



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE- J.)**

**PETITION NO.20 OF 2020**

**BETWEEN**

**EMMANUEL ZAKAYO ANYEMBE.....PETITIONER**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. EMMANUEL ZAKAYO ANYEMBE, (*Petitioner*) was sentenced on 19<sup>th</sup> August, 2010 to 20 years' imprisonment in **WINAM CRIMINAL CASE NO. 3228 OF 2009**, for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the **Sexual Offences Act No. 3 of 2006**. He withdrew his appeal **KISUMU HCCRA 147 OF 2015** after he was served with a notice of enhancement of sentence.

2. The Petitioner has petitioned this court for resentencing. He expressed remorse and stated that he was arrested at the age of 18 years and is an orphan, He has served 10 years within which time he has obtained 3 certificates in bible studies and a certificate in Health Education. He has also attained Grade III as a polisher and Grade III in carpentry and joinery.

3. Ms. Gathu, Senior Prosecution Counsel for the state appreciated that the Petitioner had prepared himself for integration with the public but recommended that the Petitioner serves the 20 more years as handed down to him by the trial court.

**Analysis and Determination**

4. 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.**

5. From the foregoing, I find that the trial magistrate acted lawfully in not sentencing the Petitioner to the mandatory sentence.

6. Since the Appellant was not sentenced to a mandatory sentence, he cannot benefit from the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic & 5 others [2016] eKLR** that declared the mandatory sentences unconstitutional. This Petition is consequently disallowed. The Petitioner's Appeal **KISUMU HCCRA 154 OF 2010** is still pending and he is at liberty to pursue it if he so wishes.

**DELIVERED AND SIGNED IN KISUMU THIS 12<sup>th</sup> DAY OF March 2020**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant** - Amondi/Okodoi

**Petitioner** - Present in person

**For the State** - Ms. Gathu