

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 30 OF 2020

PNG.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner herein was charged, tried and convicted of the offence of Incest contrary to Section 20(1) of the Sexual Offenses Act No. 3 of 2006, in Chuka Criminal Case No. 373 of 2010 then sentenced by the trial court to serve a life imprisonment. The particulars of the offence were set out to be that on 26/3/2010 at Kamwimbi Location in Meru South District, within the then Eastern Province, he caused his genital organ to penetrate the genital organ of JG, a female person aged 8 years, and who was by relation his daughter.

2. The petitioner appealed against that decision in High Court in Meru High Court Criminal Appeal No. 141 of 2011 and a second time in the Court of Appeal, Criminal Appeal No.136 of 2014 but in both instances, his appeals were dismissed and the sentence upheld.

3. He then moved this court through a notice of motion dated 22/7/2020 pursuant to Section 20(1) of the Sexual Offenses 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 in which he seeks, in the main, orders that the honourable 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 R**

4. The petitioner contends that the trial court did not consider his mitigating factors and imposed the mandatory without regard to the fact that the same is unconstitutional. He further contends that for the 10 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. He therefore urged the court to consider the period he has been in custody, in line with the provisions of Section 333(2) of the CPC. On the reform he has undergone, he has exhibited a letter from the chief to show that he has since reconciled with his wife and the complainant.

5. In opposition to the petition, the prosecution asserted that the petitioner is not eligible to re-sentencing in view of the Supreme Court's directives issued on 6/7/2021 having been charged with defilement and not murder.

6. This court is bound by the directions of the Supreme Court that for now only those convicted of murder and given the mandatory sentence may apply for re sentencing. That guidance shuts out the applicant and makes his petition untenable. I find it not to lie.

7. On the contention that the period he served in custody before conviction be taken into account to reduce the sentence, I do find that it is impracticable to reduce the life sentence by any period served before conviction. The petitioner was presented to court and charged on the 30/3/2010 and released on bond on the 15/4/2010. He was out on bond until 27/6/2011 when the bond was cancelled. He was then in incarceration up to 22/9/2011 when he was convicted and sentenced. In my assessment the period to be reckoned with under section 333(2) Criminal Procedure Code is an aggregate of some 3 months and 10 days. Having been convicted to serve life imprisonment, an unknown period I have asked myself how the court may apply section 333 Criminal Procedure Code I find the term to be indefinite and unquantifiable period hence not capable of being subtracted from. 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. 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. I find no merit in the petition and order that it be 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 prosecution

Patrick J.O Otieno

Judge