REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 251 OF 2019

DENNIS WILLIAM KIMANZI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **DENNIS WILLIAM KIMANZI** was charged with three counts of Defilement contrary to 8 (1) as read with section 8 (2) of the Sexual Offences Act.

2. The particulars of the offence were that "***on the diverse dates between 14th June 2014 and 22nd June, 2014 at [Particulars Withheld] Village in Changamwe caused his penis to penetrate the vagina of EN a child aged 9 and half years."*** *the second count was that* ***"on the diverse dates between 14th June 2014 and 22nd June, 2014 at[Particulars Withheld] Village in Changamwe caused his penis to penetrate the vagina of AO a child aged 12 years."*** *The third count was that* ***"on the diverse dates between 14th June 2014 and 22nd June, 2014 at [Particulars Withheld] Village in Changamwe caused his penis to penetrate the vagina of JMJ a child aged 9 and half years."***

3. He was convicted and sentenced to life imprisonment for the 1st and 3rd counts, and 20 years on the 2nd count to run concurrently.

4. His Appeal to the High Court was dismissed and sentence was upheld.

5. The Petitioner is now in this court pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex Court found the mandatory nature of the death sentence to be unconstitutional. That reasoning was adopted in **Dismas Wafula Kilwake v R [2018]** where the court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***
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> ***Being so persuaded, we 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.***
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> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."***

6. As a corollary, the High Court in the **Constitutional Petition of Yusuf Shiunzi Kenani, Petition No. 24 of 2019**, made a declaration that the mandatory penal laws in the sexual offences act are also unconstitutional.

7. When the matter came for resentencing, Ms. Moke learned counsel appeared for the State. Counsel submitted that this Court should consider the gravity of sexual offences and their effect on the victims thereof and in this particular case the age of the victims ought to be considered. Counsel submitted that the Petitioner had been sexually assaulting the victims until he was caught. Had he not been discovered he would have harmed the lives of other victims. Counsel emphasized on the need to protect young girls from such predatory behavior. Counsel relied on **Petition No.17 of 2019 Erick Oduor Ng'ong'a v Republic** and prayed that this court confirms the sentence imposed on the Petitioner.

8. The Petitioner on his part submitted that he was a first offender and asked for forgiveness. He is remorseful and is now a born again Christian. He promised that if released to rejoin his family, he will not indulge in crime in future. He prayed for a non-custodian sentence.

9. In the **Muruatetu case (supra)** the court laid out the factors to consider when dealing with a resentence. The factors are; **age of the offender**, **being a first offender**, whether **the offender pleaded guilty**, character **and record of the offender**, commission **of the offence in response to gender-based violence**, **remorsefulness of the offender**, the **possibility of reform and social re-adaptation of the offender**, and **any other factor that the Court considers relevant**.

10. In the instant case, this was clearly a gender violence based crime and not just against one child but against three different children. The prosecution counsel has pointed the aggravating factors to be; the age of the victim; gravity of the sexual offences and their effect on the victims. The Petitioner defiled two girls who were 9 and half years old and one girl who was 12 years old. It seems like the Petitioner was in an expedition to defile young girls. The Petitioner is not fit to rejoin the society just yet. Further, there is no guarantee that the Petitioner if released will stop defiling young children. The Petitioner must be kept behind bars to protect young girls.

11. I therefore lift the life sentence imposed on the Petitioner, and sentence the Petitioner to forty (40) years for count I and forty (40) years for Count III. For count II, this court will exercise its discretion and uphold the trial court's decision, and jail the Petitioner to 2o years. The sentences shall run concurrently.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mr. Fedha for the DPP

Mr. Josephat Court Assistant