



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 83 OF 2020

ERUSTUS IMBUSIA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted of the offence of defilement contrary to Section 145(2) of the Penal Code. He was sentenced to life imprisonment.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court, **Criminal Appeal No 122 of 2005** challenging the sentence. His Appeal was dismissed in its entirety.
3. Being dissatisfied with the first appellate court's decision, he further lodged an Appeal in the Court of Appeal, **Criminal Appeal No 305 of 2012** where his Appeal was also dismissed.
4. On 10th September 2020, he filed an application for review of the sentence. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic, Petition No 15 of 2015**. In his affidavit that he swore in support of his said application, he invoked Article 2,25, 27 and 50 (2) p and urged the court to declare the maximum sentence of life imprisonment of Section 145 (2) of the Penal Code as inconsistent with the principles of the Constitution.
5. He contended that he had so far spent fifteen (15) years in custody and had been reformed and rehabilitated.
6. In his Written Submissions, he argued that the mandatory life sentence was harsh, excessive and unconstitutional. He stated that courts in resentencing should be guided by many factors such as first offender, age of the offender, remorsefulness of the offender, whether the offender pleaded guilty or not among other factors. He relied on the case of **Guyo Jarso vs Republic [2018] eKLR** where the court set aside a life sentence and replaced it with twenty (20) years imprisonment.
7. He contended that he was a first offender and argued that it was one of the factors that the court ought to look at as in this circumstance. In that regard he relied on the case of **Hezekiah Mwaura Kibe vs Republic (1976) 118**.
8. He further explained that he had enrolled and fruitfully engaged in Theological courses and attained Certificates which he filed herein. He prayed for mercy and leniency.
9. The State opposed his Petition for review of sentence. It pointed out that the minimum mandatory death sentence for murder was declared unconstitutional in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It also pointed out that the mitigating factors in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) were also extended in cases of defilement by the Court of Appeal in the cases of **Christopher Ochieng vs Republic [2019] eKLR** and **Jared Koita Injiri vs Republic Criminal Appeal No 93 of 2014** (eKLR Citation not provided).
10. It asserted that the Petitioner defiled a two and a half (2 ½) year old child who was caused pain and physical injury. It termed the act that was committed by the Petitioner as horrible and incomprehensible. It was the State's contention that the Petitioner's sentence was lawful. It added that life Sentence was not unlawful save for its mandatory nature.
11. It argued that even though the Petitioner had shown his Certificates of rehabilitation and claiming he was remorseful, his conduct during trial revealed a man who was dangerous. It urged this court to uphold his conviction and sentence considering the age of the minor who was defiled and for the reason that defilement has become rampant.

12. Reading the Judgement on Petitioner's Second Appeal delivered on 4th October 2013, the Court of Appeal rendered itself as follows:-

“...we are nonetheless of the view that the sentence of life imprisonment was well deserved even though the court had discretion to award a lesser sentence. The victim was a child of 2 ½ years. The reasons given by the appellant and before us cannot sell. Indeed, in our mind, just like the first appellate court; we cannot conceive a worse case in respect of Sexual Offences. Maximum sentences are normally reserved for the very worst cases in any category of offences and in our view this was the worst case in the category of Sexual Offences even under the Penal Code and the appellant has only himself to blame.”

13. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) to the effect that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. It also clarified that all offenders who had been subject to the mandatory death penalty and desired to be heard on sentence would be entitled to re-sentencing hearing.

14. The Supreme Court was categorical that an application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court. It was also emphatic that where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

15. It further directed that in a re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence. It added that where the appellant has lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

16. It clarified that the guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals and that the same would also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

17. It reiterated that in re-hearing the sentence for the charge of murder, the court had to take into account the mitigating factors that had earlier been set out in the same case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It further directed that the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in the said case.

18. This court considered the rehabilitation programmes that the Petitioner had undergone while in prison which under normal circumstances would persuade the court to review a sentence. The court also agreed with him that the mandatory life imprisonment under Section 8(2) of the Sexual Offences Act No 3 of 2006 was unconstitutional in that it removed the discretion of the court to determine the appropriate sentence to mete out to a person who was convicted under the said Section.

19. However, the Petitioner's Petition was not one that this court could grant. Firstly, he was not sentenced to death. He was sentenced to life imprisonment. This therefore rendered the case of **Francis Karioko Muruatetu and Another vs Republic** (Supra) that addressed the constitutionality of mandatory death sentence irrelevant in the circumstances of the case. Secondly, the Court of Appeal upheld the sentence of life imprisonment and this court had no power to overturn the said decision being a court lower in hierarchy to the Court of Appeal.

20. Notably, whereas the Constitution of Kenya, 2010 does not specifically provide that the decisions of the Court of Appeal are binding on the High Court, Environment and Land Court, Employment and Labour Relations Court, Magistrates' courts, Kadhis' courts and all tribunals like that in Article 163(7) of the Constitution of Kenya, the common law doctrine that decisions of higher courts are binding on courts below it, apply.

21. Having said so, it is clear from Article 165 (6) of the Constitution of Kenya, 2010 that the High Court has no supervisory role over the courts superior to it. The said Article 165(6) of the Constitution of Kenya provides that:-

“The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.”

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was filed on 10th September 2020 was not merited and the same be and is hereby dismissed. Accordingly, the conviction and sentence of the Petitioner for the offence of defilement be and is hereby upheld.

23. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER, 2021

J. KAMAU

JUDGE