



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 142 OF 2019**

**MWALONGO CHICHORO MWANJEMBE.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**JUDGEMENT ON RESENTENCING**

1. This Petition is restricted to the resentencing of **Mwalongo Gichoro Mwanjembe the Petitioner herein who** was charged before the Principal Magistrate's Court at Mariakani in Criminal Case No. 51 of 2012 with and convicted of the offence of Defilement Contrary to Section 8(1) and (2) of the *Sexual Offences Act*, the particulars being that on 27/1/2012 at Majengo Taru in Kwale County he willfully and intentionally caused his genitalia into the genitalia of a 9 year old girl. In the alternative the Petitioner was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006 particulars being that on 27/1/2012 he touched the genitalia of a 9 year old girl by his genital. At the conclusion of the hearing he was convicted thereof and sentenced to 25 years imprisonment.

2. The Petitioner appealed the lower court decision vide **Mombasa HC CA No 14 of 2013** and the same was dismissed. He yet again filed an appeal over the High Court decision in Mombasa COA CA No 24 of 2015 where the sentence was substituted with life imprisonment. This Petition is based on the finding in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015** where the mandatory death sentence was declared unconstitutional by the Supreme Court and which reasoning was adopted by the Court of Appeal in **Dismas Wafula Kilwake v R [2018] eKLR** where the court had the following to say about the mandatory minimum sentences prescribed in the sexual offences act;

i. "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.

ii. 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.

iii. 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."

3. In his written submissions filed in court on 14/1/2021 the Petitioner relied on the sentencing policy guidelines and particularly paragraph 23.5 on mitigation. He further addressed Article 50(2) of the Constitution on fair hearing and stated that he had not been given an opportunity for mitigation during his sentencing in the lower court. The Petitioner stated that the life sentence imposed on him by the court was unconstitutional and was the basis of the resentencing petition before court. He placed reliance on **Christopher Achieng v R** and **Jared Koita Injiri v R**. In his mitigation he stated that he had benefited from the prison rehabilitation facilities and had sat for his KCPE examinations in 2016 and was further awaiting to sit for his KCSE examinations in 2020. That he was the school's president and had attained

several Certificates and Diplomas in Theology from prison. In conclusion he asked this court to be guided by the decision in the **Baraka Safari Case Criminal Appeal No. 75 of 2016 (Mombasa)**. The Petitioner further made oral submissions in court on 26/5/2021 where he stated that he regretted his actions, that he had lost both his wife and parents at the time he has been incarcerated and his 5 children were now living on their own. He asked the court to put into consideration the 9 years he had served and asked for a 15 year sentence inclusive of the 9 years. Further that the victim was now married with two children and that her family had reconciled with his family.

4. M/s Wanjohi for the Respondent in the written submissions filed in court on 4/12/2020 submitted that the offence committed had been heinous as it involved a 9 year old. It was submitted that both physical and psychological effects on the victim were not to be underestimated and that a deterrent sentence would help in preventing future occurrence of such crimes. In oral submissions made before court it was submitted that a 40 year sentence would suffice based on the circumstances of this particular case.

5. The reasoning in the **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015 with regards to mitigating factors was spelt out as follows:**

**“[71] To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:**

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (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 factor that the Court considers relevant.*

6. I have carefully considered the Petition, the Supreme Court on 6/7/2021 issued further directives with regards to resentencing applications arising from the Muruatetu Case. The apex court stated that the decision of Muruatetu and the guidelines therein apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. This court does not therefore have the jurisdiction to interfere with the life sentence imposed on the Petitioner given that the charges against him were in relation to sexual offences.

In the circumstances the application herein is unmerited and the same is hereby dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY, 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