



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO. E042 OF 2021

CHARLES KIBA PETITIONER

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

The Applicant, **CHARLES KIBA**, was convicted for the offence of **Defilement** contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.

1. Being dissatisfied with both the conviction and the sentence, he mounted an appeal at the High Court. The said appeal was dismissed.
2. Thereafter, the Applicant lodged a further appeal, at the Court of Appeal; but that too was dismissed.
3. In the matter which he has now filed before this Court, the Applicant made it clear that he was not challenging the merits or demerits in the two appeals. His view was that whilst the law prescribed only one sentence, the recent developments in jurisprudence untied the hands of Judicial Officers, thus rendering the Courts free to determine appropriate sentences, depending upon the circumstances of each case.
4. The Applicant informed this Court that at the time the offence was committed, he was 24 years old. He was not only a young man but also a first offender.
5. Following his conviction and sentence, in July 2011, the Applicant has been in prison for more than 10 Years.
6. During the period of time he had spent in prison, the Applicant has, in his own assessment, been reformed and rehabilitated. He describes himself as a person who used the period in prison, to improve his skills.
7. In the circumstances, the Applicant believes that he has a great potential for re-integration into the community.
8. When canvassing the application, the Applicant cited the decision of the Court of Appeal in **CHRISTOPHER OCHIENG Vs REPUBLIC, CRIMINAL APPEAL NO. 202 OF 2011**. That case was determined on 7th December 2018; and the learned Judges of Appeal held as follows;

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the Sexual Offences Act; and if the reasoning in the Supreme Court case applied to this provision, it too would be considered unconstitutional on the same basis needless to say, pursuant to the Supreme Court decision in FRANCIS KARIOKO MURUATETU Vs REPUBLIC, (2017) eKLR, we would set aside the sentence for life imposed, and substitute it with a sentence of 30 Years imprisonment, from the date of sentencing by the trial court.”

9. The Supreme Court had made it crystal clear that it was only the mandatory nature of the death sentence, in respect to persons convicted for Murder, that was unconstitutional. The Supreme Court did not declare the Death Penalty itself, as unconstitutional.
10. It would therefore follow that for persons convicted for the offence of **Defilement** pursuant to **Section 8 (1)** and **8 (2)** of the **Sexual Offences Act**, the sentence of Life Imprisonment was not, of itself, unconstitutional. It was only when the trial court held the view that it lacked any discretion in the sentence to be imposed, that the imposition of “*the mandatory*” sentence could be deemed as unconstitutional.
11. In this matter the record of the proceedings before the trial court show that after the Applicant was convicted, the learned trial magistrate

provided the Applicant with an opportunity for mitigation.

12. The Applicant had the following to say in his mitigation;

“I am a young man. I wanted to develop myself. Kenya will benefit from me. I wanted to have a family. I want to live a good life. I ask the court to decide.”

13. After the trial court had recorded the Applicant’s mitigation, it called for a Victim Impact Statement, which would assist the court in determining an appropriate sentence.

14. However, after taking into account the Victim Impact Statement, the learned trial magistrate made the following note, when handing down the sentence;

“The court’s discretion is tied in this matter. The accused is sentenced to life imprisonment.”

15. It therefore appears that although the trial court gave to the accused person an opportunity for mitigation; and even though the trial court called for and received the Victim Impact Statement, the same played no role in the sentencing, as the court believed that its hands were tied.

16. In principle, therefore, I find that the learned trial magistrate erred when he handed down the sentence of life imprisonment, just because the court held the opinion that it had no discretion on the matter.

17. The Court will now give due consideration to the circumstances in which the offence was committed.

18. I will take into account matters such as the age of the Applicant, and the fact that he was a first offender.

19. The Applicant was a member of the same congregation as the victim and the victim’s father. However, when he was giving his evidence in-chief, he asserted that the whole case had been framed against him, after the victim’s father had refused to pay for the painting work which the Applicant had carried out over a period of 2 days.

20. However, I note that during cross-examination, the Applicant confirmed that the family of the victim were fellow congregants.

21. The victim was six years old!

22. I was shocked to read what the Applicant said in his mitigation; especially when he said that he wanted to have a family. Surely, the Applicant cannot possibly have desired to have a family with a child who was 6 years old!

23. Furthermore, I am at a loss how Kenya would have benefitted from the actions of the Applicant, or from his desire to have a good life.

24. I also note that the Applicant ruined the future of the victim, when he raped her. Considering that the father of the victim was the Patron for the Youth at the church where the Applicant was a member; and also that the Applicant was one of the members of the said Youth Group, the circumstances were that much more traumatizing.

25. The Applicant was a frequent visitor to the home of the victim’s family. And he committed the offence within the house where the victim’s family lived.

26. At the time he committed the offence, both the victim’s sister and uncle were within the same house, although they were in different rooms.

27. In my considered opinion, the sentence was commensurate to the offence. Accordingly, I uphold the sentence of Life Imprisonment.

DATED, SIGNED and DELIVERED at KISUMU

This 3rd day of February 2022

FRED A. OCHIENG

JUDGE