REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 152 OF 2019

WILLIAM SOWA MBWANGA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein WILLIAM SOWA MBWANGA was charged with the Offence of defilement violence contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act, and sentenced to 15 years in jail.

2. The particulars were that, "**between the months of July and October, 2010 at [particulars withheld] village in Taita Taveta County, he unlawfully caused his genital organ to penetrate the genitalia of PM, a girl aged 17 years old.**"

3. His appeal to the High Court and to the Court of Appeal did not succeed.

4. The Petitioner is now in this court pursuant to the Supreme Court's 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**.**

5. The Petitioner avers that the mandatory nature of the sentence denied the trial court the opportunity to consider mitigating circumstances. Section 8 (4) of the Sexual Offences Act reads thus:

> **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term not less than fifteen years."**

6. The Petitioner relied on paragraph 53 of the Muruatetu Case (supra) where the Supreme Court stated that, "***if a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability……Consequently, failure to individualize the circumstances of an offence or offender may result in the undesirable effect of over punishing the convict."***

7. **Mr. Fedha** the learned prosecutor submitted that the Petitioner committed a heinous offence which has psychological and physical effects on the victim who was a child aged 17 years. Counsel prayed this court to confirm the conviction and sentence meted by the trial court.

8. In mitigation the Petitioner stated that he was a first offender, that he has reformed and has had a good relationship with fellow inmates and the prison authorities. He has taken industrial and theological courses which have prepared him on how to earn a living outside prison if released. He also left behind a housewife and two children who are languishing in poverty due to his absence. He prayed for a more lenient sentence. He relied on **Yusuf Shiunzi v Director of Public Prosecution [2020] eKLR** where this Court stated that, ***"It is not disputed that the opinion of the Supreme Court with respect to mandatory sentences applies with equal force to minimum sentences***." This is also supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

> ***"Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders."***

9. In **Dismas Wafula Kilwake v R [2018] eKLR**, 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.

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."

10. I have carefully considered the Petition. This Court has the jurisdiction to interfere with the mandatory sentence of 15 years imposed on the Petitioner. The Petitioner has demonstrated reformation and has registered his remorsefulness. However, the term he has served is not sufficient punishment for the offence he committed.

11. I hereby re-sentence the Petitioner to 11 years in prison including the term already served**.**

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person via video link

Ms. Wanjohi for DPP

Ms. Peris Court Assistant