



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO 72 OF 2019

GEORGE ODHIAMBO SWAN.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No 3 of 2006 and sentenced to serve twenty (20) years imprisonment. He had also been charged with the offence of committing an indecent act with a child and was sentenced to serve ten (10) years imprisonment. Both sentences were to run concurrently.

2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **HCCRA No 32 of 2015** which, on 6th October 2016, was dismissed in its entirety. He did not appeal to the Court of Appeal.

3. On 29th November 2019, the Petitioner filed this Petition for review of the sentence. The said application was supported by his Affidavit in which he stated that the minimum mandatory sentences meted to him was unconstitutional as it deprived courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence that this court had jurisdiction to determine and impose an appropriate sentence.

4. In his Written Submissions that were filed on 14th July 2021, he relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** but it was not exactly clear what his argument regarding the same was as it appeared to be hanging. He also relied on Section 333(2) of the Criminal Procedure Code and urged this court to consider the period he had spent in custody as from the date of his arrest and conviction was 29th September 2011 and 25th February 2015 for his date of his arrest and sentencing respectively.

5. He pleaded with this court to consider that he was arrested at the age of thirty three (33) years and was the sole bread winner of his young family. He added that he had so far spent eleven (10) years in custody and was now forty three (43) years of age (**sic**). He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration. He asserted that he was a first offender and very remorseful for having engaged in a criminal activity.

6. He submitted that he had undergone various transformation programs and acquired skills and attained Certificate of Completion in Prison fellowship, Mind Education Training and Mahanaim Bible Studies amongst other courses. He asserted that he had been extremely (**sic**) reintegrated, rehabilitated and reformed and thus urged this court to consider the provisions of Section 333(2) of the Criminal Procedure Code.

7. In his Written Submissions that he filed on 4th August 2021, he placed reliance on the cases of **Thomas Mwambu vs Republic [2017] eKLR** and **Christopher Ochieng vs Republic [2019] eKLR** amongst other cases to buttress his argument that mandatory minimum sentences leave no room for examination of the prospects of rehabilitation and the incarceration method to be adopted.

8. Initially, the State was not technically opposed to the reduction of the sentence. In fact, in its Written Submissions that were filed on 12th July 2021, it recommended that this court re-sentences the Petitioner to fifteen (15) years taking into account the number of years he had spent in custody pursuant to Section 333(2) of the Criminal Procedure Code. It had relied on the cases of **Christopher Ochieng vs Republic** (Supra) and **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the mandatory minimum sentence for murder had been declared unconstitutional.

9. 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 said decision and those guidelines only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code.

10. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.

11. Notably, the fact that the Petitioner was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of defilement and not murder. As the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein, his prayer that the court reviews his sentence thus fell by the wayside.

DISPOSITION

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

13. In the event the Petitioner spent any time in custody during the hearing of his case, that time so spent shall be taken into consideration when computing the length of the sentence he is to serve as provided in Section 333(2) of Criminal Procedure Code.

14. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER 2021

J. KAMAU

JUDGE