



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 58 OF 2020

MUM.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT ON RESENTENCING

1. The Petitioner herein **MUM** was charged and convicted for the offence of incest contrary to Section 20 (1) of the Sexual Offences Act and was sentenced to serve life imprisonment. He has exhausted his appellate avenues and is now in this Court for resentencing in light of the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** in which the apex court found that the mandatory nature of the death sentence is unconstitutional. In that case also, the apex court indicated that a trial court may be in a position to determine what amounts to life imprisonment.

2. The particulars of the offence were that: -

“between 1st February 2014 and 28th February 2014 at Mrima Mкуру Vilage Jibana location in kaloleni sub-county in Kilifi county, while the victim mother had travelled for two days, he unlawfully and intentionally committed an act which caused penetration of his penis into a female genital organ of HNM a child aged 15 years who to his knowledge was his daughter”

3. The Petitioner on his part submitted that the life imprisonment meted upon him by the trial magistrate was unconstitutional since the mandatory nature of the sentence is dehumanizing having denied him the prospect of release. He further submitted that he regretted the offence, he is reformed, and that he has undertaken several courses while incarcerated and he has been awarded several certificates and diplomas. He prayed for mercy and leniency since he was just a first offender. He submitted that a jail term of 10 years would be adequate punishment.

4. **Ms. Wanjohi** learned counsel for the State submitted that the Petitioner took away the innocence of his own child leaving the child scarred for life. He was meant to offer safety and protection to his child but failed to do so. Counsel prayed the Petitioner’s life sentence be reduced to 20 years.

5. In my view, and pursuant to the Supreme Court in the aforesaid **Muruatetu** case, this Court has the jurisdiction to revisit all sentences which were meted pursuant to the mandatory nature of the enabling law. Further, and in the same spirit of **Muruatetu**, this Court has the jurisdiction to determine what amounts to life imprisonment. For these reasons, this Court has the jurisdiction to interfere with the sentence meted out in the trial court.

6. The issue then is to what extent can that be done. It is not in doubt that the crime committed by the Petitioner was a grave one, against a girl of 15 years, and his own daughter. This is a crime not only against the young soul, but also against the public interest, and must be punished adequately. Indeed, the punishment must reflect the life imprisonment which was imposed by the trial court, and which was confirmed in appeal. Even though this Court can interfere with the life sentence, the sentence meted out herein must match the crime.

7. The Petitioner prays for a jail term of 10 years including the 7 years already served in prison.

8. In the instant case, whereas this was clearly a gender based violence crime against the Petitioner’s own child, the Petitioner is a first offender. He has reformed as the prosecution also noted this in their submissions.

9. In **KNN v Republic [2020] eKLR**, the court resentenced a Petitioner who was convicted of incest, from life imprisonment to a sentence of 20 years. It is my view that the petitioner shall be appropriately punished by a jail term of 20 years. Accordingly, I hereby set aside the life sentence imposed by the trial court and in place thereof, I jail the Petitioner to serve a term in prison of twenty (20) years from the date of

arrest.

10. Based on this Court's decision in **Sammy Musembi Mbugua & 4 Others v Attorney General & Another [2019] eKLR**, the Petitioner is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving their said sentence.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 17th day of June, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant