REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CR. APPLICATION NO. E074 OF 2021

JOHNSON OMOLLO SOLO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Having been convicted for the offence of **Defilement**, the Applicant was sentenced to 20 Years imprisonment.

1. He has invoked the Constitution, and submitted that the mandatory sentence of 20 years imprisonment was unconstitutional.

2. He also submitted that the said sentence was harsh and excessive. That contention is founded upon the assertion that the trial court failed to give any consideration to the mitigation.

3. The Applicant was of the view that the court's failure to consider his mitigation rendered the trial unfair.

4. He therefore urged this Court to set aside the sentence, and to substitute it with a more appropriate punishment.

5. He told this Court that he was a first offender who was very remorseful. He therefore pleaded with this Court to give him a second chance in life, by enabling him to re-unite with his family.

6. He said that he had been married to 2 wives, and that they had 6 children.

7. However, after he was imprisoned, one of his wives went away, leaving his children helpless.

8. He looked forward to an opportunity to provide for his family and his elderly mother.

9. Whilst he was in custody, the Applicant had undergone training in several courses, and he exhibited the certificates which he had earned.

10. I was invited to correct the mistakes which had been made by the trial court: And the best way which the Applicant suggested, was the reduction of the sentence.

11. I note that after he had been convicted, the Applicant lodged an appeal at the High Court, at Migori. He confirmed that Mrima J. dismissed the appeal, and upheld the sentence of 20 years imprisonment.

12. As I am a Judge of the High Court, I hold a jurisdiction which is at par with that of my learned brother, Mrima J.

13. Following the judgment on appeal, by which the learned Judge upheld the sentence, I hold the considered opinion that the Applicant's request, (that I correct the mistake, by reducing the sentence), constitutes an appeal over the decision of a Judge whose jurisdiction is similar to mine.

14. No Judge of the High Court has any jurisdiction to sit on an appeal over a decision made by another Judge of the High Court.

15. I also find that, in principle, the courses undertaken by an inmate, after conviction, cannot alter an otherwise lawful sentence, to one which was either harsh or excessive.

16. Furthermore, when the family of the convict was undergoing suffering because the convict was serving a sentence of imprisonment, he should appreciate that he was the author of his said family's misfortune.

17. I further note from the Judgment which Mrima J. delivered on 26th July 2019 that;

> ***"The record is however clear that the court did not give the sentence because it was the minimum sentence in law.***
>
> ***The court stated that it had considered the mitigation by the Appellant; that the***
>
> ***Appellant was a first offender; the relationship between the complainant and the Appellant, which placed the Appellant in a position of trust, among many other factors as required under the Sentencing Guideliness."***

18. In the effect, the learned Judge had already held that the trial court cannot be faulted on the basis of the allegation that it handed down the sentence of 20 years imprisonment because it was the prescribed minimum sentence.

19. In the result, the application for a reduction of the sentence is dismissed.

20. Nonetheless, pursuant to the requirement of **Section 333 (2)** of the **Criminal Procedure Code**, I direct the Prison authorities to take into account the **29 days** which the Applicant spent in custody, whilst he was still undergoing trial; he should be given credit for the said days when calculating the actual period which he is supposed to serve the sentence.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 29TH DAY OF MARCH 2022

FRED A. OCHIENG

JUDGE