



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL PETITION NO. 43 OF 2018
(IN THE MATTER OF AN INTENDED APPEAL)
BETWEEN
EZEKIEL KOSGEI CHELIMO.....APPLICANT
VERSUS
REPUBLICRESPONDENT

JUDGMENT

The petitioner herein, one Ezekiel Chelimo is a real fighter who does not easily give up. He was charged on 31/8/2010 with the offence of defilement of a girl, contrary to section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of this offence are that on the 20th day of August 2010 at about 2.00p.m at Kapkatui Sub-location of Keiyo District within Rift Valley province, the petitioner intentionally and unlawfully caused penetration of his genital organ namely penis into genital organ namely vagina of SC, a girl aged 4 years and 11 months.

In the alternative, the Petitioner was charged with the offence of Indecent Act with a child, Contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006.

The particulars of this offence being that on the 20th day of August 2010, at about 2.00p.m at Kapkatui Sub-Location of Keiyo District within Rift valley province, the Petitioner Committed an indecent Act to SC, a girl aged 4 years and 11 months by touching her genital organ namely vagina and thighs.

The case was heard fully by the lower Court and he was found guilty. He was sentenced on 28/7/2011 to serve life Imprisonment.

The Petitioner dissatisfied with the conviction and sentence, appealed to the High Court in Criminal case No. 157 of 2011. My “sister” Justice, A Mshila heard the appeal and found no merit in it. On 19/1/2012 she dismissed the same.

The petitioner still dissatisfied with the finding proceeded to Court of Appeal vide Criminal Appeal No. 12 of 2012. The appeal was heard by Justice Maraga as he then was, Justice Mutisya and Justice Murgor. On 10/12/2015 they made a decision that the appeal had no merit and was dismissed.

The petitioner on 16th October, 2019 filed a petition before this Court under Articles 25, 27(1) and 50(2) of the Constitution of Kenya 2010. He urges this Court to reduce the life Imprisonment sentence of which he is serving. He alleges that his vision has deteriorated and is actually blind. He requires personalized care of which can be accorded by his family. He relies on petition No. 15 and 16 of 2015 (consolidated), of **Francis Karioko Muruatetu and another -Vs- Republic (2017) eklr**. At paragraph 69, the Court found that;

“.....we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

Given the foregoing decision, the Courts have subsequently held that the mandatory nature of any other sentence carried in our enactment is unconstitutional. This would include the mandatory minimum sentences under sexual offences Act No.3 of 2006. However, this does not mean the indicated sentences are by themselves unconstitutional but only the mandatory nature of it of which denies the Courts the discretion

to give any other appropriate sentence. I would therefore say that, the petitioner herein if the circumstances of his case are that he deserved a lesser sentence than life imprisonment, he would be entitled to it given the Muruatetu decision.

On the issue of jurisdiction, Article 165(3) (a) states the High Court has unlimited original jurisdiction in Criminal and Civil matters. Article 165(6) indicates that the High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or Quasi-judicial jurisdiction, but not over superior Courts.

The Court of appeal is a superior Court at a higher level than the High Court, Environment and land Court and employment and labour Court. The High Court cannot have jurisdiction to determine on an issue already determined on by the Court of appeal. If such was to be allowed, the Courts would engage in undesirable game of moving back-and-forth with no foreseeable end to litigation. The pursuit for justice climbing ladder of jurisdiction must be clear, firm and only one way upward, unless reversed to a lower level by an order of Court at a higher level.

Having expressed the foregoing, its clear in this petition that the life Imprisonment meted against the petitioner is lawful and appropriate given the circumstances of the case. Secondly, this Court lacks jurisdiction to interfere with a sentence already confirmed by the Court of appeal. The petition therefore lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY, 2021

In the presence of:-

Gitonga for the appellant.

Ms. Limo for state

Gladys - Court assistant