



REPUBLIC OF KENYA



KENYA LAW
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Odero v Republic (Petition E001 of 2024) [2024] KEHC 4315 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU**

PETITION E001 OF 2024

RE ABURILI, J

APRIL 4, 2024

BETWEEN

BENSON NYAMWAYA ODERO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Benson Nyamwaya Odero, the petitioner herein was on the 23rd September 2016 sentenced to serve life imprisonment for the offence of defilement contrary to section 8 (1) and 8 (2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence were that on the 12th July 2015 at Upper Tamu sub-location Muhoroni sub-county, Kisumu County, the petitioner intentionally caused his penis to penetrate the vagina of F.A, a child aged 10 years old.
3. The petitioner exhausted his first appeal vide HCCRC No. 69 Of 2016 where the High Court, vide a judgement rendered on 20th November 2017 upheld both the conviction and sentence meted out on the petitioner.
4. The Petitioner is now before this court pursuant to the High Court decision by Justice G.V. Odunga (as he then was) in Machakos Criminal Petition No. E017 of 2021- [Philip Mueke Maingi & 5 Others v DPP & AG](#) where the petitioners requested the court to breathe life to Article 27 (1) (2) (3) & (4) of the [Constitution](#) as well as the decision of Justice F.M. Gikonyo in Narok High Court Misc. Cr. Application No. 014 [Baragoi Rotiken v Republic](#) seeking resentencing and/or review of his sentence to a definite and lenient sentence.
5. The petitioner submits that the sentence imposed on him was way too harsh and constitutes excessive punishment contrary to Article 29 (d) (f) of the [Constitution](#). That he is remorseful, a first offender, a prisoner of good character, well rehabilitated and totally reformed. The appellant further relies on



the Court of Appeal decisions in the case of *Eliud Waweru Wambui v R* [2019] eKLR and in *Evans Wanjala Siibi v Republic* [2019] eKLR.

6. Mr. Marete learned prosecutor opposed the petition submitting that the petitioner betrayed the trust that the child had for him and that the action he committed was very grave. It was his submission that the punishment was sufficient and that he advocated for the harshest punishment possible which was within the law.
7. I have considered the arguments presented before this court.
8. The constitutionality of the mandatory minimum sentence meted out to the petitioner raises a question of law. The Court of Appeal in *Christopher Ochieng v R* [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in *Jared Koita Injiri v R*, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the *Sexual Offences Act*. The 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*.
9. On 6/7/2021; the Supreme Court, in the *Muruatetu II Case* clarified that the Muruatetu I was applicable only to sentences in murder cases only. The Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute and accordingly cautioned as follows:

“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*.”
10. In the instant case, both the trial court and the appellate court found no reason to interfere with the sentence as enshrined in section 8(1) as read with section 8(2) of the *Sexual Offences Act*. In addition, the decisions cited by the petitioner herein, Machakos Criminal Petition No. E017 of 2021- *Philip Mueke Maingi* supra and Narok High Court Misc. Cr. Application No. 014 Baragoi Rotikensupra were both rendered by courts of concurrent jurisdiction and thus not binding on this court but merely persuasive.
11. I also note that defilement of a child of 10 years is a very heinous offence and hence, the heavy penalty of life imprisonment provided for in law upon conviction of the offender.
12. . In addition, sexual offences ordinarily cause trauma to, and compromises the integrity of the victim as a human being. Future references to or flash-back of the incident of the sexual assault, either in the memory of the victim or by others or by whatever circumstances reminds of the trauma, shakes the very foundation of the life of the victim. It is such an offence with dire post traumatic consequences.
13. Nonetheless, whereas the petitioner should pay for his crime, and act as a deterrent for such debauchery, I should also give the applicant an opportunity to be re-integrated back into society and be a productive citizen. Life sentence may necessarily not achieve the purposes and objects of punishment, especially where the offender is committed to reform and has been rehabilitated through prisons rehabilitation programmes.
14. Accordingly, I exercise discretion and allow this petition for resentencing. I set aside the life imprisonment imposed on the petitioner and substitute it with a term sentence of thirty (30) years’



imprisonment. The sentence shall be calculated taking into account the period served in remand custody before conviction and the original sentence imposed.

15. Signal to issue.

16. This file is closed.

17. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

