



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 60 OF 2019

WALLACE CHEGE WAIHIGA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

JUDGMENT

1. The Petitioner herein above mentioned was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that: -

“On the diverse dates between the 7th day of January, 2011 and 20th May, 2011 at Kwale County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MHS a child aged sixteen (16) years”.

2. It was not denied that the Petitioner and the Complainant had cohabited as “husband and wife” for the period between 7th January, 2011 to 20th May, 2011. This marriage appears to have had the blessings of the complainants’ grandparents. As a result of this cohabitation the complainant became pregnant and later gave birth to a daughter now called HWC. A birth certificate for the complainant shows that she was born on 5th February, 1995. The offence was committed between 7th February, 2011 and 20th May, 2011. This places her age at sixteen (16) years. This is the same age indicated in the charge sheet.

3. The Petitioner was convicted and jailed to 15 years pursuant to Section 8 (4) of the Sexual Offences Act.

4. The Petitioner has now served 7 years in prison, and has filed this constitutional petition praying that he be released on health, age and compassionate grounds so that he can take care of the child he fathered.

5. The Petitioner submitted that he is 79 years old now. His wife died in 2000. He has four children who visit him in prison. He is sickly and suffers from diabetes. He takes care of the child he fathered.

6. Mr. Fedha, learned Counsel for the State objected to the petition, stating that the same is baseless and that the Petitioner should serve the entire 15 years.

7. I have carefully considered the petition and submissions of parties. The Petitioner was already jailed to 15 years, and this court would have no jurisdiction to interfere with that.

8. However, this court notes that **Covid-19** with us, we are all living in challenging times. The Judiciary has taken cogent steps to decongest prisons with the result that the courts are encouraged to consider the release of prisoners in deserving cases, under the Community Service Order, and other legal instruments.

9. The case before the court is peculiar in the sense that the Petitioner is a very old man. He is 79 years and sickly, suffering from diabetes. His demeanour in court was of a desperate old man. I have no doubt in my mind that the Petitioner is suffering a great deal in prison.

10. The girl he defiled is now married to someone else. But the Petitioner takes care of the child he fathered. The Petitioner’s stay in the prison is clearly a burden not only to himself and his family, but also to the prison authorities. At his age he should be at home taking care of the child he fathered. His family also wants him home. It is with these considerations in mind that I make the following Judgment without

interfering with the sentence imposed on the Petitioner of 15 years by the trial court.

11. The Probation Report filed herein on 5/12/2019 speaks well for an early release of the Petitioner. The community members are ready to receive him. He has adequate accommodation and financial support to restart his life again.

12. The Petitioner is a senior citizen of this country. He is aged and frail, but he appears very apologetic and has a very positive attitude to his predicament, which be blamed on loneliness after the death of his wife, and retrogressive cultural practices.

13. According to the prison records, the Petitioner's possible release date is 6/11/2022, about three years from now.

14. With all these in mind, I reach the following Judgment:

(i) The Petitioner is hereby released on suspended sentence.

(ii) The Petitioner shall, within 48 hours of his release, report to Senior Probation Officer, Mombasa County, under whom the Petitioner shall serve a probation period of six (6) months.

(iii) The Petitioner is therefore hereby set free and released from prison unless otherwise lawfully held.

15. 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