



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CONST. PETITION NO. 29 OF 2019

BETWEEN

EZEKIEL ORAMAT SONKOYO.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioner, **EZEKIEL ORAMAT SONKOYO**, was charged and convicted for the offence of defilement contrary to **section 8(1) and 8(3)** of the *Sexual Offence Act, 2006* (“the *SOA*”) in **Kilgoris Magistrates Criminal Court Case No. 795 of 2011**. He was sentenced to serve 20 years’ imprisonment in accordance with **section 8(3)** of the *SOA*. His appeal to the High Court; **Kisii High Court Criminal Appeal No. 124 of 2011** was dismissed on 20th January 2012. Likewise, his second appeal to the Court of Appeal; **Kisumu Court of Appeal Criminal Appeal No. 99 of 2012** was also dismissed on 26th July 2013.

2. The petitioner has now moved the court for resentencing. In essence the application seeks that he be released on probation as he had been in custody for a period of 10 years, has reformed and would benefit from an order of probation. He states that at the time he was arrested and convicted he was 26 years old and is now 35 years old and would benefit from an order of probation.

3. In essence the petition is one for resentencing following conclusion of his appeal to the Court of Appeal. The petition has been brought after the Supreme Court declared the mandatory death sentence for murder unconstitutional in ***Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR***. Thereafter the Court of Appeal applied the same principles in several cases where it held that the mandatory minimum sentences under the *SOA* were unconstitutional (see ***Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*** and in ***Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014***).

4. Since the mandatory minimum sentences under the *SOA* have been held to be unconstitutional and a violation of fundamental rights and freedoms, the question is whether this court has jurisdiction to re-sentence the petitioner.

5. In ***Mururatetu’s Case (Supra)***, the Supreme Court, having declared the mandatory death sentence unconstitutional, directed that the petitioners’ case be remitted back to the High Court for re-sentencing in accordance with directions of the court. In the meantime, and as regards petitioners in other similar cases, the Court stated that;

[111] ... [They] ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

6. As I stated in ***Michael Kathewa Laichena and Others v Republic MRU Pet. No. 19 of 2017 [2018] eKLR***, the direction regarding other petitioners in similar cases would suggest that their cases would be determined within the framework set up by the Attorney General. The Attorney General did appoint a ***Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code Act*** vide ***Gazette Notice No. 2160*** dated 15th March 2018.

7. In relation to the effect of the direction by the Supreme Court, the Court of Appeal in ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*** held that;

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme

Court opened the door for review of death sentences even in finalized cases. [Emphasis mine]

8. The result of the decision by the Court of Appeal is that the High Court may review and re-sentence petitioners who come before by way of petition or appeal as the Supreme Court did not foreclose that avenue of re-sentencing.
9. Since the High Court is the court that has unlimited jurisdiction in civil and criminal matters and the court imbued with jurisdiction to enforce fundamental rights and freedoms under **Article 165(3)** of the Constitution, it is the proper forum for re-sentencing. I also add that the petition herein falls within the purview of **Article 22** of the Constitution seeking relief for what the Supreme Court and Court of Appeal have held to be an unconstitutional state of affairs. This court is therefore mandated to grant such relief to ameliorate such a violation under **Article 23** of the Constitution.
10. By re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory minimum sentence. For the reasons I have set out I am satisfied that I have jurisdiction to consider this petition for re-sentencing.
11. At the hearing before the trial court, the appellant pleaded leniency and in considering the sentence, the trial court imposed the mandatory minimum sentence of 20 years' imprisonment.
12. According to the facts of the case, the appellant lured the complainant into a "*marriage*" while she was in school. He was later discovered and prosecuted. In his defence, he admitted that the complainant was his girlfriend and that they stayed together for a while until her parents intervened and he was prosecuted. At the time of the offence, the petitioner was aged 26 years old.
13. The appellant knew that the complainant was a child and was still in school and he went ahead to "*marry*" her. This is the kind of conduct that the **SOA** was intended to punish. The sentences enacted in the SOA reflect a deliberate intention by the legislature to protect the rights of the child.
14. In light of the circumstances of the case, I resentence the appellant to **10 years' imprisonment to run from the date of arraignment, that is, 4th October 2010.**

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 27TH day of SEPTEMBER 2019.

R. E. OUGO

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Petitioner in person.