



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 166 OF 2018

HASHON BUNDI GITONGA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT ON RE-SENTENCING

[1] The petitioner, Hashon Bundi Gitonga, was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence are that on 2nd February, 2012 in Tharaka South District within Eastern Province, the petitioner intentionally caused his penis to penetrate the vagina of HK (name withheld) a child aged ten (10) years.

[2] He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, No. 3 of 2006. The particulars are that on 2nd February, 2012 in Tharaka South District, within Eastern province intentionally touched the buttocks, breasts and vagina of HK a child aged 10 years.

[3] The charge was later amended and another count of assault causing actual bodily harm contrary to Section 251 of the Penal Code was added. The particulars of offence being that on 2nd February, 2012 in Tharaka South District within Eastern province assaulted HK thereby occasioning her actual bodily harm.

[4] After the trial, the applicant was found guilty and convicted on the main charge of defilement under Section 8 (2) of the Sexual Offences Act and sentenced to life imprisonment. On the second offence of assault he was sentenced to six (6) months with both sentences running concurrently.

[5] Being aggrieved by the decision, the petitioner appealed to the High Court, vide HCCRA No. 97 of 2012. Wendoh J set aside the charge of defilement as the age of the child had not been conclusively proved. But convicted him of the offence of rape under Section 3 of the Sexual Offences Act as read with Section 186 of the Criminal Procedure Code. The judge quashed the conviction for assault contrary to Section 251 of the Penal Code and set aside the sentence.

[6] The petitioner appealed to the Court of Appeal vide Criminal Appeal No. 29 of 2015; his appeal was dismissed but the Court set aside the conviction and sentence on the charge of rape and substituted it with conviction on the charge of defilement under Section 8 (1) of the Sexual Offences Act as read with Section 8(3) of the Sexual Offences Act and sentenced the petitioner to twenty (20) years imprisonment.

[7] Vide his application the petitioner petitioned this court to review his sentence on the basis of the Supreme Court decision in the case of Francis Muruatetu and Others vs Republic [2017] eKLR.

[8] I note that the petitioner in his application stated that he had been charged and convicted of the offence of robbery with violence in Criminal Case No. 84 of 2012. However, this is not the case. The error was, however, cleared; the petitioner on 25/1/2019 confirmed that he was sentenced to twenty (20) years for defilement.

[9] Although the Supreme Court of Kenya dealt with mandatory sentence of death provided in Section 204 of the Penal Code, the court laid down a principle of law; that a law that provides a mandatory sentence divested the Court of discretion in sentencing, which was an affront to fair trial and therefore unconstitutional. I have stated before and I will state it again, that, nothing prevents similar argument in respect of other provisions of the law which take away or limit the discretion of the court in sentencing. I have also stated that the principle emerging from the Muruatetu case is not of a nature that it only applies to section 204 of the Penal Code. Accordingly, mandatory death sentence for robbery with violence is subject to the same arguments. See the Court of Appeal decision in William Okungu Kittiny vs. Republic [2018] eKLR.

[10] But this case enlarges the frontier of the debate. The petitioner was sentenced pursuant to Section 8(3) of the Sexual Offences Act

which provides that:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

11. The petitioner seems to argue that the wording of this section is that a person found guilty is imprisoned for a term of not less than twenty (20) years. The section sets a minimum sentence of twenty (20) years. Such prescription in law may not escape the charge that it limits the discretion of the court in sentencing. In fact, it limits the discretion of the court in passing appropriate sentence. Doubtless, this is real prejudice to fair trial. Another argument; as not all circumstances of the case are the same, minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would otherwise, after mitigation, would be entitled to a lesser sentence. Therein lies prejudice.

12. In light thereof, I set aside the sentence of 20 years imposed for defilement. I sentence him to 15 years' imprisonment from the date of his initial sentence by Wendoh J.

It is so ordered.

Dated, signed and delivered at Milimani this 7th day of May, 2020

F. GIKONYO

JUDGE

Representation:

Applicant – in person

Respondent – Prosecution, Meru.

Ruling – 21/5/2020