



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

IN THE CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 50 OF 2019

SAFARI CHARO KOYO PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

RE-SENTENCE

The instant petition for re-sentencing has been brought pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** in which the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the **Muruatetu decision Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The same principles were also extended to defilement cases by the Court of Appeal at Kisumu in the case of **Christopher Ochieng v Republic (2019) eKLR**.

Initially, the petitioner was charged, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No. 6 of 2006. He was accused of having defiled a child aged 13 years on the 13th day of October 2006 at Ganda Location within Malindi District of the Coast Province. He had his appeals on both conviction and sentence dismissed for want of merit in both appellate courts. The petitioner is therefore seeking that the 20 years' sentence meted out on him be set aside and for the court to impose an appropriate sentence.

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.**

The petitioner having exhausted the appellate right up to the Court of Appeal, therefore he qualifies to be re-sentenced in light of the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. In that regard this court ought to take into account the appellant's mitigation and impose an appropriate sentence.

In mitigation the petitioner stated that he is a first offender, is reformed and has been in custody since the time of his arrest. He also added that he has been rehabilitated and equipped enough to rejoin the society. The aggravating factors are that the offence was quite egregious act and that the same was committed against a minor of 13 years. The fact that he violently perpetrated the sexual act on her and threatened to cause grievous harm on her in the event that she disclose the ordeal, she also had a scar on the head that was inflicted by the Petitioner as well as a rugged hymen accompanied with a foul smell discharge which suggested that she had contracted a sexual transmitted disease was aggravating. In that respect there is need to protect children from sexual predators. This is because there is a high possibility that they may suffer psychic or physical injury. In my view, the rationale is much broader. It is against morality for a man to have sexual intercourse with a child eighteen years and below. It is therefore for the preservation of society's sense of morality that the offence exists.

There was no evidence of remorse by the appellant. On the contrary, he denied any wrongdoing right up to conviction. There can be no doubt that the circumstances herein call for a much severe punishment. Therefore, taking into account the aggravating circumstances, a long jail term is necessary in this case. I therefore find no reason to disturb the Learned Magistrate's sentence. In the premises, I find and hold that the petitioner is not entitled to the reliefs prayed for in the petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

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