



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE- J.)

PETITION NO.64 OF 2019

BETWEEN

MAURICE ODUOR AGWINGI.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. On 03rd September, 2004, the trial court in **KISUMU CRIMINAL CASE NO. 396 OF 2004** convicted and sentenced **MAURICE ODUOR AGWINGI, (Petitioner)** to life imprisonment for the offence of defilement contrary to Section 145 of the Penal Code.
2. Petitioner lodged an appeal **KISUMU HIGH COURT CRIMINAL APPEAL NO. 183 OF 2004** which by a judgment dated 29th April, 2005 upheld the conviction and sentence.
3. The Petitioner subsequently appealed to the Court of Appeal in **KISUMU CRIMINAL APPEAL NO. 231 OF 2005** which by a judgment dated 21st March, 2013 similarly upheld the conviction sentence.
4. The Petitioner has petitioned this court for resentencing. He has served 16 years since conviction and as a means of rehabilitation has been trained in spray painting and obtained Grades III certificate. He has also trained as a Home and Community Based Care worker and has a certificate of participation in Behavior Change and Communication training. The officer in charge Kisumu Maximum Prison by his letter dated 21st November, 2019 has vouched for the Petitioner's good conduct.
5. Ms. Gathu, Senior Prosecution Counsel for the state appreciated that the Petitioner had prepared himself for integration with the public and recommended that he be resented to 20 years.

Analysis and Determination

6. The Supreme Court's decision in **Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR** declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory sentences.
7. I have considered ***The Sentencing Policy Guidelines, 2016*** and its application which is intended to promote transparency, consistency and fairness in sentencing (See **Michael Kathewa Laichena & another v Republic [2018] eKLR**).
8. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under ***the Act***. It observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or

unreasonable exercise of discretion in sentencing.

9. Even though Appellant was a first offender, the psychological effect of the offences on the 16-year-old complainant cannot be underestimated.

10. As stated hereinabove, the Appellant has served 16 years. He has expressed remorse and has been rehabilitated and prepared himself for life outside prison. I re-sentence him to **period served.**

DELIVERED AND SIGNED IN KISUMU THIS 5th DAY OF MARCH 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Amondi/Okodoi

Petitioner - Present in person

For the State - Ms. Gathu