



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NO. 149 OF 2019

IN THE MATTER OF SENTENCE REVIEW/NON CUSTODIAL SENTENCE UNDER ARTICLES 22(1) 23(1) 25 159(1)160(1) 165(3) (B) OF THE CONSTITUTION OF KENYA , SECTION 39 OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006 AND SECTION 333 (2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

GEOFFREY KIPKORIR RONO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant **GEOFFREY KIPKORIR RONO** was charged, tried and convicted of **Defilement c/s 8 (1) as Read with 8 (2) of the Sexual Offences Act**. He was sentenced to life imprisonment in Nakuru Chief Magistrate's Criminal Case Number 2 of 2018. It is his position that he filed High Court Criminal Appeal Number 76 of 2018 but was not successful. That he also filed an appeal in the Court of Appeal which he sought to withdraw in order to pursue this application, a Notice of Motion seeking a sentence review to a non-custodial sentence under the auspices of the **Francis Karioko Muruatetu** Case.

In the supporting affidavit sworn on the 5th March 2020, he deponed that he had not exhausted all his appeals, something he claimed in his oral submissions was a typing error. He also deponed that the reason for his application was that the life sentence was too harsh and excessive and went against the holding in the **Muruatetu** case where the Supreme Court held that the mandatory nature of the death sentence was unconstitutional. That he was also not accorded a fair trial *'from the trial court to the last court of appeal thus contravening Article 50(2) (q) of the Constitution'*

At the hearing of the application he submitted orally that he was indeed charged with defilement and sentenced to life imprisonment in 2008, and retried in 2011. And again sentenced to life imprisonment. That he was young, twenty (20) year old man, drunk at the time of committing the offence. Now he was thirty (33) years old, was remorseful and sought forgiveness. That he had sought ways to improve his life while in prison by taking several courses, and acquiring useful skills e.g. mechanic grades 3 and 2. That he was a first offender, and just needed the forgiveness of the court. Further that his parents died when he was young and his siblings had scattered and given the opportunity he would bring them together. More importantly that the court would have given him the chance to go out there and have a family of his own and have even one child only.

The application was opposed by the state through the Prosecuting Counsel Ms. Wambui on the ground that the applicant had filed an appeal and the High Court had upheld the life imprisonment. That that court was of the same jurisdiction as this court and therefore, that the appropriate forum for a sentence rehearing was the court that first heard the case and sentenced the applicant. That the only available option for him was his appeal.

I have carefully considered the application, the appellant's submissions and authorities cited **Guyo Jarso Guyo vs R Petition No. 6 of 2018 at Maralal**, and the **Muruatetu** case. I have also considered the submissions by the state.

I do agree with the applicant that a sentence that is meted out simply because it is the only sentence without the consideration of the circumstances cannot be a fair sentence, and worse still when it is a life imprisonment sentence.

The applicant has not exhausted all his appeals. He still has a chance at the Court of Appeal where the issues he raises here would be dealt with there.

This is because in my humble view the applicable authority to Sexual Offences is the **Dismas Wafula Kilwake vs R [2018] eKLR** in which the Court of Appeal stated:

“Here at home in a judgment rendered on 14th December 2017 in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the Sexual Offences Act, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. The Court expressed itself thus:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.” (Emphasis added)

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing. Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. **In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.(emphasis mine)** On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

In PAUL MWANGI MACHARIA vs R NAKURU CRIMINAL MISCELLANEOUS APPLICATION NUMBER 60 OF 2020 I held the view that in sexual offences the application of Muruatetu would come at the sentencing stage and no provision was made by the Court of Appeal for sentence rehearing. I still hold that view that I can only interfere with a sentence while dealing with an appeal on sentence.

On the other hand the Supreme Court did state in Muruatetu that the appropriate forum for sentence rehearing was the court that first heard the case and sentenced the applicant. Clearly this is not the forum for this application.

The application is therefore not merited and is disallowed. The applicant ought to pursue the issue at the Court of Appeal.

Dated this 9th January, 2021.

Mumbua T. Matheka

Judge

Signed and Delivered Virtually this 13th day of January, 2021.

In the presence of:

Court Assistant: Martin

Court Prosecutor: Ms Malimu

Applicant: Present