



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**PETITION NO E023 OF 2021**

**REUBEN KIPKOECH TANUI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was tried and convicted for the offence of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to ten (10) years imprisonment. He did not appeal against the said sentence.
2. However, on 17<sup>th</sup> March 2021, he filed the Petition herein for review of his sentence. The said application was supported by his Affidavit in which he stated that the court has power to give directions under the Power of Mercy Act Cap 94 (Laws of Kenya). He further stated that he was remorseful of the offence that he committed and promised not to repeat the same again. He also averred that he had attained several certificates in Theology, Bible Leage (**sic**) International and RODI Kenya (Resource Oriented Development Initiatives) undergone several courses while in prison, a fact that he reiterated in his Written Submissions.
3. He submitted that he was a suitable applicant to be considered for non-custodial sentence and that he was a first offender. He vowed to abide by all terms and conditions that would be imposed by the court.
4. The State opposed his Petition for the reason that the offence that the Petitioner committed was serious as the Complainant was aged eight (8) years at the material time. It pointed out that the cases of defilement had become rampant in Fort Tenan area where the offence was committed.
5. It was also its submission that Section 9(2) was tailored in a mandatory minimum nature which could not be revised based on the current Supreme Court decision in Muruatetu.
6. At the instance of the State, on 30<sup>th</sup> June 2021, the court directed the Probation Office to file a Probation Report to guide it on the suitability of the Petitioner being considered for a non-custodial sentence. The matter was set for a mention on 5<sup>th</sup> October 2021 to confirm the filing of Written Submissions by both parties and to establish where or not the said Probation Report had been filed.
7. On 13<sup>th</sup> July 2021, William O Otieno Principal Probation Officer Kisumu filed his Probation Report dated 14<sup>th</sup> July 2021 (**sic**). He indicated that whereas there was no hostility between the Petitioner herein and the Complainant's family or the community in general, he found it difficult to recommend a non-custodial sentence for the reason that sexual offences were very rampant in the area where the Petitioner came from.
8. Prior to 6<sup>th</sup> July 2021, courts were reviewing minimum sentences in defilement cases following several Court of Appeal decisions amongst them **Wisconsin Otieno Olugo vs Republic [2020] eKLR** where the court therein reduced the sentence of life imprisonment to twenty (20) years where the appellant therein had been tried and convicted of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act. If the Probation Report had been favourable, the court could have perhaps exercised its discretion in reviewing the sentence downwards.
9. However, the Petitioner's Petition was a non starter due to several reasons. The first reason was that the Probation Office was not in favour of a non-custodial sentence. It was unlikely that this court would have considered the Petitioner for the non-custodial due to the negative Probation Report.
10. Secondly, this court did not have mandate to entertain this Petition as the same was hinged on powers that could be exercised under Section 25 of the Power of Mercy Act No 21 of 2011. Indeed, there is a specific committee established pursuant to Article 133(2) of the

Constitution of Kenya, 2010, that is charged with considering pardon under the Power of Mercy Act.

11. Notably, Article 133(1) of the Constitution of Kenya provides that:-

**On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—**

- a. granting a free or conditional pardon to a person convicted of an offence;**
- b. postponing the carrying out of a punishment, either for a specified or indefinite period;**
- c. substituting a less severe form of punishment; or**
- d. remitting all or part of a punishment.**

12. Further, Section 25 of the Power of Mercy Act provides that:-

**Where the relief sought and granted in a petition for the exercise of power of mercy is a pardon under Article 133(1)(a) of the Constitution—**

- a. such pardon shall operate as conclusive proof that the Committee and the President are satisfied that the petitioner for the pardon is deserving of the relief; and**
- b. the pardon shall not be construed to be an acquittal.**

13. Having said so, this court could also not re-sentence the Petitioner in any other manner. Notably, on 6<sup>th</sup> July 2021 the Supreme Court of Kenya gave fresh guidelines to assist in interpreting the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**. It clarified that the decision of Muruatetu and these guidelines only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code and not under any offences that courts had liberally applied to.

14. The fact that the Petitioner was remorseful and had undergone various courses while in prison could not therefore assist him as the offence he was charged with provided for a minimum mandatory sentence. Indeed, until the law is changed, the Petitioner is best advised to pursue other avenues such as pardon under the Power of Mercy Act or consideration for community service under the Community Service Order Act Cap No 10 of 1998.

#### **DISPOSITION**

15. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition to be considered for pardon under the Power of Mercy that was lodged on 17<sup>th</sup> March 2021 was not merited and the same be and is hereby dismissed.

16. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF DECEMBER 2021**

**J. KAMAU**

**JUDGE**