



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 188 OF 2019

AYUB SHAFI MUSA.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **AYUB SHAFI MUSA** was charged with the Offence of attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the Sexual Offences Act No 3 of 2006 in Criminal Case No 3289 of 2012. He was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was convicted and sentenced to serve 10 years' imprisonment for the offence of attempted defilement. The Petitioner's appeal in Criminal Appeal 48 of 2014 was partially successfully as his conviction on attempted defilement was quashed, and substituted with a conviction for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was sentenced to 10 years' imprisonment from the date of his conviction by the trial Court.

2. The Petitioner is now in this court pursuant to the Supreme decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. That reasoning was adopted in **Dismas Wafula Kilwake v R [2018] eKLR**, 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.

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.

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.”

3. The particulars of the offence are that on 15/11/2012, at Majengo area, in Mombasa, the Petitioner unlawfully committed an indecent Act with a child aged 5 years that had been left in his care, since he was a Madrassa teacher.

4. The Petitioner submitted that the mandatory minimum sentence meted out to him was unconstitutional. In mitigation, the Petitioner submitted that he had been reformed and/or rehabilitated thanks to the rehabilitative programmes initiated by the prison authorities. He has also acquired several skills, diplomas and certificates from several theological programmes, and he can use his skills acquired as an imam to benefit the society given a second chance. The Petitioner urged this Court to sentence him to 5 years imprisonment since he was his family's sole bread winner and his children are currently destitute.

5. **Mr. Fedha** the learned prosecutor submitted that this Court should consider that at the time of committing the offence, the Petitioner was

an imam who was held in high regard by the community and trusted by parents and children. That notwithstanding he took advantage of the trust bestowed upon him. Consequently, Counsel urged this Court to uphold the sentence of 10 years, which in his view was commensurate with the offence.

6. I have considered the petition, the Prisoner's Progress Report, the submissions by the Petitioners and the D.P.P. Section 11(1) of the Sexual Offences Act provides that:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

7. Section 11 provides for a mandatory minimum sentence. However, such a sentence does not meet the constitutional test in in **Francis Karioko Muruatetu & Another v Republic, Petition No. 15 of 2015**, since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.

8. This Court has the discretion to impose any sentence over and above the minimum sentence, and the Court confirms that it was lawful and within the discretion of the Court to sentence the Petitioner to serve a term of 10 years' imprisonment. The only question is whether the sentence was excessive and manifestly harsh taking into consideration the facts before the court.

9. It is trite that the Court in sentencing should take into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** pronounced itself thus: -

“To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(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-adaptation of the offender;

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

10. This Court finds that the Petitioner deserved a sentence that would serve as a deterrence to other would be offenders not to abuse their position of trust as a guardian/teachers to children and those in their care.

11. In the upshot I render Judgement as under:

(i) I hereby uphold the Court's discretion in sentencing the Petitioner to 10 years' imprisonment.

(ii) The Petition on resentence is hereby dismissed

That is the Judgment of the court.

Dated, Signed and Delivered at Mombasa this 4th day of May, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Mw. Wanjohi for DPP

Ms. Peris Court Assistant