



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 67 OF 2019

ALFRED SHAMWATA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner was on the 14th January, 2010 convicted by the lower court of the offence of defilement contrary to Section 8 (1) as read with sub section 8 (2) of the Sexual Offences Act and sentenced to the mandatory sentence of life imprisonment. His appeal to the High Court resulted to Lenaola J. (as he then was) substituting the offence committed to incest contrary to Section 20 (1) of the Sexual Offences Act but the sentence of life imprisonment being maintained.

2. The petitioner has now filed a notice of motion dated 28th August, 2019 seeking for review of the sentence meted out on him on the grounds that the Supreme Court in the case of **Francis Karioko Muruatetu & Another –Vs- Republic (2017) eKLR** declared mandatory sentences to be unconstitutional. That in the premises the sentence imposed on him ought to be reviewed and mitigation taken as the trial magistrate imposed a straight jacket mandatory life sentence regardless of any and all mitigating factors.

3. Mr. Malalah for the petitioner mitigated that the petitioner has served almost 10 years in jail. That that period is adequate punishment for the offence committed. That the petitioner is now a reformed citizen. He urged the court to substitute the sentence to the period already served.

4. The court called for a probation report that was prepared by a probation officer, Abisai Kiyunzu. The report indicates that the petitioner is aged 31 years. That he is unmarried with no children. That he was a first offender at the time of conviction. That his immediate family members and community members are of the view that the sentence served is enough punishment for the offence committed. That they are not opposed to him being released. That the petitioner himself is remorseful. That the victim was his niece who at the time the offence was committed was aged 10 years. That she is now approaching 20 years. That she has been adequately counselled and has forged on with her life. That she sat for her KCSE in 2018 and is waiting to join college in Nairobi. That she has no problem with an early release of the petitioner as she believes the period he has been in custody is enough punishment on him. That the victim's parents have forgiven the petitioner. The report recommends that the petitioner be released back to the community.

5. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR 161**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with 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.

6. In **Republic –Vs- Jagani & Another (2001) KLR 590**, it was held that:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders.”

7. Section 333 (2) of the Criminal Procedure Code requires a court while sentencing an accused person to take into account the period spent in custody awaiting trial.

8. The offence committed by the petitioner was substituted by the High Court to incest contrary to Section 20 (1) of the Sexual Offences Act. The section prescribes a sentence of not less than 10 years imprisonment for the offence of incest. The proviso to the Section however has a rider –

“Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years,

the accused person shall be liable to imprisonment for life ...”

9. The proviso to Section 20 (1) of the Sexual Offences Act does not prescribe a minimum sentence as the words used are “*shall be liable to imprisonment for life*”. In **Opoya –Vs- Uganda (cited in D. M. W. –Vs- Republic (2015) eKLR)**, where such words were being interpreted it was held that:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the state penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only while the liability existed the court might not see fit to impose it.”

This means that petitioner could have been sentenced to any period from 10 years upto life imprisonment.

10. In the case of **Christopher Ochieng –Vs- Republic (2018) eKLR** where the victim was aged 8 years the Court of Appeal substituted a sentence of life imprisonment for defilement under Section 8(2) of the Sexual Offences Act with one of 30 years imprisonment. In **Evans Wanjala Wanyonyi(2019) eKLR** where the victim was aged 14 years and the court reduced the sentence imposed by the High Court of 20 years to 10 years imprisonment.

13. I have considered the mitigation by the petitioner. The petitioner defiled a child aged 10 years. I do not think that the sentence served of ten years is adequate punishment for defiling a child of ten years of age. It is the duty of the court to send out a clear signal that those who defile such young children will pay for their sins fully. Considering that the sentence for the offence of incest is upto life imprisonment and the victim herein was aged 10 years, I am of the view that a sentence of 30 years imprisonment is adequate punishment for the offence committed. The sentence of life imprisonment meted out on the petitioner is thereby set aside and substituted with one of 30 years imprisonment.

Delivered, dated and signed in open court at Kakamega this 19th day of December, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Omondi..... for respondent

N/A..... for petitioner

PetitionerPresent.....

Court AssistantPolycap.....

14 days right of appeal.