



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPLICATION NO. 17 OF 2020

GEORGE ODHIAMBO OJWANG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, **GEORGE ODHIAMBO OJWANG** was convicted for the offence of Defilement of a girl under the age of 16 years, and was sentenced to 20 Years Imprisonment.

1. He was also convicted for the offence of Assault causing actual bodily harm, and was sentenced to 1 Year Imprisonment.
2. The learned trial magistrate directed that the 2 sentences would run concurrently.
3. Being dissatisfied with the conviction and the sentences, the Applicant lodged an appeal at the High Court. However, the said appeal was dismissed.
4. The Applicant has now brought the present application, seeking a review of the sentence of 20 years imprisonment, for the offence of defilement.
5. He asked the court for a;

“..... review of the 20 years sentence (to) least severe term as the court may deem just.”

6. The Applicant has told the court that he had undertaken several programs for rehabilitation and reformation.
7. He provided copies of certificates which show that he had been trained in Painting and Decoration, as well as in Carpentry and Joinery. In both trades, the Applicant had attained qualifications in Grade III, II and I.
8. In the light of the said qualifications, the Applicant believes that he was currently well equipped to earn a living through lawful means.
9. The Applicant also informed the court that during his stay in prison, he had maintained a high degree of discipline and obedience, which has earned him promotion to the Special Stage of a Trustee.
10. The Officer-In-Charge at the Kisumu Maximum Prison wrote a letter of recommendation dated 5th May 2020, confirming that the Applicant had been promoted to the Special Stage. The Officer explained that, as a Trustee, the Applicant had the responsibility of training and supervising other inmates at the workshop.
11. The Officer described the Applicant's character and discipline as being exemplary.
12. In the circumstances, the Officer expressed the view that the Applicant was now able to reintegrate well, back into the society.
13. In answer to the application, Ms M. Odumba, learned Prosecution Counsel submitted that even though the Applicant appears to have reformed whilst in prison, it ought to be remembered that when he committed the offences, he broke the trust and responsibility that was bestowed in him by the community.

14. Obviously, when the Applicant defiled the minor, he broke the trust which the society had in him.

15. I hold the considered view that he who breaches the trust bestowed upon him, also imposes upon himself the gigantic task of rebuilding such trust. And when the offence was committed against a vulnerable member of the society, such as minors, the offender must appreciate that that calls for much greater effort on his part, to regain the trust of the society.

16. In this case, the Applicant committed the offence when he was 24 years old. He has so far, served a total of 12 years in prison.

17. The Applicant pleads for an opportunity to re-shape his future, which would otherwise be ruined by the long incarceration.

18. I hold the view that the training which the Applicant has undertaken are a clear sign that he did not allow the punishment to drive him into depression and hopelessness. With the help and guidance of the Prison authorities, the Applicant has earned some skills which could prove useful to him, whenever he may regain his freedom from prison.

19. The important question is whether or not the Applicant has made out a case to warrant the review of the sentence.

20. The Applicant was handed the minimum sentence prescribed by statute. Pursuant to **Section 8 (3)** of the **Sexual Offences Act**, a person who commits the offence of defilement with a child between the age of 12 and 15 years, is liable to imprisonment for a term of not less than 20 years.

21. In the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, CRIMINAL PETITION NO. 15 OF 2015**, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict’s mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”

22. It is now well settled that Mandatory Sentences reduce the normal judicial function of imposing appropriate sentences, which take into account all the individual characteristics of each case.

23. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

“(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaption of the offender;

(h) any other factor that the Court considers relevant.”

24. In this case, I have taken into account the said guidelines, and in particular the age of the offender at the time when he committed the offence. He was 24 years old.

25. During the 12 years when he has been in custody, he has undergone rehabilitation, and is now disciplined and responsible.

26. He has learnt practical skills, which could enable him to earn a living in a lawful manner. In the assessment of the Officer-In-Charge of the Kisumu Maximum Prison, the Applicant was now able to reintegrate well, back into the society.

27. Having given due consideration to all the objectives of sentencing, in their totality, I find that it is appropriate to review the sentence herein downwards. Accordingly, the 20 years imprisonment is hereby set aside, and it is substituted with Imprisonment for **FIFTEEN (15) YEARS**, which will run from the period when the trial court first sentenced the Applicant.

28. I have consciously decided that the sentence should run from the date when the Applicant was first sentenced, after I have taken into account any period which the Applicant spent in custody pending conviction.

DATED, SIGNED and DELIVERED at KISUMU This 13th day of April 2021

FRED A. OCHIENG

JUDGE