



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 18 OF 2020

EMS PETITIONER

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

The Petitioner, **EMS**, was convicted for the offence of **Defilement** contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. Thereafter, the trial court sentenced him to Life Imprisonment.

1. His appeal to the High Court was dismissed.
2. His second appeal was, thereafter, dismissed by the Court of Appeal.
3. The Petitioner has now asked this Court to grant him a re-hearing of the sentence.
4. By his supporting affidavit, the Petitioner drew the Court's attention to the fact that whilst his appeal was still pending before the Court of Appeal, he had lodged a Petition at the High Court, seeking re-sentencing.
5. When the High Court had heard the Petition, it ordered that the Life Imprisonment be substituted by 30 Years Imprisonment.
6. However, when the Court of Appeal heard the Petitioner's appeal, it upheld the Life Imprisonment which had been imposed by the trial court, and which had been upheld by the High Court in **ERNEST MAUNGO SIMIYU Vs REPUBLIC, HIGH COURT CRIMINAL APPEAL NO. 318 OF 2012.**
7. The Petitioner has asked this Court to set aside the Life Imprisonment, and to have it substituted with an appropriate sentence.
8. He told this Court that he was a first offender, and that he was very remorseful.
9. He requested this Court to consider the fact that he was a young offender, who would wish to have a fresh start in life, if he were given the chance to reform.
10. He said that he was 21 years old at the time when he was arrested. According to him, he did not know what the law was at the material time.
11. However, as he was now 29 years old, the Petitioner said that he was rehabilitated and reformed.
12. I have given due consideration to the petition. I note that the Petitioner was, (according to his own words), 21 years old when the offence was committed.
13. However, I also note that on 10th December 2012, when the Petitioner testified during his trial, he told the learned trial magistrate that he was 18 years old.
14. I am therefore not sure about the age of the Petitioner.
15. Meanwhile, the victim was six (6) years old. Secondly, the Petitioner was an uncle of the victim.

16. From the Judgment of the Court of Appeal, (In Ernest Maungo Simiyu V Republic, Criminal Appeal No. 80 of 2016), the learned Judges of Appeal expressed themselves thus;

“23. That said, the circumstances in which the offence in this matter was committed by the appellant deserves the severest of punishment.

The medical evidence was that as a result of the defilement, DK developed hemorrhoids requiring surgical treatment.

DK’s mother testified that since the ordeal DK had become withdrawn. DK is scarred for life.”

17. Even at this stage when I have been called upon to re-sentence the Petitioner to an appropriate sentence, I find that the words (above), of the Court of Appeal provide a useful guide to this Court.

18. I further find that the lack of knowledge about the law, when the offence was being committed, is not a mitigating factor. I so hold because it is well settled that Ignorance of the law is not a Defence to a criminal charge. Every person is deemed to know the law.

19. It is my understanding that in offences of a technical nature, the lack of knowledge of some of the technicalities which were the ingredients of the offence, might constitute a mitigating factor.

20. However, I strongly believe that the defilement of a child is absolutely wrong, regardless of whether or not the offender was knowledgeable about the law.

21. In the circumstances of this case it was made even worse by the following facts;

(a) the victim was 6 years old;

(b) the offender was her uncle.

22. I have taken into account those aggravating factors, and I have earnestly searched for mitigating factors. However, I found no factors that could be deemed as mitigating the awful offence in this case.

23. I hold the considered view that the Life Imprisonment was not an unreasonable sentence. Nonetheless, in order to give the Petitioner hope in life, I do set aside the said sentence and I substitute it with Imprisonment for 36 Years. The said sentence shall run from 20th December 2012.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE