



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL PETITION NO. 1 OF 2018**

**KENNEDY OBOYA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioner was on the 6<sup>th</sup> October, 2010 convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. His appeals to the High Court and the Court of Appeal were unsuccessful. He has now filed the instant petition seeking for review of his sentence and for re-sentencing. This follows the Supreme Court decision in **Francis Karioko Muruatetu & Another – Vs- Republic (2017) eKLR** where the said court declared the mandatory death sentence for murder under Section 204 of the Penal Code to be unconstitutional. Counsel for the petitioner Mr. Malalah relied on the said decision where it held at paragraph 48 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 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 accrued persons under Article 25 of the Constitution; an absolute right.”***

2. Counsel argued that the holding by the Supreme Court is applicable in the mandatory sentence under Section 8 (2) of the Sexual Offences Act in that just like Section 204 of the Penal Code it denies the court in a case of defilement the discretion to impose a lesser sentence in an appropriate case. Counsel submitted that the straight jacket sentence of life imprisonment under Section 8 (2) of the Sexual Offences Act contravenes the petitioner’s right to a fair trial as provided in Article 50 (2) of the Constitution of Kenya 2010 as read together with the Bill of Rights.

3. Following the Supreme Court decision in the *Muruatetu Case* the Court of Appeal in **Evans Wanjala Wanyonyi (2019) eKLR** considered the effect of the case in relation to the mandatory sentence under Section 8 (2) of the Sexual Offences Act and held as follows:-

***“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***

***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. .... Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.***

***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set***

***aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years.”***

4. In view of the above decision of the Court of Appeal which decision is binding on this court, the mandatory sentence of life imprisonment provided under Section 8 (2) of the Sexual Offences Act amounts to a discretionary maximum sentence and is thus not a mandatory sentence. A court therefore has a discretion to impose a lesser sentence other than a mandatory life imprisonment. When the trial court in the case against the petitioner sentenced him it did not consider the possibility of an alternative sentence. The application by the petitioner for re-sentencing is therefore well founded and properly before the court.

5. The brief facts of the case against the petitioner were that the complainant/victim was an 8 year old primary school pupil. That on the material day the victim and other pupils were on their way to school when the petitioner waylaid the victim and took her into a nearby shamba where he defiled her. The girl screamed. Her sister and other members of the public went to her rescue. The petitioner was arrested and taken to Vihiga Police Station. The victim was taken to Mbale District Hospital where she was treated. The petitioner was charged with the offence. He admitted the charge and was convicted on his own plea of guilty. He was sentenced accordingly and given the mandatory life imprisonment.

6. Mr. Malalah mitigated on behalf of the petitioner that the petitioner was aged 20 years at the time of sentence. That he is married with two children. That his family has been tormented by his absence as he was the breadwinner of the family. That he has been in prison for nine (9) years. That he is remorseful for the offence committed. That the time served is sufficient punishment for the offence. That he is fully reformed and has been an exemplary prisoner while serving sentence.

7. The court called for a pre-sentencing report that was prepared by a Probation Officer, Dorothy Walumbe. The report indicates that the petitioner's family is of the view that the sentence served is sufficient lesson to the petitioner for the offence committed. The report recommended a review of the petitioner's sentence. The victim was however not found for interview.

8. The state did not make any submissions in the petition.

9. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be 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.

10. 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 Maharashtra** 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.***

11. 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 defilement.

12. I have considered the principles of sentencing set out above. I have considered the mitigation by the counsel for the petitioner, the pre-sentencing report and all the surrounding circumstances of the case. The petitioner defiled a child aged 8 years. He was aged 20 years at the time that he committed the offence.

13. Though the petitioner defiled a tender child I am of the view that a life sentence is not warranted as the appellant was aged only 20 years when he committed the offence. I however entertain no doubt that a heavy sentence is called for in such a case. The period of 9 years so far served is not sufficient for the heinous crime that the petitioner committed. At the tender age of 8 years the victim has to live with bad memories of the ordeal throughout her life. Considering the age of the petitioner when he committed the offence I am of the view that a sentence of twenty (20) years is the most appropriate sentence for the offence.

14. In the premises the sentence of life imprisonment imposed on the petitioner by the trial court is set aside and substituted with one of twenty (20) years imprisonment commencing from the date of sentence by the trial court.

**Delivered, dated and signed in open court at Kakamega this 25<sup>th</sup> day of September, 2019.**

**J. NJAGI**

**JUDGE**

**In the presence of:**

**Miss Kibet for State**

**Petitioner**

**Court Assistant - George**

**14 days right of appeal.**