



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 23 OF 2020

JAMES MWEBIA M'IRWARE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner herein was charged and convicted with defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006, in Nkubu Criminal Case No. 37 of 2008. At the end of the trial he was found guilty of the offence and sentenced to serve life imprisonment. He first appealed against that decision in High Court Criminal Appeal No. 25 of 2010, and a second time in the Court of Appeal in Criminal Appeal No.113 of 2013 and in both instances, his appeals were dismissed and the sentence upheld.

2. He then moved this court through a notice of motion dated 22/7/2020 pursuant to Section 20(1) of the Sexual Offences Act No. 3 of 2006, Articles 23(1), 165(3)(b)(d)(i), 50(2), 25(c)(d), 51(1), 163(7) of the Constitution pleading that the court be pleased to re-sentence him considering the facts, mitigation and sentence pursuant to the Supreme Court's judgement dated 14/12/2017 in **Consolidated petition No. 15 & 16 of 2015 between Francis Karioko Muruatetu & Anor v Republic**.

3. In advancing his request, the petitioner contends that the trial court did not consider his mitigating factors, due to the mandatory nature of the sentence under Section 8(1)(2) of the Sexual Offences Act, and therefore the court acted unconstitutionally. He further contends that for the 14 years he has been in incarceration, he has undergone various rehabilitation programs hence he is ready to contribute to the Nation's development through legal means.

4. In his written submissions, the petitioner urged the court to retrieve back his personal dignity which was disenfranchised by the indefinite mandatory life sentence that was unconstitutional, and cited **Francis Karioko Muruatetu & anor v R (2017) eKLR** to support that argument. He also relied on **Evans Wanyonyi v R (2019) eKLR** on the importance of taking mitigating factors into consideration during sentencing. In urging the court to compute the period spent in custody time in line with Section 333 of the CPC and the right to benefit from the least severe punishment as provided under Article 50(2)(p) of the Constitution, he cited **Solomon Njagi Nyamu v R(UR)**. He reiterated and rehashed the submissions orally on 24/9/2021, and urged the court to re-sentence him so that he can go back home to his family and children.

5. In opposition to the petition the prosecution offered oral submissions and contended that the petitioner is not eligible to re-sentencing in view of the Supreme Court's directives issued on 6/7/2021 where the apex court clarified that its decision was only applicable to murder trials and not applicable to other mandatory sentences.

6. It is now settled that the decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** is only applicable to the offence of murder and one needs no re-convention of the wheels but must be bound by the law as established and settled as of today. The Petitioner herein had been sentenced to the mandatory sentence of life imprisonment for an offence under Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2016. Re-sentencing as of today must remain limited to murder cases and not defilement like in this matter unless the issue of re-sentencing in defilement cases is heard by the High Court, then escalated to the Court of Appeal and eventually heard by the Supreme Court resulting into a similar conclusion like in **Francis Karioko Muruatetu & Another v Republic**. The fact that the petitioner herein is a reformed, remorseful and a rehabilitated person falls by the wayside and is not a basis to interfere with the sentence in this matter.

7. On the contention on the provisions of Section 333(2) of the Criminal Procedure Code, the petitioner was admitted to bail on 17/1/2008, and was out on bail the entire trial period before being convicted and sentenced to serve life imprisonment. I have asked myself how the court may apply section 333 (2), Criminal Procedure Code where it decided to impose a death or life sentence and come to the conclusion that it is practically untenable in those two situations. It can only be applicable where the prison sentence is for a definite and quantified

period. In the circumstances and facts of this petition it is not practical to reduce the term by the period served in custody while undergoing trial.

8. On that basis, I find that even though this court has the obligation to effect a correction wherever the law has not been complied with, here there is no leeway to intervene.

9. Accordingly, the petition is hereby dismissed.

Dated signed and delivered at Meru this 19th day of November, 2021

Patrick J.O Otieno

Judge

In presence of

Petitioner in person in custody

Mr. Maina for the state

Patrick J.O Otieno

Judge