



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CONST. CRIMINAL PETITION NO. 29 OF 2019

ELLY ONYANGO OWINO.....PETITIONER

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

JUDGMENT

1. The Petitioner herein, *Elly Onyango Owino*, has once again attempted to secure his freedom. This is the second attempt. The first attempt was *vide Criminal Appeal No. 11 of 2017*. The appeal was against conviction and sentence. The appeal on conviction was dismissed. However, the sentence was enhanced from 30 years' imprisonment to life imprisonment. That was pursuant to the judgment rendered on 08/03/2018.

2. The Petitioner then filed a Petition before this Court. The Petition was very brief. It contended that the sentence handed to the Petitioner in the appeal was unconstitutional as it contravened the legal principles in **Francis Muruatetu & Another -vs- Republic (2017) eKLR**. The Petitioner further contended that he was serving an unlawful sentence an act which this Court should not countenance. He prayed for re-sentencing.

3. The brief background to the Petition is that the Petitioner was charged in *Migori Chief Magistrate's Court Criminal Case No. 100 of 2016* with the offence of *defilement* contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. He also faced an alternative charge of *indecent act with a child* contrary to **Section 11(1) of the Sexual Offences Act**. He denied both offences and was tried.

4. He was eventually found guilty, convicted and sentenced to 30 years' imprisonment. That was on 28/02/2017. He appealed to this Court.

5. As the Petition is centred on the sentence rendered by the High Court on appeal, I will reproduce the part of the judgment in the appeal as follows: -

33. The appellant also appealed against the sentence. The offence of defilement under which the appellant was charged attracts the sentence under Section 8(2) of the Sexual Offences Act. That sentence is a mandatory life imprisonment. The sentence rendered is therefore contrary to law and I hereby set it aside and substitute it with the mandatory life imprisonment.

6. That is the basis of the Petition. The prosecution vehemently opposed the Petition. It contended that the decision in **Francis Muruatetu & Another -vs- Republic** case (supra) did not apply to sexual offences under the **Sexual Offences Act**. Consequently, a dismissal of the Petition was called for.

7. I have previously dealt with the issue raised in this Petition. In **Migori High Court Criminal Appeal No. 58 of 2018 Morris Odera Nyangoko versus Republic** (unreported) I stated as follows: -

25.The Sexual Offences Act No. 3 of 2006 is a pre-2010 statute and introduced a raft of mandatory, sole and/or minimum sentences in sexual offences. It is therefore one of those statutes which must be applied in light of the Constitution which was promulgated in 2010. The issue of mandatory and sole nature of sentences was well settled by the Supreme Court in the much celebrated case of Francis Muruatetu & Another -vs- Republic 2017 eKLR where the Court stated in part thus: -

.....On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional

provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.

.....Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right." (emphasis added).

26. Applying the foregone reasoning, the Court of Appeal in Kisumu Criminal Appeal No. 93 of 2014 Jared Koita Injiri v Republic [2019] eKLR while considering an appeal against life sentence imposed under Section 8(2) of the Sexual Offences Act had the following to say: -

....In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic(supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.

27. Section 8(1) and (2) of the Sexual Offences Act states as follows:

8(1).

(2)

28. It therefore goes without say that the mandatory life sentence imposed by Section 8(2) of the Sexual Offences Act cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the Constitution contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by Section 8(2) of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing. The appeal on sentence is hereby allowed for the reason that the trial court stated that it had no discretion in sentencing in view of the mandatory nature of Section 8(2) of the Sexual Offences Act. The life sentence is hence set-aside.

8. It is on the foregone that the Petition must succeed. As a result the following final orders do hereby issue: -

(a) The Petition herein be and is allowed and the life sentence rendered in Migori High Court Criminal Appeal No. 11 of 2017 on 08/03/2018 be and is hereby set-aside.

(b) Since the trial court in Migori Chief Magistarates Criminal Case No. 100 of 2016 considered the Petitioner's mitigations and handed a 30 years' imprisonment term, I hereby reinstate the said sentence.

(c) For avoidance of doubt the sentence of 30 years' imprisonment shall run from 28/02/2017 when the Petitioner was sentenced.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Elly Onyango Ouma, the Petitioner in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant