



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL PETITION NO. 74 OF 2020

FREDRICK OCHIENG AGUKO.....PETITIONER

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Petitioner, **FREDRICK OCHIENG AGUKO**, has asked this Court to review its own orders.

1. He asked the Court to either order that he be acquitted or that the period which he had already served in prison custody be deemed to be sufficient punishment.
2. The Petitioner was convicted for the offence of **Gang Defilement** contrary to **Section 10** of the **Sexual Offences Act**. He was then sentenced to 15 Years Imprisonment.
3. He has brought this Petition seeking a re-hearing on the issue of the sentence. He stated that the Petition was prompted by the decision by the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, PETITION NO. 15 OF 2015**.
4. It was the Petitioner's understanding that the Supreme Court had declared as unconstitutional, the mandatory nature of prescribed minimum sentences.
5. He believes that if the trial court had exercised its discretion appropriately, it would have appreciated that the Petitioner, who was a first offender did not pose any real danger to the community.
6. Therefore, in the light of the congestion in our prisons, and given the high cost of maintaining non-serious offenders in prison, the Court ought to ensure that only those persons who deserve to be in prison custody, are imprisoned.
7. In my considered view, the offence of gang defilement cannot be classified as a "non-serious" offence.
8. In any event, it is the legislature which stipulates the sentences deemed appropriate for each particular offence. Therefore, the Court cannot exercise its discretion in such a manner as to impose sentences which had not been prescribed by law.
9. According to the Petitioner, the courts ought to take into account the impact of unnecessary imprisonment on the accused and also on the family of the said accused.
10. I fail to understand what the Petitioner means by unnecessary imprisonment.
11. As I have already held, sentences are prescribed by law. Therefore, when a sentence has been prescribed by the legislature, I am of the view that it cannot then be construed as being unnecessary.
12. The Petitioner has re-visited the circumstances in which the offence was committed. He said that his accomplices had made him drink alcohol, and that he was intoxicated when the offence was being committed.
13. If that were the factual position, it should have been raised by the Petitioner as part of the defence during the trial.
14. The Petitioner also pointed out that he was a young man, who was only 24 years old at the time when the offence was committed.
15. The age of the Petitioner, as well as the circumstances of his young family; for which he was the sole bread winner, are all factors which

were brought to the attention of the learned trial magistrate during mitigation.

16. It is noted that the trial court did take the mitigation into account. The trial court also took into account the Sentencing Policy, at the time when the Petitioner was being sentenced.

17. The learned trial magistrate handed down the sentence of 15 years imprisonment because **Section 10** of the **Sexual Offences Act** couched the said sentence in mandatory terms. It was for that reason that the Petitioner invited this Court invoke the reasoning of the Supreme Court, and order that he be re-sentenced, whilst appreciating that the discretion of the trial court could not be stifled.

18. On 6th July 2021 the Supreme Court issued Directions in “*the Muruatetu case*”. The court reiterated that **Section 204** of the **Penal Code** was inconsistent with the Constitution and was therefore invalid to the extent that it provides for the mandatory death sentence for murder. At paragraph 14 of the Directions, the Supreme Court said;

“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution.”

19. Later, at paragraph 18 of the Directions, the Supreme Court said;

“Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;

.....”

20. Following the issuance of those Directions, it follows that the Petitioner, who was not convicted for Murder, cannot derive any assistance from the Muruatetu case.

21. In the result, the Petition is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE