



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**PETITION NO.61 OF 2019**

**(CORAM: CHERERE- J.)**

**BETWEEN**

**ELISHA OLOO OYUGI.....PETITIONER**

**AND**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

### **Introduction**

1. On 06<sup>th</sup> September, 2010, the trial court in **TAMU CRIMINAL CASE NO. 322 OF 2010**, convicted and sentenced **ELISHA OLOO OYUGI, (Petitioner)** to 20 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the **Sexual Offences Act No. 3 of 2006**.
2. Petitioner lodged an appeal **KISUMU HIGH COURT CRIMINAL APPEAL NO. 125 OF 2010** which by a judgment dated 04<sup>th</sup> November, 2012 upheld the conviction and sentence.
3. The Petitioner subsequently appealed to the Court of Appeal in **KISUMU CRIMINAL APPEAL NO. 342 of 2011** which by a judgment dated 20<sup>th</sup> June, 2014 similarly upheld the conviction sentence.
4. The Petitioner has petitioned this court for resentencing. He expressed remorse and stated that he was arrested at the age of 35 years and had served 9 years since conviction within which time he has been trained in upholster and tailoring and obtained Grades III, II and I and Grade II in masonry as a means of rehabilitation. The officer in charge Kisumu Maximum Prison by his letter dated 19<sup>th</sup> November, 2019, filed on 03<sup>rd</sup> December, 2019 has vouched for the Petitioner's good conduct.
5. Ms. Gathu, Senior Prosecution Counsel for the state appreciated that the Petitioner had prepared himself for integration with the public and recommended that he be resentenced to 6 more years.

### **Analysis and Determination**

6. At the time of the petitioner's conviction, mandatory sentences had not been declared to be unconstitutional.
7. The Supreme Court's decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory sentences.
8. I have considered **The Sentencing Policy Guidelines, 2016** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).
9. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under **the Act**. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

10. Even though Appellant was a first offender, the psychological effect of the offences on the 12-year-old complainant cannot be underestimated.

11. The Appellant has served 9 years. He has expressed remorse and has been rehabilitated. I re-sentence him to 10 years from 06<sup>th</sup> September, 2010 when he was convicted.

**DELIVERED AND SIGNED IN KISUMU THIS 18<sup>th</sup> DAY OF December 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Amondi/Okodoi**

**Petitioner - Present in person**

**For the State - Ms. Gathu**