



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 197 OF 2018

NYAMAWI NDORO CHAKA..... PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged and convicted with the offence of defilement of a child contrary to Section 8 (1) as read together with Section 4 of the Sexual Offences Act No. 3 of 2006 in *Criminal Case No. 874 of 2013 Republic –Vs- Nyamawi Ndoro Chaka*. The Petitioner was sentenced to life in prison. The Petitioner appeal to High court and to the Court of Appeal were unsuccessful.

2. The Petitioner by this Petition now allege that the sentencing process was unfair and violated his right to a fair trial under Article 50 (2) of the Constitution. The Petitioner's case is that he was never given the right to offer his mitigation and that the imposition of mandatory life imprisonment is unlawful and unconstitutional and against the tenets of a fair trial. The Petitioner therefore seeks declarations and judgment as follows:-

- (a) A declaration that the Petitioner's fundamental rights under Article 27 (1) and 50 (2) of the Constitution were violated and infringed.
- (b) An order that his sentence be reviewed.
- (c) An order that the ultimate sentence be limited to the period already served by the Petitioner.
- (d) Any other order the court deems fit.

3. The Petitioner was opposed by the state, but in his submissions, Mr. Fedha for the State submitted that there are now adequate case law authoritatively stating that the imposition of mandatory life imprisonment as a sentence is unconstitutional. Mr. Fedha submitted that at the same time the offence for which the Petitioner was convicted is a very serious offence and if the court uphold the Petition then the Petition should be sentenced to sixty (60) years in prison.

The Determination

4. I have carefully considered the Petition and submissions of Petition. Section 8 (2) of the Sexual Offences Act No. 3 of 2006 provides mandatory life imprisonment for a person convicted of defilement of a child aged eleven years or less. The trial court under the said law has no other option but to pronounce the life sentence. This means that there is no purpose for, or need for mitigation. Even where the court listens to mitigation, there is no useful purpose to which the court can apply the said mitigation. It is this fact that irks the Petitioner who argues that the lack of mitigation amounts to an unfair trial contrary to Article 50 (2) of the Constitution.

5. Now however, the Supreme Court in *Francis Karioko Muruatetu & Another –Vs- Republic SCK Pet. No. 16 of 2015* held that mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and that the mandatory nature of deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and 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. The Petitioner herein avers that it does not matter whether the mandatory nature of the sentence relates to a murder charge or to any other charge. The Petitioner states that to restrict the Supreme Court aforesaid decision to murder cases only amounts to discrimination under Article 27. The Petitioner submitted that the mandatory nature of any sentence provision deprives the court of its jurisdiction to exercise discretion and that this also applies to his case.

6. Guided by the aforesaid Supreme Court decision, the Court of Appeal in *CHRISTOPHER OCHIENG –VS- REPUBLIC (2018) EKLK KISUMU CRIMINAL APPEAL NO. 202 OF 2011* stated as follows:-

“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 –Vs- 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.”

7. Apply the decisions in the Muruatetu case and being bound by the ***Christopher Ochieng case*** (Supra), this court is satisfied that the mandatory nature of sentence herein of life imprisonment meted out against the Petitioner is unconstitutional and cannot stand and is hereby reversed and set aside. In place thereof this court, being convinced of the gravity of the offence for which the Petitioner was convicted, and being conscious of the need to properly punish the same, herewith sentence the Petitioner to serve a period of thirty five (35) years in prison with effect from the date of arrest.

Right of appeal in fourteen (14) days.

Dated, Signed and Delivered at Mombasa this 11th day of November, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Fedha for DPP

Petitioner in person

Mr. Kaunda Court Assistant