



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 38 OF 2019

DANIEL OTIENO ORACHA.....PETITIONER

VERSUS

REPUBLIC (ODPP).....RESPONDENT

(Being a Petition for resentencing from Kisumu CA. CRA No. 324 of 2010 dated 23.7.2010 from original Siaya PMCR. Case No. 30 of 2007)

JUDGMENT

1. By a Constitutional Petition dated 14.8.2019 filed in Court on the same day, the Petitioner/Convict Daniel Otiemo Oracha seeks for resentencing by this Court.
2. He was convicted for the offence of defilement contrary to **Section 8(3) of the Sexual Offences Act vide Siaya PMCR. Case No. 30 of 2007**. He was sentenced to serve 21 years imprisonment.
3. He appealed vide Kisumu High Court Criminal Appeal Number 79 of 2008 which appeal was also dismissed.
4. He proceeded to the Court of Appeal vide CA.CR. A 324/2010 which appeal was also dismissed on 2.1.2011 leaving the Petitioner to serve the sentence imposed on him.
5. The Petitioner then filed Siaya H.C. Constitutional Petition No. 5 of 2010 seeking for reduction of sentence from 21 years to 20 years imprisonment. This Court struck out the said Petition because the Petitioner only disclosed to Court he had appealed to the High Court and not the Court of Appeal. The Court held that it could not review its own order on sentence as the Petitioner had not exhausted his right of appeal to the Court of Appeal hence the Court could not apply Supreme Court decision in the **Francis Muruatetu V. R SC Pet No 15 and 16 of 2015 decision**.
6. The Petitioner after losing out on 25.6.2019 in Petition 5 of 2018 filed this Petition through an advocate Mr. Ochanyo of Wakla and Company Advocates seeking for resentencing applying the principles laid down in the **Francis Karioko Muruatetu and Another V. R. [2017] eKLR**, wherein the Supreme Court outlawed mandatory death penalty for Murder. That holding has found its way in other cases. It is now widely applied in Robbery with Violence cases as well as in defilement cases where the **Sexual Offences Act** sets out Mandatory Minimum sentences.
7. **Section 8(3) of the Sexual Offences Act** 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.
8. The wordings in **Section 8(3) are different from those in Section 8(2) of the Act which provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction** be sentenced to imprisonment for life.
9. From the above provisions cited, it is clear to me that the sentence under **Section 8(3)** is not mandatory. It is discretionary. On the other hand, from the language used in **Section 8(2) of the Sexual Offences Act**, the sentence is Mandatory.
10. However, it would appear that most trial courts have applied the same yardstick in sentencing sexual offenders by stating that all sentences under the **Sexual Offences Act** are Mandatory Minimum. In my view, that is an erroneous interpretation of the law.
11. It is for that reason that the trial Court in this case stated that the only sentence that could be meted out on the appellant after convicting him under section 8(3) of the Act was not less than 20 years hence he meted out 21 years imprisonment.
12. The **Francis Karioko Muruatetu** decision has breathed life in several other cases including **William Okungu Kittiny v R. [2018]**

eKLR and quite recently in **Jared Koita Injiri v R [2019] eKLR** and **Evans Wanjala Wanyonyi v R [2019] eKLR**.

13. The Court of Appeal in the above cases held that there was discretion in meting out minimum sentences under the Sexual Offences Act and proceeded to reduce minimum prison Sentence meted out by trial Courts. The Court of Appeal however appreciated that the **Sexual Offences** are heinous offences that traumatize its victims.

14. In this case, the Petitioner has been in prison for 11 years from the time of his conviction by the trial Court on 16.6.2008. While in prison, he has learnt several life's skills including carpentry and joinery, Health Education, Tailoring and Theology from Discovery Bible School. Today, he has availed a recommendation letter form Prisons in-charge, Siaya G.K. Prisons Benjamin K. Boit Senior Superintendent of Prisons to demonstrate his good character and conduct and discipline and industry while in prison, urging this Court of consider the Petitioner for resentencing favourably.

15. This Court has also been visiting Siaya G.K. Prisons on a quarterly basis and has been shown by the prisons authorities some of the work done by the Petitioner by his own hands following the training that he has undergone while in prison.

16. His carpentry work is exemplary. I have considered his mitigation and the fact that the Petitioner has been in prison for 11 years and is remorseful and regrets the offence. He admits that he committed the offence due to drunkenness but that he cannot commit such offence again. Should he do so, the law that put him behind bars for 11 years is still alive. It will deal with him.

17. He ignorantly misled this Court in Petition 5 of 2018 that he had not filed an appeal before the Court of Appeal leading to that Petition being struck out to his disadvantage. He has apologized to the Court profusely which apology this Court accepts.

18. However, the Court is well aware that defilement is traumatizing to the victims who was 13 years old then in 2007.

19. In Petition 5 of 2018, the Petitioner stated;

In prison I have learnt that crime “sio poa” I will never repeat any crime I will never commit any crime.”

20. This Court holds the Petitioner to account for speaking those words in the open Court for all present to hear and know that crime **Sio Pooa**.”.. “Crime is not good at all.”

21. The victim of crime deserves justice too. The Petitioner has served more than half of the 21 years imprisonment. In my view, he has lost his liberty but gained in life's skills and losing liberty is not anything to celebrate about that is why he is before this Court all the time seeking to be free.

22. For the above reasons, I exercise discretion and resentence the Petitioner to serve twelve (12) years imprisonment to be calculated from the date when he was convicted on 16.6.2008.

23. Orders accordingly.

Dated, Signed and Delivered at Siaya This 20th day of November, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The Petitioner

Mr Ochanyo Advocate

CA: Brenda and Modestar