



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. 20 OF 2019

REUBEN DENA MAKOMBOA..... PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCING

The Petitioner herein was initially charged, convicted and sentenced to fifteen years imprisonment for the offence of defilement of a 15 years old minor contrary to section 8(4) of the sexual offences Act No. 3 of 2006. He appealed against sentence and conviction in both appellate courts, but the same was dismissed. He has now come under **Francis Muruatetu and Another vs Republic (2017) eKLR** which declared the mandatory death sentence unconstitutional on the basis that it deprives the Court of the discretion to impose appropriate sentence given the circumstances of each case.

In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. See **Ambani Vs Republic**. The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareashtra** at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge: -

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.**
- 4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.**
- 5. Community protection: To protect the community by incapacitating the offender.**
- 6. Denunciation: To communicate the community's condemnation of the criminal conduct.**

In his mitigation, he has called upon this court take into account the fact that he is a first offender, he is remorseful, he has spent over nine years in solitary confinement, he has been rehabilitated since he has undergone bible courses and is now a fully reformed person. In aggravation, the court notes that the victim was a school going minor. He had full knowledge that the victim was a schoolgirl but he nevertheless proceeded to have a relationship as well as sexual intercourse with her.

I note that sentence must be proportional to the offence, be fair to the accused while paying due attention to the public interest. I have been drawn to think very seriously as to what would be an appropriate sentence in the circumstances. Emphasis must always be given to the fact that the purpose of Section of the Sexual Offences Act to protect the girl child from the man who can't control their sexual appetite even in circumstances where she might have consented to sex. The girl child 18 years of age is considered an unequal partner; hence the man would still be held liable. Further emphasis must be given to the reality that every man should feel obliged not to touch any girl in school uniforms. The Petitioner being a father of a young daughter, who ought to have considered the pain that the victim's family would have to endure upon committing the offence.

I have considered the petition, the supporting affidavit, the submissions, the probation and aftercare services victim impact assessment report and factual matrix of the main suit. The aggravated circumstances in this petition far outweigh the mitigating circumstances.

I, therefore, find no justification to disturb the prevailing sentence. The 15 years imprisonment from the date of arrest suffices.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MALINDI THIS 30TH OF SEPTEMBER , 2020

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the state
2. The petitioner