family of six children who had been rendered destitute by his incarceration. He averred that he had reformed and prayed for a review of sentence.

6. This petition is however overtaken by the new directions issued by the Supreme Court on 6/7/2021 on Muruatetu case. The apex court has by those directions limited the applicability of the Muruatetu case to murder offenders only.

7. The upshot is that this Court has no jurisdiction to entertain this petition.

8. On the allegation that the Petitioner was in remand for 1 year, if that is proved, he is entitled to remission under Section 333(2) of the Criminal Procedure Code. He shall avail evidence of this to the prison authorities so that his sentence can be shortened by the period which he spent in remand.

It is ordered accordingly.

Dated, Signed and Delivered at Mombasa this 29th day of July, 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