



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL PETITION NO. 2 'B' OF 2019**

**EMS.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The petitioner has filed this petition seeking for re-hearing of his sentence of life imprisonment imposed on him by the lower court after he was found guilty of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The petition is based on the grounds that:-

- (1) The petitioner is a convict serving life imprisonment.
- (2) The petitioner was convicted on a charge of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offence Act No. 3 of 2006.
- (3) The life sentence imposed on the appellant is excessive arbitrary, demeaning and inhuman and it violates the petitioner's right to fair trial contrary to Article 26 (1) (3).
- (4) The mitigation factors of the appellant was not considered by the trial magistrate and the first appellant court.
- (5) The time limit for life sentence meted on the petitioner is not known.
- (6) The judgment of the first appellant court delivered on 27<sup>th</sup> day of July, 2016 did not take into consideration all grounds set by petitioner, the petitioner was fundamentally prejudiced.
- (7) Article 25 (c) of the constitution was infringed, flouted and threatened.
- (8) The appellant is reformed, trained and a law abiding citizen.

2. The petitioner argues that this court has powers to impose a lesser sentence in conformity with the judgment of the Supreme Court in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR**.

3. The petition is made pursuant to article 23 (1) and (165 (3) (b) of the Constitution of Kenya 2010 which articles grants this court power to hear and determine the question on whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

4. The evidence against the petitioner was that the victim was at the time that the offence was committed aged 6 years. The appellant was an uncle to the victim. That on 29<sup>th</sup> December, 2011 the mother to the victim had left the victim at home together with a sibling aged 3 years and went to the shamba. The appellant went to the home and defiled the girl. The victim reported the incident to her mother after 2 days. The appellant was arrested and charged. He was convicted and sentenced by the lower court. His appeal to the High Court was unsuccessful.

5. The prosecution counsel **Mr. Ng'etich** opposed the petition. He argued that the section the petitioner was charged under provides for a minimum sentence of life imprisonment. That the ruling of the Supreme Court in the **Muruatetu** case does not apply in the petitioner's case. Therefore that the petition lacks merit and should be dismissed summarily.

6. Section 8 (2) of the Sexual Offences Act No. 3 of 2006 provides that:-

**“A person who commits an offence of defilement with a child eleven years or less shall upon conviction be sentenced to imprisonment for life.”**

7. In **Denis Kinyua Njeru –Vs- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under section 8 of the Sexual Offences are “*straight jacket*” penalties that left no room for the exercise of discretion by a sentencing court. However, recently in **Evans Wanjala Wanyonyi –Vs- Republic [2019] eKLR**, the court held that:-

**“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:**

**In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. .... Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.**

**25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years.”**

8. The meaning of the latter holding by the Court of Appeal is that the sentence provided by Section 8 of the Sexual Offences Act is a discretionary maximum sentence. A sentencing court therefore has the discretion to impose a lesser sentence. The trial court and the High Court in the petitioner’s case imposed the maximum sentence of life imprisonment. The courts did not consider whether a lesser sentence other than the maximum sentence could be imposed. The petitioner is entitled to a review of his sentence on that basis.

9. The petitioner was a first offender. An age assessment report produced during the trial in 2012 indicated that the petitioner was at the time aged 21 years. He is therefore now aged about 28 years.

10. The petitioner defiled a child aged 6 years. The medical report produced at the time indicated that the child had developed hemorrhoid that necessitated surgical operation.

11. The offence committed by the petitioner was very serious. The sentence of life imprisonment is hereby set aside. I re-sentence the appellant to 30 years imprisonment.

**Delivered, dated and signed in open court at Kakamega this 18<sup>th</sup> day of July, 2019.**

**J. NJAGI**

**JUDGE**

**In the presence of:**

**Mr. Juma for state**

**Petitioner - present**

**Court Assistant - George**

**Right of appeal 14 days.**