



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 47 OF 2019

EDWARD KATANA SAFARI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

1. The Petitioner herein Edward Katana Safari was charged and convicted for the offence of defilement of a child of 7 years contrary to Section 8 (2) of the Sexual Offences Act. He was sentenced to life imprisonment. His appeals both to the High Court and to the Court of Appeal were unsuccessful.
2. The facts giving rise to this petition are that on 7/12/2013 at around 7:00 p.m. Furaha Kazungu Kavatsi (PW3) reported to work at [particulars withheld] Primary School where he had been employed as a guard. He saw GW. (complainant) playing in the compound and told her to go home. After completing his routine inspection around the school, he noticed that GW was still in the compound, in the company of a man later identified as the Petitioner. The Petitioner removed biscuits from his pocket and gave GW. Thereafter, the two of them walked into a forest which was behind the classrooms. Suspicious of the Petitioner's intentions, Furaha informed his friend, Shida Kazungu Karisa (PW4) who had passed by, and they decided to follow them into the forest.
3. According to GW, the Petitioner led her into the forest and directed her to lie down. He then undressed her, lay on top of her and proceeded to defile her. She began screaming out in pain. Meanwhile, Furaha and Shida heard the screams which led them to the scene. They found the Petitioner in the process of defiling GW. They apprehended him and helped GW, who they described as a child, to dress up. They then escorted the Petitioner and G.W to the area sub-chief. While on their way, they ran into CKM (PW2), GW.'s mother who followed them to the sub-chief's office. The Petitioner was arrested while GW was taken for medical attention.
4. As per the evidence in the P3 form which was filled by Ibrahim Abdullahi (PW5), a clinical officer, GW's hymen was missing which evidenced penetration of her vagina. Consequently, the appellant Petitioner was arraigned and charged at the Chief Magistrate's Court at Malindi with one count of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He also faced an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**.
5. The particulars of the main count were that on 7/12/2013 at [particulars withheld] Village in Magarini District within Kilifi County, the Petitioner unlawfully caused his penis to penetrate the vagina of GW, a girl aged 7 years. On the alternative count, the particulars read that on the above mentioned date and place, the appellant intentionally and unlawfully touched the vagina of GW, a girl aged 7 years.
6. The Petitioner pleaded not guilty to both counts and gave unsworn testimony. He stated that on the material day while heading to his uncle's house he was accosted by two men who were armed with *runqus*. He ignored their directive to stop and continued walking. They caught up with him, assaulted him and stole money from him. They did not stop at that but ordered him to continue walking with them. Upon arriving at [particulars withheld] Primary School another group of people pounced on him and assaulted him once again. He was later taken to the sub-chief's office and re-arrested by the police. He only learnt of the charges against him when he was arraigned in court.
7. At the conclusion of the trial, the trial court convicted the appellant for the offence of defilement and sentenced him to life imprisonment. Aggrieved with his conviction and sentence, the appellant appealed to the High Court. The High Court (Chitembwe, J.) in a judgment dated 10th November, 2016 dismissed the appeal. It is that decision that gave rise to a second appeal in Court of Appeal, which was also dismissed.
8. The Petitioner is now before this court challenging the mandatory nature of the life sentence under Section 8 (2) of the Sexual Offences Act, stating that he was not given a chance to mitigate.

9. The Petitioner submitted that if he had a chance to mitigate he would have informed the court that he was remorseful and that he has a wife and children to take care of. The Petitioner submitted that he has already reformed and pleaded with the court to jail him to a term of 10 years.

10. On their part Ms. Mutua, learned Counsel for the State submitted that the Petitioner defiled a child of 7 years and should be jailed to fifty (50) years in prison. Counsel did not address the court on the mandatory nature of the life imprisonment under Section 8 (2) of the Sexual Offences Act.

11. I have carefully considered the petition. The guilt of the Petitioner has already been determined and his appeals against the life sentence has been dismissed both by the High Court and by the Court of Appeal.

12. However, the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** decided that the mandatory nature of death and life sentences is unconstitutional. That being so, it is the duty of this court to establish whether or not the trial court gave the Petitioner a chance to mitigate. There is no such evidence that indeed the Petitioner was given a chance to mitigate. That means that the trial court felt bound by the mandatory nature of the life sentence. In accordance with the aforesaid Supreme Court decision in Muruatetu, this court is mandated to revise the said sentences which I hereby do, and accordingly set aside the same.

13. The next issue is to determine the appropriate sentence to mete out to the Petitioner. A conviction for defilement of a child under Section 8 (2) of the Sexual Offences Act is a serious conviction. This is a very serious offence which the promulgators of the Sexual Offences Act decided should be punished with life in prison. Accordingly, the court, after lifting the life sentence, must still retain the capacity to severely punish the crime.

14. The State has submitted that I jail the Petitioner to fifty (50) years in prison, while the Petitioner submitted that 10 years would suffice.

15. In my view the Petitioner deserves to be jailed for a term which sends a clear message to would be defilers that the crime, if proved will be very severely punished. I jail the Petitioner to Thirty (30) years from the date of arrest.

16. In the upshot I issue orders as follows:

(i) The life sentence herein is uplifted.

(ii) The Petitioner is jailed to a term of Twenty Eight (28) years from the date of arrest.

17. Orders accordingly.

18. Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 9th day of April, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Mwangeka for DPP

Petitioner in person via video link

Mr. Kaunda Court Assistant