



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.57 OF 2019

BETWEEN

KENNEDY OKOTH BARE.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. On 11th August, 2016, the trial court in **WINAM CRIMINAL CASE NO. 1112 OF 2014**, convicted and sentenced **KENNEDY OKOTH BARE, (Petitioner)** to 15 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with section 8(4) of the **Sexual Offences Act No. 3 of 2006**.
2. Petitioner lodged an appeal **KISUMU HIGH COURT CRIMINAL APPEAL NO. 38 OF 2016** which by a judgment dated 30th May, 2017 upheld the conviction and sentence.
3. The Petitioner has petitioned this court for resentencing. He expressed remorse and stated that he was arrested at the age of 20 years and had served over 3 years since conviction within which time he has not undertaken any training.
4. Ms. Gathu, Senior Prosecution Counsel for the state opposed the appeal on the ground that the Petitioner had not served adequate sentence required to have him fully rehabilitated.

Analysis and Determination

5. The Supreme Court's decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory sentences.
6. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under ***the Act***. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

7. Even though Appellant was a first offender, the psychological effect of the offences on the 16-year-old complainant cannot be underestimated.
8. The Appellant has served 3 ½ years. He has expressed remorse and he is relatively a young man. I re-sentence him to **7 years** from **11th August, 2016** when he was convicted.

DELIVERED AND SIGNED IN KISUMU THIS 27th DAY OF FEBRUARY 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Petitioner - Present in person

For the State - Ms. Maureen