



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 69 OF 2020

MESHACK OMONDI ODHIAMBO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to life imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal in this Court, **Kisumu Criminal Appeal No 4 of 2018** where the Court upheld his conviction but set aside his sentence of life imprisonment and substituted it with a sentence of fifteen (15) years imprisonment.
3. On 20th August 2020, he filed an application for review of the sentence. In his affidavit that he swore in support of his said application, he stated that while in prison, he had maintained high standards of discipline and urged the court to apply Section 333 (2) and Section 137 (i) (a) of the Criminal Procedure Code when reviewing the sentence.
4. In his Written Submissions, he reiterated his aforesaid averments and asserted that in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** and the case of **Christopher Ochieng vs Republic [2005] eKLR** where the courts held that mandatory sentences disregard all individual characteristics and that such a system can result in gross disregard of the right to dignity as provided for under Article 28 of the Constitution of Kenya, 2010.
5. He pleaded with the court to consider that he was arrested at the age of twenty six (26) years and had spent eight (8) years in custody. He added that he was a family man therefore his family is overwhelmed with responsibilities due to his incarceration and his health status has since deteriorated as he was diagnosed with chest complications and a broken leg. He submitted that he was a first offender and remorseful and that he was ready to resettle after his rehabilitation. He averred that he had enrolled and fruitfully engaged in spiritual training and had acquired Diploma in Biblical Studies and Prison Fellowship Kenya and thus urged this court to consider the requirements of Section 333(2) of the Criminal Procedure Code.
6. The State opposed his Petition for review of sentence. It submitted that on the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) that the Petitioner had relied upon did not apply to defilement cases. It asserted that the Petitioner had already benefitted through re-sentencing in his Appeal before this court and therefore this court could not review its own decision.
7. In her decision of 28th November 2019, Cherere J rendered herself as follows:-

“Since mandatory sentences have been declared unconstitutional in line with the Supreme Court holding in Francis Karioko Muruatetu & Another vs Republic SC Petition No. 16 of 2015 [2017] eKLR I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature.

From the foregoing, the Appeal fails except on the issue of sentence. The life sentence imposed on the Appellant is substituted with a sentence of 15 years from 31st January, 2018 when Appellant was sentenced (emphasis court).”

8. In view of the fact that Cherere J reviewed the sentence of life imprisonment that was imposed upon the Petitioner herein by the Trial Court downwards to fifteen (15) years and she directed that the same commence from 31st January 2018 when he was sentenced, the only remedy that was left to him was to appeal to the Court of Appeal on the question of when the computation of his sentence should commence. This court could not sit on appeal on the learned judge decision and/or review the same as both courts are of equal and competent

jurisdiction.

DISPOSITION

9. For the foregoing reasons, the upshot of this court's decision is that the Petitioner's Petition for review of the sentence that was filed on 20th August 2020 was not merited and the same be and is hereby dismissed.

10. Accordingly, the court hereby upholds the conviction and sentence of the Petitioner herein for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006.

11. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2021.

J. KAMAU

JUDGE