



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

PETITION NO. 6 OF 2020

ALFRED OTIENO.....PETITIONER

VERSES

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Applicant was charged with the offence of defilement, convicted and sentence to 20 years' imprisonment. He has been in custody since then and his appeal to this court vide Criminal Appeal No. 57 of 2012 was disallowed.
2. Pursuant to the famous Supreme Court decision in the case of **FRANCIS MURUATETU & ANOTHER VS. REP.2017 eKLR**, the Applicant has premised his petition on the same. He argued in the supporting affidavit as well as the submissions that his sentencing runs contrary to the said decision by the Superior Apex Court and he should be allowed to benefit.
3. The Applicant cited several other decisions including the case of **DISMAS WAFULA KILWAKE V. REP C. A. NO 129 OF 2014** as well as the case of **JARED KOITA INJIRI VS. REP. (2019) eKLR**. These authorities among others essentially interpreted the spirit of the decision by the Supreme court in the Muruatetu case above.
4. The learned state counsel on the other hand left the matter to this court to make decision.
5. The court has perused the application as well as the courts record. The Sentencing Policy Guidelines by the Kenya judiciary encompasses several factors which this court may take into consideration. The court in the above case of **DISMAS WAFULA KILWAKE(supra)** outlined the same and went further to state that;

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we 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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

6. At the same time in a similar case of **JARED KOITA INJIRI** (supra) the Court of Appeal stated as follows.

“This then leaves the question of the sentence. Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

“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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) 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.”

7. Pursuant to the above citations and quotations, and taking the totality of the matter at hand, this Petition is worth considering. The Appellant has been in custody for about 15 years or thereabouts. The letter on record from the prison authorities indicate that he has been of good conduct and has learned several trades as well as undertaking religious education. The period served must have surely given him a lifelong lesson.

8. In the premises, this court finds that the period he has served is sufficient save that for purposes of monitoring and continuity the Applicant should serve another one year of Probation under the relevant Probation Office.

9. The Applicant is set free unless lawfully held.

Dated, Signed and delivered at Kitale this 28th day of October 2020.

H. K. CHEMITEI.

JUDGE.

28/10/2020