



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 92 OF 2019

GEOFFREY MONGARE ONDIMU.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. **GEORGE MONG'ARE ONDIMU** hereinafter referred to as the applicant seek a review of his sentence under section 354/364 of the CPC Cap (75) Laws of Kenya & Article 23 (3) (F) & 50 (2) (Q) of the Constitution.
2. That applicant was convicted of the charge of defilement of a girl under the 16 years contrary to section 145 (1) of the Penal Code at Nyamira PMCC and was sentenced to 30 years to imprisonment on the 31st December 2003. The applicant filed an appeal in the High Court at Kisii challenging both the conviction and sentence and his appeal was dismissed on the 5th March 2005. The High Court noted that the applicant had defiled a girl of 6 years old and that her life had been ruined.
3. Still aggrieved by the decision of the High Court the applicant filed Criminal Appeal No. 25 of 2006 in the Court of Appeal and again his appeal was dismissed. The Court of appeal noted that there was no valid reason to interfere with the conviction of the applicant the conviction was upheld.
4. The applicant moved to the High court again vide Miscellaneous Application No. 2 of 2015. In this application the applicant sought to have a retrial of his case under Article 50(b) of the Kenyan Constitution. Justice Nagillah found that the applicant had not made out his case with sufficient reasons to be considered in his favour and his application was dismissed on the 19th October 2015.
5. In his current application the applicant seeks a review of his sentence. He avers that he has been in prison for 16 years, he is more remorseful and regretful of what transpired. That he is changed individual and he is ready to cooperate with the society of origin at large now that he is 61 years old. That the 30 years imposed upon him was excessive in nature and he invokes Article 27 (1) (2) of the Constitution. That he seeks that he be given the benefit of least severe punishment as prescribed of an offence of the nature in Article 50 (1) (J) (O)(P) Constitution of Kenya.
6. The applicant produced a letter from the Officer in Charge of Kisii Main Prisons E. Kariuki which states that whilst in custody the applicant's behaviour has exemplary improved and he risen from the entire reformatory stages as provided in their orders Cap. 90 namely stage 1,2,3,4, and special stage. That he is currently on stage 4. That the applicant has also undergone training and holds certificates in tailoring trade test grade 11 and discovery bible school. That the applicant has well reformed and is a role model to other reforming inmates.
7. Mr. Otieno Senior State Counsel Office of the ODPP submitted that he was of the opinion that the court can relook the sentence and that the applicant can benefit from the recent Court of Appeal decisions which deals with sentences under the Sexual Offences Act. That though the applicant is serving a legal sentence the court can interfere with his sentence.
8. The applicant in addition to his averments submitted that the Court should consider the period he has spent in jail, the sickness he is suffering from, he has a problem with breathing, that he should be sentenced to probation for 2 years. that as a result of his imprisonment his family broke up he pleads for leniency.
9. The applicant was charged and convicted under section 145 (1) of the Penal Code which was deleted by Act No. 3 of 2006, Second Sch.Under section 8 (2) the Sexual Offences Act a person who commits an offence of defilement with a child aged elevenyears or less shall upon conviction be sentenced to imprisonment for life.
10. **In the case of Kennedy Odhiambo Ouru v Republic [2020] eKLR** the Court of Appeal held as follows:

"Turning now to sentence, the trial court in imposing 20 years imprisonment stated that it was the minimum sentence under

the Sexual Offences Act, and this was confirmed by the learned Judge. The appellant had stated in mitigation that he was the eldest of five children and the bread winner as the mother was 'sick and unable' and he was also a first offender. We are of the view that minimum sentences are patently unconstitutional in so far as they divest trial courts of the discretion in sentencing that achieves an individualized consideration of the particular facts and circumstances of each case. They treat all offenders as an undifferentiated whole which the Supreme Court loudly instigated in FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC [2017] eKLR. We thus hold that trial courts do have discretion to impose appropriate sentences which may well be for terms shorter than the minimum sentences set out in the Sexual Offences Act. [Emphasis mine]

11. Guided by the above decision I am of the view that this court can resentence the applicant. The applicant was sentenced to serve 30 years on the 31st December 2003. He has been in jail for about 17 years. He has a good report on his conduct in prison, he also claims he is sick and desires to serve the remainder of his sentence on probation. He states he is now 60 years. I also note that the child who was defiled was 6 years old. Indeed, her life was ruined. Considering all this I set aside the sentence of 30 years and substitute it with a sentence of (25) twenty five years from the date he was sentenced by the PMCC Nyamira Court. It is so ordered.

Dated, signed and delivered at KISII this 16th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Applicant In person

Mr. Otieno Senior State Counsel Office of the Directorate Public

Prosecution

Ms Rael Court Assistant.