



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CR. APPLICATION NO. 14 OF 2020**

**RICHARD OCHIENG ORWA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, **RICHARD OCHIENG ORWA**, was convicted for the offence of **Defilement** contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**, and also for the offence of **Abuse of Position of Authority** contrary to **Section 24 (4)** of the **Sexual Offences Act**.

1. For the offence of **defilement**, the Applicant was sentenced to 20 years imprisonment, whilst for the offence of abuse of position of authority he was sentenced to 10 years imprisonment.
2. Following the conviction, the Applicant filed an appeal at the High Court. On 3<sup>rd</sup> March 2016, Majanja J. dismissed the appeal, and upheld both the conviction and the sentences.
3. The Applicant has now invoked the pronouncement by the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**, which declared the mandatory nature of the death sentence unconstitutional.
4. He also invoked the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.
5. The Complainant in this case was 12 years old at the time when the offence was committed. It was for that reason that the Applicant was convicted under **Section 8 (3)** of the **Sexual Offences Act**.
6. Pursuant to that statutory provision;

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

7. It is thus evident that the said statutory provision stipulated a mandatory minimum sentence.

8. As regards **Section 24 (4)** of the **Sexual Offences Act**, a person convicted for a sexual offence relating to a position of authority,

***“shall be liable upon conviction to imprisonment for a term of not less than ten years.”***

9. The said statutory provision thus spells out the mandatory minimum sentence.

10. Following the bold pronouncement by the Supreme Court in “*the Muruatetu case*”, it is now well settled that the *ratio decidendi* on the nature of mandatory sentences applies *Mutatis Mutandis* to, inter alia, sexual offences.

11. It therefore follows that the sentences handed down in this case were, in principle, amenable to review, so that the court could determine the appropriate sentences.

12. The Applicant was a teacher at the institution where the Complainant was a pupil. He instructed the Complainant to accompany him from his office, to go and collect a letter which the Applicant wanted to be delivered to another teacher.

13. Once the Complainant got into the Applicant's house, he defiled her. Thereafter, the Applicant warned the Complainant against revealing what had transpired.
14. However, as the act of defilement had caused some injuries to the Complainant, the resultant pain caused her to confess to her mother about what had transpired.
15. When the law caught up with him, the Applicant approached the father of the Complainant, seeking forgiveness.
16. The evidence on record shows that he was arrested at the hospital when he went there in company of the Complainant's father.
17. It was the Applicant's case that this Court should exercise mercy and leniency, so that the sentence of 20 years imprisonment be reduced.
18. He said that he was truly remorseful, and that his heart bleeds at the emotional and physical injury which he had caused to the Complainant and her family.
19. Even though the actions of the Applicant have been a reflection of remorse, I find that in most instances when an offender has been arrested and charged, they do regret their actions. I cannot be sure that the Applicant is any different from such other offenders. I say so because, whilst the Applicant sought forgiveness from the Complainant's father, his defence was a complete denial of any involvement in the offence.
20. One of the factors to be taken into account when the court was determining an appropriate sentence, is whether or not the accused had pleaded guilty to the charges.
21. By seeking forgiveness from the Complainant's father, and then putting up a spirited defence, (in which he completely denied committing the offence), the Applicant was blowing both hot and cold.
22. No doubt, as he now says, the conviction and sentence has taught him a bitter lesson. But that lesson, of itself, would not be a basis for a reduction of the sentence.
23. One factor that stands out in this case is that the father of the Complainant has informed this court, through the Probation Report dated 6<sup>th</sup> April, 2021, that;

***“..... the inmate made lots of effort to seek forgiveness and reconciliation before conviction, but the same was not tenable given the nature of the offence.***

***The family of the victim categorically stated that they would not wish to have the inmate continue languishing in prison, while his family equally suffers at home.”***

24. Furthermore, the family of the victim has continued to relate well with the family of the inmate.
25. Those two unique features of the case, demonstrate remorse on the part of the inmate, as well as an active and genuine effort at reconciliation.
26. Such efforts do not render the original sentence wrongful: But they do suggest that the inmate may be more readily re-integrated into the society.
27. Having taken into account the skills which the inmate has acquired whilst in custody and the very supportive recommendations from the Prison authorities. I do now set aside the sentence of 20 years, and substitute it with a sentence of 10 years Imprisonment.
28. The said sentence will run concurrently with the sentence of 10 years imprisonment for the offence of **Abuse of position of Authority** contrary to **Section 24 (4)** of the **Sexual Offences Act**.
29. The sentences will run from 12<sup>th</sup> May 2015.

**DATED, SIGNED and DELIVERED at KISUMU**

This 7<sup>th</sup> day of **July** 2021

**FRED A. OCHIENG**

**JUDGE**