



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CR. APPLICATION NO. 35 OF 2020

ERICK OMONDI ABUOGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **ERICK OMONDI ABUOGO** told this Court that he was seeking the review of the sentence which the learned trial magistrate had imposed upon him.

1. He was convicted for the offence of **Defilement**, and was then sentenced to 15 Years Imprisonment.
2. When handing down the sentence, the trial court expressed itself thus;

“At the time the offence took place the complainant was 16 years of age, therefore a minor as per the provisions of the Sexual Offences Act No. 3 of 2006. I will therefore sentence the Accused Person to 15 years imprisonment.”

3. In effect, the trial court derived guidance from the provisions of **Section 8 (4)** of the **Sexual Offences Act**, which stipulates that;

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

4. In my considered opinion, the trial court felt compelled to comply with the express letter of **Section 8 (4)** of the **Sexual Offences Act**. The court did not address the specific circumstances of the Petitioner.

5. Following the pronouncement by the Supreme Court, in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**, it is now deemed unconstitutional when a statutory provision imposes a mandatory sentence.

6. Accordingly, as the trial court failed to demonstrably take into account the factors which could result in an appropriate sentence, the Petitioner is entitled to being re-sentenced.

7. When the High Court dismissed the Petitioner’s appeal, it expressed itself in the manner following;

“Whilst the court may have discretion in sentencing, such discretion can only be exercised within the confines of the law as laid down by the legislature.

In this case, I note that the Appellant betrayed the trust which the Complainant had in him. He took advantage of a young girl who believed that he would assist her.

To my mind, that is one of the relevant factors to be taken into account when handing down an appropriate sentence: and rather than being a factor in the reduction of the sentence, it could actually be the basis for a more severe sentence.”

8. That factor is still a relevant consideration during re-sentencing.
9. Another relevant factor is that the Petitioner was a young man of 20, and also that he was a first offender.
10. Although he reasons that long incarceration had shattered his dreams, I hold the view that it is his actions, of defiling the young girl,

which caused him to be imprisoned. Therefore, if his dreams for a promising future was shattered, the Petitioner must take full responsibility for it.

11. The fact that the parents of the Petitioner were overwhelmed with the burden of responsibilities, cannot be a reason to review the sentence. The situation of the Petitioner's parents was the un-intended consequence of the actions taken by their son, when he committed the offence.

12. The realization that his parents were undergoing suffering which was attributable to the punishment for the offence he had committed, will probably be a serious deterrence to the Petitioner and also to any other person who might otherwise be tempted to commit similar criminal offences.

13. In this instance, it does appear to me, that the Petitioner has begun appreciating that he must always strive to avoid committing any criminal offence. To that extent, the Petitioner appears to have matured physically and mentally.

14. Having taken into account all the relevant factors, I now set aside the sentence of 15 Years Imprisonment, and I substitute it with a sentence of 10 Years Imprisonment. The said sentence will run from 29th November 2018.

15. However, pursuant to **Section 333 (2)** of the **Criminal Procedure Code**, the Petitioner's term of imprisonment shall be discounted by the period of Four (4) Months and Sixteen (16) Days, when he remained in custody, during the trial.

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

FRED A. OCHIENG

JUDGE