REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

IN THE CONSTITUTIONAL & HUMAN RIGHTS & DIVISION

CONSTITUTIONAL PETITION NO. 6 OF 2019

THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULE 2013

IN THE MATTER OF: ARTICLES 2 (1), 22, 23,27, 48, 50 (2) (P) (Q) 165, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 362, 354 AND 364 OF THE CPC

AND

IN THE MATTER OF: SECTION 9 (1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006

BETWEEN

TYSON GEORGE NGOWA..............PETITIONER

-VERSUS-

REPUBLIC ....RESPONDENT

Coram: Hon. Justice Reuben Nyakundi

The Petitioner in person

Ms. Sombo for the Respondent

RULING

On 30.6.2016 following a full trial the petitioner was found guilty, convicted and sentenced to twenty (20) years imprisonment for the offence of attempted defilement contrary to Section 9 (1) (2) of the Sexual Offences Act.

Upon conviction the petitioner preferred an appeal to the High Court which on determination dismissed the appeal on both conviction and sentence.

Aggrieved further with the High Court decision, the appellant appealed to the Court of Appeal. In the Judgment of the Court of Appeal delivered on 7.12.2017, the court dismissed the appeal on both conviction and sentence.

In so far this petition is concerned, the petitioner is still aggrieved hence another chance to petition the court on sentence. The borne of contention the three courts erred in law and fact in confirming the sentence of twenty (20) years for an offence punishable to a term imprisonment of ten (10) years.

The bottom line advanced by the petitioner is that the sentence of twenty (20) years is manifestly harsh and excessive demanding this court to treat it as an infringement of his right under the constitution. The entire appeal was directed to be disposed of by way of written submissions duly filed by the petitioner.

Analysis and resolution

In the first place though filed as a constitutional petition, the petitioner has exhausted his right of appeal by prescription of the constitution. Article 50 (2) (Q) of the Constitution states that the accused person has a right of appeal or review if convicted to a higher court.

The Article in as far as it purports, any question as to conviction of an accused for any offence is to be determined by an appeal or review. The petitioner in his notice of motion has placed reliance on the provisions of Article 50 (6) of the Constitution which reads as follows:

> **"A person who is convicted of a criminal offence may petition the High Court for review if**
>
> > **i. The person's appeal if any has been dismissed by the Highest Court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and new and compelling evidence has become available.**
>
> **A reading of this provision entrench a review to the High Court only if there exist new and compelling evidence."**

The sentence complained of by the petitioner is provided for under Section 9 (4) of the Sexual Offences Act which the trial court was competent to impose as punishment at the conclusion of the trial. It is clearly stated that parliament prescribed the minimum sentence and not the maximum for such offences like the one the petitioner was charged and imposed at the end of it by the trial court.

In the case of **Francis Muruatetu v R {2017} eKLR** in determining the mandatory death penalty for the offence of murder as punishable under Section 204 of the Penal Code one of the test laid down to render it unconstitutional was that by nature of its mandatories. The sentence is inhuman, cruel and degrading.

The court went further to state that the mandatory nature of death sentence as encapsulated. In terms of the Penal Code deprives trial courts the requisite discretion to weigh both aggravating and mitigation factors before an appropriate sentence is determined. Borrowing from the principle in **Muruatetu case**, the Court of Appeal in **Christopher Ochieng v R {2019} eKLR** declared the provisions of Section 8 (2) of the Sexual Offences Act unconstitutional with regard to the mandatory nature of life imprisonment. Despite the foregoing observations, the sentence ordained by the trial court of twenty (20) years cannot be censored for reason that it is above the minimum of ten years.

In other words the petitioner to this petition must show that the sentence of twenty (20) years imposed by the trial court was under Article 29 (f) punishment which is cruel, inhuman or degrading in order for him to bring the petition within the provisions of Article 50 (6) of the constitution.

The question is whether the justice of this whole conviction and subsequent sentence upon the petitioner demands a review so as to meet the best interest of justice.

The guiding principles in sentencing as summed up in the sentencing guidelines of the judiciary 2016 and the framework in **Francis Muruatetu (supra) case** as retribution, deterrence, prevention and reliabilitation.

In addition to these the Supreme Court went further to entrench as a whole in its own peculiar setting guidelines and factors that may impugn a validity of sentence:

> **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 probability of reform and social re-adaption of the offender.**
>
> **h. Many other factors that the court considers relevant.**

The basic requirement of the basic provisions of the constitution under Article 50 (6) to provoke a review of sentence must in effect not only make reference to the articles of the constitution but demonstrate flawed illegality and impropriety so compelling to justify a review.

It will thus be seen from the petition there are such special reasons save that the petitioner wants to join his family, and the incarceration has caused his siblings to dropout of school.

Having traced his history of this matter to my mind even with the framework on sentencing in **Francis Muruatetu (supra)** I regard the twenty (20) years period of imprisonment proportionate to the offence committed by the appellant.

I reject the motion that by the trial court not imposing a minimum of ten (10) years imprisonment, there is a constitutional invalidity of the sentence. I am afraid the petitioner's petition is an argument in despair. There is no judicial error illegality with the sentence curable under Article 50 (6) of the Constitution.

So far as this challenge is concerned, I hold the view that it has no merit and the punishment is neither cruel, inhuman or disproportionate to the offence committed by the petitioner.

For the reasons stated herein, the petition is hereby dismissed with no orders for want of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF DECEMBER 2019

....

R NYAKUNDI

JUDGE