



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE- J.)

MISC CRIMINAL APPLICATION NO. 55 OF 2019

BETWEEN

PAUL ODHIAMBO MBOLA.....PETITIONER

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. **PAUL ODHIAMBO MBOLA, (Petitioner)** was convicted and sentenced to life imprisonment on 16th November, 2010 in **KISUMU CRIMINAL CASE NO. 318 OF 2009**, for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the **Sexual Offences Act No. 3 of 2006**.
2. Petitioner lodged an appeal **KISUMU HIGH COURT CRIMINAL APPEAL NO. 175 OF 2010** which by a judgment dated 24th September, 2012 upheld the conviction and sentence.
3. The Petitioner subsequently appealed to the Court of Appeal in **KISUMU CRIMINAL APPEAL NO. 16 OF 2014** which by a judgment dated 23rd October, 2014 similarly upheld the conviction sentence.
4. The Petitioner has petitioned this court for resentencing. He expressed remorse and stated that he was arrested at the age of 35 years and had served 10 years since conviction within which time he has been trained in theology, paralegal, counselling, making juice and shampoo among others and was the Deputy Head Teacher at Naivasha Inmates Education Centre as a means of rehabilitation. The officer in charge of Naivasha Inmates Education Centre by his letter dated 02nd January, 2010 has vouched for the Petitioner's good conduct and rehabilitation.
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 more years.

Analysis and Determination

6. At the time of the Petitioner's conviction, mandatory sentences had not been declared unconstitutional.
7. 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.
8. 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**).
9. 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.

10. Even though Appellant was a first offender, the psychological effect of the offences on the 11-year-old complainant cannot be underestimated.

11. The Appellant has served 10 years. He has expressed remorse and his record of rehabilitation within those 10 years is remarkable. I wholly agree with the state that the Petitioner has fully prepared himself for integration with the public and is armed with skills to enable him lead a productive life outside prison. Consequently, I find that it would be in the interest of justice to resentence him to the period served. It is so ordered.

DELIVERED AND SIGNED IN KISUMU THIS 05th DAY OF March 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Petitioner - Present in person

For the State - Ms. Gathu