



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

PETITION NO. E002 OF 2021

BOO.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

The petitioner was convicted and sentenced to ten (10) years imprisonment on 12/6/2019, for the offence of attempted defilement contrary to Section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 by Hon. M. Obiero (PM) at Migori Law Courts.

The petitioner filed an undated Petition seeking a review of his sentence to a lesser sentence. The petitioner also asked this court to consider the provisions of Section 333 (2) of the Criminal Procedure Code Cap 75 Laws of Kenya ('CPC') and back - date his sentence from the period he served in remand.

The petitioner submitted that he is a form three student and is asking for reduction of the sentence to enable him to complete his education; that he is a first offender and remorseful for the crime he attempted to commit and that this court should consider and backdate his sentence from the date of his arrest.

Learned State Counsel Mr. Kimanthi for the respondent submitted that this is a serious offence considering the age of the victim. The trial court considered all factors before sentence and therefore the ten (10) years meted to the petitioner was proper.

On the issue of sentencing, Mr. Kimanthi submitted that section 9 (2) of the Sexual Offences Act No. 3 of 2006 is tailored in a mandatory minimum nature. The Trial Magistrate gave the mandatory sentence and may have failed to exercise discretion while delivering sentence.

He further submitted that this court has supervisory powers over subordinate courts under Section 362 and Section 364 of the CPC; that this is a proper case where the High Court can revise the sentence in favour of the petitioner. Learned counsel further referred to the Muruatetu doctrine where the Supreme court declared mandatory maximum and minimum sentence to be unconstitutional because they take away the court's discretion.

On the issue of the petitioner's right being violated under Articles 50 and 23 of the Constitution of Kenya, 2010; Mr. Kimanthi submitted that there is no evidence of such violation and the same lacks merit and should be dismissed.

This court has carefully read and considered the petitioner's petition, supporting affidavit and the respective submissions.

The petitioner submitted that this application falls under Article 23 (1) and 50 (2) (Q) of the Constitution of Kenya (*supra*). The said provisions centre around bill of rights and the right to fair hearing. The petitioner has not particularized how his said rights were infringed during the trial, conviction and sentencing by the Trial Court. I find no basis in bringing the petition under those provisions.

Though the petitioner seeks review of his sentence, the petition before this court is not one of revision or an appeal. The jurisdiction of review lies with the High Court. The petitioner cannot therefore substitute this petition with a review as provided for in **Sections 362 and 364 of the CPC**. See also the decision in **Joseph Nduvi Mbuvi v Republic (2019) eKLR**.

The petitioner further submitted that the trial court did not take into consideration the period he served in remand meting out its sentence. **Section 333 (2) of the CPC** provides that when the courts should consider the period already spent in custody when sentencing.

The petitioner has not attempted to give guidance to this court when he was actually taken into custody. I have perused the court record and

the amended charge sheet shows that the petitioner was taken into custody on 2/4/2018.

The petitioner was accorded bond terms of Kshs. 200,000 with one (1) surety of similar amount and it was later reviewed but there is no evidence the same was ever posted by the petitioner. In that regard, this court shall ride on the assumption that the petitioner did spend the entire period of the hearing in remand from 2/4/2018 to the date of his conviction and sentencing on 12 /6/2019 when he commenced serving his ten (10) years period. This was a span of 1 year and 2 months which the court will take into consideration.

Though the applicant claims to be a student, he did not avail any evidence to support that claim. I have seen the court record, that he underwent an age assessment and he was found to be nineteen (19) years as of April, 2018.

Under Section 9(2) of the Sexual Offences Act, the minimum sentence is ten years and that is what the trial court imposed. In light of the rule in **Francis Muruatetu =vs= Republic (2017) (EKLK)**, the court is not bound by the minimum sentence.

In this regard, I am inclined to revise the sentence and reduce it to **‘the seven (7) years imprisonment and the same shall run from the date of the arrest of the petitioner, being 2/4/2018.’**

It is so ordered.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 17TH DAY OF JUNE, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Present - Petitioner in person.

Mr. Kimanthi for the Republic.

Nyauke Court Assistant