



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 96 OF 2017

RKPETITIONER

VERSUS

REPUBLICDIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The petitioner herein was convicted, in Butali PMCCRC No. of 937 of 2010, of incest, contrary to section 20(1) of the Sexual Offences Act, No. 3 of 2006, and sentenced to life imprisonment. The victim of the sexual assault was aged twelve (12) years at the time of the offence. The petitioner filed an appeal at the High Court, Kakamega HCCRA No. 35 of 2012, where the conviction was affirmed and the sentence upheld. He moved on to the Court of Appeal, in Kisumu CACRA No. 97 of 2014. The Court of Appeal, in a decision rendered on 21st September 2016, dismissed his appeal.

2. He did not give up. He initiated the instant petition on 28th September 2017, arguing that his constitutional rights were violated. I have gone through the petition and the affidavits sworn in support of it. To my mind the issues raised are similar to those raised before the High Court and the Court of Appeal. The petitioner is no doubt seeking a second bite at the cherry. He is beating the trodden path. If there were any obvious violations of the Constitution, no doubt they would have been picked by the judicial officers who handled his case at all three levels that it passed through. There is, therefore, nothing for me to consider here with regard to the issues raised, since they have been dealt with, particularly by the Court of Appeal.

3. The only thing that I may give some attention to is the sentence. There are recent developments in the Kenyan jurisprudence with respect to mandatory sentences. The Court of Appeal and the Supreme Court have led the way in that regard. See *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR and *Dismas Wafula Kilwake vs. R.* [2018] eKLR.

4. The offence in respect of which the petitioner was convicted is incest, which is defined in section 20 of the Sexual Offences Act in the following terms:

“20. Incest by male persons

(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

5. The offence can be committed with respect to both adults and children. Where incest is between adults, the penalty for it is a minimum of ten years imprisonment. Where the victim is a minor, the upper ceiling is life imprisonment. The sentence is mandatory with regard to the lower ceiling. That being the case, the matter before me would be available for re-sentencing.

6. Upon conviction, the petitioner did not express remorse. He merely said that he had children who were dependent on him. His spirited attempts to get the higher courts to reverse the determination of the trial court, much as it is his constitutional right, is also telling. When this matter was placed before me, I called for a re-sentencing report. The probation office filed one on 26th September 2019, of even date. It is unfavourable to the petitioner. It indicates that his community is still hostile to him and would not like to have him back, his security may, therefore, not be guaranteed.

7. The victim of the petitioner's crime was his own daughter, a child of tender years, the abuse began when she was just ten (10) years old. Fathers are supposed to be protectors of their own daughters, not their tormentors. Children trust their parents to care for and protect them. Failure to provide care and protection is a serious breach of trust. Abuse of children by their parents is a scar that never heals. What the petitioner did to his daughter has tarred her life forever. The only objective that sentence can serve in such circumstances is both retributive and deterrence, to make the petitioner pay for his misdeeds to his own child and for his breach of the divine responsibility to care and protect her. It would also give him a chance to reflect on his life and to come to terms with the folly of his ways.

8. It could be argued that it is unusual that a normal adult person, such as the petitioner, could prey on his own daughter, as young as ten years. The very fact, perhaps, suggests that there could be something congenitally wrong with the petitioner, so wrong that it cannot be cured by imprisonment. That may be so. However, no material was placed before the trial court or the appellate courts or before me, for the purpose of the instant petition, designed to demonstrate that the petitioner was labouring under some impulse of a sort that he had no control over, and that he needed to be handled with a lot more of compassion than condemnation.

9. The stiff penalties prescribed in the Sexual Offences Act are designed to offer protection to defenceless children. That is most critical with regard to incest, for the home is meant to be the safe haven for the child, under the care and protection her father. To be preyed on by the principal caregiver and protector is a worst form of breach of trust. Yet, much of sexual abuse of minors happens under family cover, it is the worst form of it, on account of the breach of trust and the fact that it is often covered up. It should attract the stiffest of the penalties.

10. In the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, I shall quash the sentence of life imprisonment that was imposed on the petitioner by the trial court, and confirmed by the two appellate courts. I shall substitute that sentence with one of forty (40) years imprisonment, to run from the date of conviction on 20th February 2012. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE