



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
PETITION NO 12 OF 2020
IN THE MATTER OF ARTICLES 22 (1) OF THE CONSTITUTION
IN THE MATTER OF ARTICLES 23, 25, (a) (c), 27 (1) (2), 165 OF THE CONSTITUTION
AND IN THE MATTER OF SECTION 8(1) (2) OF SEXUAL OFFENCES ACT NO 3 OF 2006

BETWEEN

DAVID NTABO ONDIEKI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of defilement of a three-year-old girl contrary to **section 8(1) and (2) of the Sexual Offences Act**. He was convicted and sentenced to life imprisonment.
2. The background of this petition is that the Petitioner was tried, convicted and sentenced to life imprisonment by the Chief Magistrate's Court at Kisii for the offence of defilement. His appeal to this Court on both conviction and sentence were unsuccessful. His appeal lodged before the Court of Appeal in 2011 failed to take off and has not been heard and determined.
3. The Petitioner filed a Petition on 21st May 2020 citing the decision by the Supreme Court of Kenya in **Francis Korioko & another –v- R (2017) eKRL, PETITION NO. 15 AND 16 OF 2015** and now seeks review of his sentence.
4. Mr Otieno, state counsel, submitted that at the time of sentence, the applicant was sentenced to serve life imprisonment which can now be reviewed. However he urged the court to consider the age of the child.
5. At the trial court, the prosecution informed the trial magistrate that the accused was a first offender. Although the trial magistrate took into consideration the applicant's mitigation and the fact that he was a first offender, the sentence meted on applicant was the mandatory sentence, which is life imprisonment. His appeal on sentence was dismissed as the Sexual Offences Act had provided the mandatory sentences which were applied.
6. However in the **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** the Supreme Court held that mandatory sentences were unconstitutional. Similarly the Court of Appeal in **Dismas Wafula Kilwake v Republic [2018] eKLR**, observed as follows in regard to mandatory sentences under the Sexual Offences Act:

[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.

7. In this instance case I have considered the mitigation of the appellant against the manner in which the offence was committed and I find no

reason to reduce the sentence. The victim who was three years experienced serious trauma from the sexual violence. Although mandatory sentences are unconstitutional, the life imprisonment is a valid sentence.

8. In conclusion, I find that the application is lacking in merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT KISII THIS 4TH DAY OF MARCH, 2021

R. E. OUGO

JUDGE

In the presence of;

Petitioner Present

Mr. Otieno Senior State Counsel Office of the DPP
Ms Rael Court Assistant