

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTION PETITION APPLICATION NO. 24 OF 2019

DANIEL NYAMUSWA OGWOKA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Daniel Nyamuswa Ogwoka** filed a petition on the 25th September 2019 seeking an order for sentence re-hearing and sentencing. The petitioner was convicted of the charge of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006 and was sentenced to life imprisonment. His appeal in HCCRA No. 16 of 2015 was dismissed on the 15/6/2016.
2. He avers that he was not accorded a fair hearing of sentencing thus contravening Article 50 (1), (2) (q) of the Constitution.
3. Mr. Otieno for the State did not oppose the application. The applicant informed the court that he has been in jail from 2012, he has reformed. That he had a wife who threw herself in the river and that their children are all alone. That he seeks to be released to go and look after the children. That he has passed tailoring courses and bible classes and that he is also epileptic.
4. The applicant was charged with the offence of defilement at the SRM's court in Kilgoris. His case was heard and he was convicted and sentenced to life imprisonment as per the provisions of section 8 (20) of the Sexual Offences Act No. 3 of 2006. The trial court noted that the subject was 6 years old. The applicant's appeal was dismissed by the High Court in HCCRA No. 16 of 2015.
5. The decisions of the Court of Appeal in the case of **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** are to the effect that mandatory minimum sentences take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.
6. However, taking into account the specific circumstances of this case that the subject was 6 years old a very young child and the court of appeal decision in the case of Christopher **Ochieng vs Republic (supra)** where the subject was 9 years old I set aside the life sentence and sentence the applicant to serve (thirty) 30 years' imprisonment from the date of sentence by the trial court 24th October 2012.

Dated, signed and delivered at KISII this 21st day of July 2020

**R.E.OUGO
JUDGE**

In the presence of:

Applicant In person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Rael Court Assistant.