



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. E011 OF 200

SAMSON ABAKUK ALIAS BOYIPETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Petitioner, **SAMSON ABAKUK Alias BOYI**, has requested this Court to re-sentence him.

1. He pointed out that the trial Court had sentenced him to 20 Years imprisonment for the offence of **Defilement**. His understanding was that the said sentence was handed down because it was deemed to be mandatory.

2. The Petitioner submitted that, pursuant to the decision of the Supreme Court in the case of **MURUATETU**, mandatory sentences were unconstitutional, as they deprived the trial Court of the discretion to impose appropriate sentences.

3. He pointed out that there were already many cases in which persons who had been incarcerated for defilement, had had their sentences reviewed by the High Court.

4. Just because one person who had been convicted for the offence of **defilement**, had the sentence reviewed, is not a reason by itself, to warrant the review of the Petitioner's sentence.

5. In my considered view, it is only when a Petitioner demonstrates that he was deprived of an opportunity for mitigation, that the Court would go through a process of re-sentencing.

6. Secondly, even when the person had been denied an opportunity for mitigation, it was not automatic that the Court would, when giving consideration to re-sentencing, reduce the initial sentence. The Court would be perfectly entitled to sustain the original sentence if the circumstances of the Petitioner warranted the said sentence.

7. In this case I have noted that the trial Court had ordered that the Petitioner be granted Bond pending trial. However, the Appellant was unable to meet the Bond Terms.

8. Therefore, by virtue of the provisions of **Section 333 (2)** of the **Criminal Procedure Code**, the Petitioner is entitled to have the period which he spent in custody, during the trial, taken into account when the prison authorities are calculating the actual duration which the Petitioner is to serve in prison.

9. As regards the request for re-sentencing, I note that the learned trial magistrate did give to the Petitioner, an opportunity for mitigation.

10. Secondly, the trial Court did not hand down the sentence simply because it was Mandatory. The learned trial magistrate stated as follows, during the sentencing;

“I have considered the points in mitigation and the circumstances of the case, but the act that was committed by the accused was quite serious. I proceed to sentence him to 20 years imprisonment for Count I and 4 years imprisonment for Count II. Both sentences to run concurrently.”

11. In the result, the Petitioner has not made out a case for re-sentencing.

12. However, even if the Petitioner had persuaded this Court to have him re-sentenced, I would have upheld the sentence of 20 years imprisonment for the offence of defilement. I so hold because the Petitioner, who was a neighbour of the Complainant, violently gained

entry into the house which the Complainant shared with her younger brother. The 2 siblings lived alone, as they were orphans.

13. The Petitioner, who was a married man and a neighbour, would have been expected to protect the orphans. Instead, he defiled the Complainant.

14. For those reasons the sentence was appropriate.

15. Nonetheless, the period which the Petitioner spent in custody, during his trial, shall be deducted from the actual period which he is to serve in jail.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 20TH DAY OF DECEMBER 2021

FRED A. OCHIENG

JUDGE