



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CR. PETITION NO. 74 OF 2019

LEONARD MAKUNDA OBONYO.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **LEONARD MAKUNDA OBONYO**, asked this court to make a declaration that his constitutional rights were breached by the state, when he was convicted and sentenced to an unlawful sentence.

1. Secondly, he asked the court to order that he should be re-sentenced under **Section 261** and **Section 329** of the **Criminal Procedure Code**.
2. He pointed out that he was convicted for the offence of **Defilement** contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**.
3. Upon conviction, the trial court sentenced the Petitioner to 15 years imprisonment.
4. Being dissatisfied with the conviction and sentence, the Petitioner appealed to the High Court.
5. On 18th February 2009 the High Court dismissed the appeal, and proceeded to enhance the sentence to Life Imprisonment.
6. The Petitioner submitted that the mandatory sentence was unconstitutional, excessive, arbitrary and inhuman, as it deprived him of his rights to a fair trial contrary to **Section 50 (4)** of the **Constitution**.
7. His request to this Court is that it should now evaluate the circumstances afresh, and then give an appropriate or lesser sentence.
8. I have perused the record of the proceedings before the trial court. It shows that the Petitioner was convicted on 29th February 2008.
9. Thereafter, the prosecution asked the learned trial magistrate to treat the Petitioner as a first offender.
10. The records show that the Petitioner addressed the trial court as follows, in mitigation;

“I came alone to court today. I did not commit offences. I pray for leniency.”
11. The record of the proceedings shows that the learned trial magistrate made the following notes on the issue of sentencing;

“Mitigation has been considered but offence for which accused is convicted has minimum sentence. He took advantage of vulnerable child and his conduct is fit to be punished.”
12. Thereafter, the trial court sentenced the Petitioner to 15 Years Imprisonment, with Hard Labour.
13. The Petitioner challenged the judgment of the trial court. However, the High Court not only re-affirmed the conviction, but also enhanced the sentence to Life Imprisonment.
14. When enhancing the sentence, the High Court observed that the Complainant was 11 years old when she was defiled. Therefore,

pursuant to the provisions of **Section 8 (2)** of the **Sexual Offences Act**, the Court noted that the sentence prescribed by law was of a mandatory nature, so that;

“..... even the best of mitigation factors would not allow a trial court to depart from it, as was the case herein.”

15. Undeterred, the Petitioner moved to the Court of Appeal.

16. In its judgment, the Court of Appeal gave consideration to the question as to whether or not the enhancement of the sentence was lawful.

17. Although the Court noted that pursuant to **Section 361 (1) (a)** of the **Criminal Procedure Code**;

“..... severity of sentence is a matter of fact and therefore outside the mandate of this Court as the second appellate court:

However, on the facts of this case, since the superior court did enhance the sentence we consider that to the extent of the enhancement we would have jurisdiction to intervene under Section 361 (1) (b) of the Criminal Procedure Code, if necessary.

However, in the circumstances, we are of the view that since the sentence is lawful we cannot intervene at all.”

18. Having given the consideration to the record of the proceedings, I find that the Petitioner is not right when he submitted that his mitigation was not considered at all. The trial court gave due consideration to the mitigation.

19. However, it is also true that the first appellate court held that where the law stipulates a mandatory sentence, the same cannot be departed from, regardless of mitigation.

20. On the authority of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, SUPREME COURT PETITION NO. 15 OF 2015**, it is now settled that the mandatory nature of sentences prescribed by statute is unconstitutional. Therefore, to the extent that the High Court concluded that mitigation cannot have any impact on sentences which a statute stipulates to be either minimum or mandatory, I am satisfied that the Petitioner is entitled to re-sentencing.

21. On the facts presented to the Court, the Petitioner was arrested on 13th September 2006.

22. On 20th September 2006 the trial Court granted him Bond in the sum of Kshs 50,000/= with one surety. However, it was not until 21st December 2006 that a surety came forward and the court approved the security he presented.

23. The record of the proceedings shows that even when the Petitioner was put to his Defence, the trial court extended his Bond.

24. Meanwhile, as the Court of Appeal noted in its Judgment, the Petitioner was caught in the act.

25. Having given due consideration to the mitigation, and after taking into account the period which the Petitioner spent in custody prior to his conviction, I now hereby re-sentence the Petitioner to 30 Years imprisonment. The said sentence will run from 29th February 2008.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16TH DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE