

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

PETITION NO.6 OF 2018

GUYO JARSO GUYO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The petitioner was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act, number 3 of 2006. The particulars of the offence are that the appellant on the 15th day of June, 2011 in Marsabit central district unlawfully penetrated a girl aged 11 years. He was sentenced to serve twenty (20) years imprisonment on 2.8.2011 by Hon. S.O. Mogute.

The petitioner filed Criminal Appeal number 130 of 2011 before the Meru High Court. Justice J. Lesiit dismissed the appeal on 13th November, 2013 and imposed life imprisonment sentence instead of the 20 years imposed by the trial Court. A second appeal to the Court of Appeal at Nyeri (No.71 of 2014) was equally dismissed on 9th July, 2015.

The Petitioner has now filed the current petition urging the Court to reconsider the sentence. The main contention is that in view of the Supreme Court decision in petition numbers 15 and 16 of 2015, **FRANCIS KARIUKO MURUATETU & ANOTHER –V- REPUBLIC**, the court should consider the sentence. The petitioner maintains that he has now served over eight years imprisonment and has been rehabilitated. He prays that the sentence be suspended and he be placed on non-custodial sentence. The sentence is too harsh. He has undergone various rehabilitation programmes and has acquired skills from an organization known as Rodi Kenya. He can make soaps, yoghurt, cake and butter.

Mr. Chirchir, learned prosecution counsel, submit that the only issue being raised is the sentence. Counsel is of the view that in view of the Supreme Court decision in the **Francis Muruatetu case (Supra)**, the Court can interfere with the sentence. Counsel has no objection to the review of the sentence.

In the **Francis Muruatetu case (supra)**, the Supreme Court held as follows:

The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

The above case involved a murder case. The current case relates to a charge of defilement under Section 8(2) of the Sexual Offences Act. The mandatory sentence is life imprisonment. It does not matter whether the victim of defilement was one (1) year or eleven (11) years old. The sentence cut across that age bracket.

The trial court had imposed a twenty (20) years imprisonment sentence. The mandatory nature of the life imprisonment sentence take away the court's direction to punish the offender. It is equivalent to having the Judicial officer hearing the entire case and at the end finding his hands tied by the law when it comes to the punishment that can be imposed on the convict. That is why the Supreme Court outlawed the mandatory nature of the death sentence in relation to murder cases. The decision of the Supreme Court can be extended to any mandatory sentence including robbery with violence and the minimum sentences provided under Section 8 of the Sexual Offences Act. Under Section 20 of the Sexual Offences Act, the offence of incest involving a victim who is under 18 years old makes the convict to be **"liable"** to life imprisonment. On the other hand, under Section 8(2) of the same Act. Defilement of a child under the age of 11 years attracts a minimum sentence of life imprisonment. Incest with a child below 11 years is similar to defiling someone under 11 years. The court can impose a different sentence in the two scenarios. The one convicted of incest can be sent to jail for a given number of years whereas the one convicted of defilement has his fate sealed by the law. It is my view that the Court should have a leeway in imposing a sentence it deems proportionate to the offence. The mandatory nature of life imprisonment under section 8(2) of the Sexual Offences Act draws back Judicial authority. It even waters down the unlimited original jurisdiction of the High Court in Criminal matters especially when an appeal is filed. The unlimited original jurisdiction in criminal matters of the High Court should not be limited by statutory provisions which calls upon the Judge to impose a specific sentence. In that case, the unlimited jurisdiction becomes a limited one in relation to sentencing. The jurisdiction of the High Court under Article 165 (3)(a) in relation to criminal matters includes the power to pass a sentence which the Court deem as appropriate given the circumstance of the case.

The trial Court exercised its jurisdiction and sentenced the Petitioner to twenty (20) years imprisonment. The victim of the defilement was eleven years old. The petitioner should not expect a non custodial sentence. He conceded that he took the victim on a motor bike to the forest and defiled her. The offence cannot go unpunished. The mandatory sentence is life imprisonment as provided Under Section 8(2) of the Sexual Offences Act. This mandatory sentence claws back Judicial discretion when it comes to sentencing.

I do find that the life imprisonment is excessive in the circumstances. The life imprisonment sentence is hereby set aside and is replaced with the twenty (20) years sentence imposed by the trial magistrate. The petition is hereby determined in the above terms.

Dated, Signed and Delivered at Marsabit this 26th day of September, 2018

S. CHITEMBWE

JUDGE