



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL PETITION NO. 70 OF 2019

BETWEEN

ELIJAH PONGE OTENG.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. On 23rd March, 2010, the trial court in **KISUMU CRIMINAL CASE NO.32 OF 2010**, convicted and sentenced the Petitioner to death on one count of robbery with violence contrary to section **296(2)** of the Penal Code and to 20 years' imprisonment on one count of rape contrary to section 10 of the Sexual Offences Act. The death sentence was later commuted to life imprisonment. Petitioner lodged an appeal **KISUMU HIGH COURT CRIMINAL APPEAL NO. 105 OF 2010** which was dismissed on 06th March, 2012 and the sentence in the offence of robbery with violence was substituted with a 12-year sentence which he has, subject to remission already served. There is evidence that the Petitioner did not appeal to the Court of Appeal.

2. By a petition filed on 18th September, 2019, the Petitioner has petitioned this court for resentencing in the second count.

3. Ms. Gathu, learned counsel for the state submitted that the petition was not opposed and proposed that the Petitioner be sentenced to an imprisonment term of 18 years for the reason that the complainant was raped in a room in the same house where her other relatives were.

Analysis and Determination

4. Section 3 of the Sexual Offences Act under which the Petitioner was charged and convicted provides that:

(1) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

5. The trial court in its wisdom enhanced the sentence to 20 years which is lawful.

6. 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 minimum and maximum sentences.

7. I have considered **The Sentencing Policy Guidelines, 2016** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).

8. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal 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.

9. Even though Appellant was a first offender, the psychological effect of the offences on the complainant cannot be underestimated.

10. Under the proviso to **section 333(2)** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, the court is entitled to take into account the period the petitioner has spent in custody in determining the sentence. The court record shows that the petitioner has served 10 years since the date of conviction.

11. The Petitioner has undertaken training and attained a certificate as a Polisher Grade III as a way of reformation. After considering all the mitigating and aggravating factors, and the fact that the Petitioner was a first offender, I re-sentence him to the period already served.

DELIVERED AND SIGNED IN KISUMU THIS 20th DAY OF February 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Petitioner - Present in person

For the State - Ms. Gathu