



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 46 OF 2018

DOMINIC KATANA MWENI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original conviction and sentence in Mariakani Criminal Case No. 50 of 2015 as presided over by Hon. L. K. Gatheru (RM) at Mariakani Law Courts dated 14th August 2015)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

RULING

The petitioner was tried and convicted of the offence of Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act. Upon conviction he was sentenced to a mandatory minimum sentence of 10 years imprisonment to Section 11 (1) of the Act.

Being aggrieved with the conviction and sentence, the petitioner preferred an appeal to the High Court. Again on appeal the court dismissed the appeal confirming the trial court Judgment on both conviction and sentence.

The factual background

From the evidence of the complainant on 26.10.2014 while at home playing, the petitioner came through her and called her aside. She acknowledged that they agreed to meet at an incomplete construction site away from home. The initial request the petitioner made, is to send her to the shops. For purpose of executing his intention the complainant told the court that the petitioner asked her to give in to Sexual Act but she declined.

According to the complainant, the petitioner forcibly removed her innerwear and using his hand caressed the private parts. In the circumstances what ensued one **Ali Juma** who testified as PW3 appeared and found them standing at the scene. Turning around and noticing **PW3** the petitioner took flight from the scene.

In that regard the complainant and **PW3** went home where they reported to her mother (**PW1**) **FB**.

Consequently, PW1 also reported the matter to **Rabai Police Station** where the complainant was issued with a P3 Form as stated by **PW4 – Corporal Simon Mureithi**. In accordance with the medical examination the prosecution adduced undisturbed evidence revealed that the hymen was intact and there were no lacerations to the genitalia.

The appellant denied the charge and raised the question of a conflict he had with the (PW1), the mother to the complainant on a relationship which were sour. That the evidence as a whole was a revenge mission by the complainant's mother to destroy his marriage.

Analysis

Turning to the issue at hand the question is whether the mandatory minimum sentence violates Article 27 of the Constitution because it imposes a cruel and punitive sentence which is discriminatory.

In Kenya, the recent body of case Law since the decision by the Supreme Court in **Francis Karioko Muruatetu v R [2017] eKLR** is the robust dynamism of constitutional jurisprudence in the enforcement of fundamental rights and freedoms in the bill of rights. Under that rubric of rights includes, the right to life under Article 26, Freedom and security of the person in Article 28, Fair trial rights under Article 50, right to equality in Article 27 and right to human dignity in Article 27 all of the constitution.

One of the significant consequences of the **Muruatetu case (supra)** was for courts to retain the residual power to exercise discretion in sentencing the offenders convicted of murder. The principle in **Muruatetu case (supra)** was that the automatic imposition of the death penalty upon conclusion of a trial was in itself cruel and inhumane treatment form of punishment.

The probable striking predominant principle in **Muruatetu** on record is its application to the other mandatory punishment like robbery with violence contrary to Section 296 (2) of the Penal Code and defilement offence contrary to Section 8 (2) of the Sexual Offence Act on mandatory life imprisonment. Though the framework by the Supreme Court determined the mandatory nature of death sentence to be unconstitutional, it did not translate to regard all minimum sentences as unconstitutional.

In my view therefore, despite guidance from the Supreme Court in the **Muruatetu Case** it's clear that under the doctrine of separation of powers parliament retains the constitutional mandate to legislate on conduct considered criminal and the appropriate sentence.

The question I pause therefore is whether the fixed minimum sentence of 10 years for an Indecent Act of a minor is disproportionate to the offence preferred against the petitioner.

In one of the leading cases in Canada on this question of the role of parliament and policy making function the court in **R v Guiller 1985 48 CR 3 D (226)** the court stated as follows:

“It is not the court to pass on the wisdom of parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final Judgment as to whether a punishment exceeds constitutional limits set by the charter is properly a judicial function. The court should be reluctant to interfere with the considered views of parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.”

I am of the view from the above extract that the court should exercise caution to exercise that jurisdiction which seeks the delineation of the role of parliament as a legislative organ of the constitution.

Suffice in to say that the law recognizes that not all mandatory minimum sentences can be impugned to a level of unconstitutionality.

In the interpretation of any law touching on mandatory minimum sentence the guiding principle among others would be the proportionality test. The question that will be posed in the circumstances of this case is whether the sentence of 10 years imprisonment was proportionate to the offence of indecent act against a minor aged 7 years.

The petitioner in his affidavit has not demonstrated that parliament in prescribing the minimum sentence for this offence was in violation of the principle of separating of powers.

In the case of **Hinds v The Queen [1977] AC 196** the court stated:

“The power conferred upon the parliament to make laws for the peace order and good governance of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent an impartial court established by Law. The comparing out of the punishment where it involves a deprivation of personal liberty is a function of the executive power, and subject to any restrictions imposed by law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. In the exercise of its legislative power parliament may, if it thinks fit prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offences as for example capital punishment for a crime of murder, or it may prescribe a range of punishments upto a maximum severity either with or as is more common, without minimum leaving it to the court by which the individual is tried to determine what punishment. Falling within the range prescribed by parliament is appropriate in the particular circumstances of the case.

Thus parliament in the exercise of its legislative power may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender, a custodial sentence. The length of which reflects the Judges own assessment of gravity if the offenders induce in the particular circumstance of this case.”

Whether the petition raises a constitutional matter to warrant this court as of right to declare the minimum sentence of 10 years unconstitutional has not met the test under the premise of the constitution. The specific provision identified by the petitioner on sentence governs punishment for all offenders convicted of indecent act against a minor.

There is no residual power for this court to exercise discretion pursuant to Articles 19 (3), 23 (1), 27 of the constitution to re-sentence the petitioner. Both the trial court and the High Court seeking an appeal lawfully the jurisdiction and a term imprisonment of 10 years is not unconstitutional.

In my opinion, the contention raised by the petitioner under Article 50 (6) of the Constitution is not well founded. The constitutionality of the statute is not in issue, it is a presumption in Law that every provision including the one authorizing minimum sentences and the procedure

of executing or equally valid and legal seeks the remedy under Article 50 (6) is not available to the petitioner unless new and compelling evidence has been appropriately presented to the Court.

Therefore, contrary to the petitioner contention there is no infringement of the fundamental rights in a manner prescribed by the constitution.

The contention of the petitioner even under Article 50 (6) of the Constitution. Facts on sufficient degree of clarity and certainty to enable this court consider the sentence for review or release as contemplated in the petition. It follows that the petition must fail and is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE