



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 58 OF 2020

ROBERT MAGARA NJERU..... PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The petitioner, *Robert Magara Njeru* was charged and convicted of the offence of rape contrary to *Section 3 (1) (a) (b)* as read with *Section 3* of the *Sexual Offences Act*.

The particulars of the charge were that on 30th January 2018 at [Particulars Withheld] village within Embu County, he intentionally and unlawfully caused his genital organ to penetrate the genital organ of *PGN* without her consent.

2. Upon his conviction, the appellant was sentenced to serve 10 years imprisonment. He has now filed the instant petition seeking *inter alia*, a declaration that the Supreme Court's decision in *Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR* equally applies to mandatory sentences prescribed under the *Sexual Offences Act*; a declaration that the trial court did not comply with *Sections 216 and 329* of the *Criminal Procedure Code* and that therefore the sentence imposed on him was inconsistent with *Article 25 (c) and 50 (2)* of the *Constitution*; that he was entitled to the benefit of the Supreme Court's decision in the *Francis Karioko Muruatetu case [supra]* and that his case should be remitted to the trial court for resentencing.

3. At the hearing, the petitioner relied entirely on his written submissions filed in court on 28th August 2020. In his submissions, he urged this court to find that the sentence meted on him by the trial court was harsh considering that he was a first offender.

4. Further, the petitioner submitted that the trial court failed to exercise its discretion by taking into account the mitigating factors he had advanced and instead felt bound to impose the minimum mandatory sentence prescribed under *section 3 (1) (2)* of the *Sexual Offences Act*.

5. Relying on the authorities of *Christopher Ochieng V Republic, [2018] eKLR* and *Jared Koita Njiri V Republic, CR No. 93 of 2014*, the petitioner maintained that he was entitled to resentencing by this court so that his sentence is substituted with what he referred to as a 'soft sentence' arguing that he had a right to equal protection and benefit of the law.

6. In contesting the petition, the respondent through learned prosecuting counsel *Ms. Mati* made oral submissions. She invited the court to note that the maximum sentence for the offence of rape was life imprisonment and that the learned trial magistrate was lenient in imposing a sentence of ten years imprisonment. She urged the court to note that the victim of the offence had undergone a traumatic experience and find that the sentence passed against the petitioner was fair and just. She implored me to dismiss the petition for lack of merit.

7. In rejoinder, the petitioner beseeched me to allow the petition and reduce his sentence to give him an opportunity to rebuild his life using the skills he had learnt in prison.

8. I have carefully considered the petition and the rival submissions made by the petitioner and the respondent.

As stated earlier, the petition is premised on the *Francis Karioko Muruatetu case [supra]* in which the Supreme Court declared that minimum mandatory sentences were unconstitutional to the extent that they deprived the trial court of its discretion to impose appropriate sentences taking into account the peculiar facts and circumstances of each case and the mitigating factors offered by the convict.

9. The petitioner has urged this court to make a declaration that the Supreme Court's aforesaid decision equally applies to sentences imposed under the *Sexual Offences Act*. The Court of Appeal in several authorities including *Dismas Wafula Kilwake V Republic, [2018] eKLR, Evans Wanjala Wanyonyi V Republic, [2019] eKLR* and the authorities cited by the petitioner namely *Christopher Ochieng V Republic, [2018] eKLR* and *Jared Koita Njiri V Republic, CR No. 93 of 2014*, has already applied the decision in the *Muruatetu case* to the minimum mandatory sentences prescribed under the *Sexual Offences Act*. In the premises, I do not have any difficulty in making a similar

declaration as sought by the petitioner which I hereby do.

10. Having so found, the issue that arises for my determination is whether the petitioner's plea for resentencing is merited.

In sentencing the petitioner to ten years imprisonment, the learned trial magistrate in his presentence notes stated that he had considered the petitioner's plea in mitigation. He also considered the circumstances that surrounded the commission of the offence and the period the petitioner had spent in custody prior to his sentence.

11. In his mitigation, the petitioner had urged the court to consider that he was 45 years old and that he had children who depended on him. Though it is true that even after indicating that he had considered the aforesaid mitigating factors, the learned trial magistrate proceeded to hand down the minimum mandatory sentence prescribed under the law for the offence of rape, this by itself is not proof that he did not exercise his discretion before sentencing the petitioner.

12. I have read the evidence on record. The victim's evidence regarding the manner in which the offence was committed and her interaction with the petitioner before the date the offence was committed shows clearly that the offence was premeditated and was executed in a most violent and beastly manner. The petitioner's actions will no doubt traumatize the victim for the rest of her life.

13. Before sentencing, the trial court was enjoined to consider both the mitigating and aggravating factors disclosed by the facts of the case. He was perfectly entitled to impose the mandatory minimum sentence if after considering the gravity of the offence, the mitigating and aggravating factors and all other relevant factors, he was of the opinion that the minimum mandatory sentence was the appropriate sentence in the petitioner's case. This appears to have been the case in this case considering that the offence of rape attracts a maximum sentence of life imprisonment.

14. I wholly concur with the petitioner that he was entitled to equal benefit and protection of the law and to the right to a fair trial. The record clearly shows that the trial court complied with *Sections 216 and 329* of the *Criminal Procedure Code* by giving the petitioner an opportunity to offer his plea in mitigation. There is nothing in the proceedings before the trial court to suggest that he was denied the benefit and protection of the law or that his right to a fair trial was violated.

15. It must always be remembered that victims of crime also have rights and they are equally entitled to justice. They can only get justice if persons suspected to have committed crimes against them are subjected to due process and punished appropriately if convicted of the offences they are alleged to have committed.

16. In view of the foregoing, I have come to the conclusion that the petitioner has not established that any of his constitutional rights were violated by the trial court in course of his trial. In the premises, I do not find merit in this petition and it is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2020.

C. W. GITHUA

JUDGE

In the presence of:

The petitioner

Ms. Mati for the respondent

Mr. Wambugu Court Assistant