THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KNYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO E056 OF 2020

JOHN MAINA MUTHONI.....APPLICANT

VERSUS

REPUBLIC OF KENYA..... RESPONDENT

RULING

1. The Applicant filed the subject application herein being a notice of motion dated 14th October 2020, premised on the provisions of; Article 50(2) of the Constitution of Kenya 2010 and Sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

2. The Applicant is seeking for orders that:

a) The Hon. Court be pleased to review the sentence meted upon him vide Criminal Case No; SO 145 of 2017;

b) The Honourable Court finds it prudent to review the custodial sentence from seven (7) years to a non-custodial sentence and do consider the duration in remand;

3. The application is supported by the affidavit of the Applicant in which he deposes that; he was convicted of the offence of; defilement contrary to, section 8(1) as read together with section 8(3) of Sex Offence Act; No. 3 of 2016 and prior to sentencing, he was in remand for a duration of three (3) years.

4. The Applicant further avers that; he is a family man married to one wife with two (2) children who are school going. He is thus the bread winner of the family and his siblings. That, due to the incarceration, he has lost his job which has impacted negatively on his family's financial status.

5. However, the Respondent opposed the application by orally submitting that, the Applicant was convicted of the offence of defilement which is serious which carries maximum sentence of twenty (20) years, yet he was sentenced to seven (7) years imprisonment, therefore, the sentence should be enhanced accordingly. Further, the period in custody was taken into account, before sentencing.

6. I have considered the application in the light of the arguments advanced. However, for better understanding of the matter, I shall briefly set out the factual background of the matter. In a nutshell, the Applicant was arrested on 5th October 2017, and arraigned in court on 10th October 2017, charged with the offence of; defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 and alternative charge of; committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of each count are as per the charge sheet.

7. He pleaded not guilty to both counts and was released on personal bond of; Kshs 300,000 with one surety of similar amount. Subsequently, he sought to be released on free bond. The court then ordered for a pre-bail report which was provided. Pursuant thereto, a ruling was delivered on 10th October 2018, whereby the court reduced the bond to; Kshs 100,000 with one surety of similar amount.

8. Subsequently, the case proceeded to hearing wherein the complainant a minor aged 13 years testified that she was sent to buy vegetables, from the Applicant's "Kibanda" and requested him to cut for her the vegetables. That, the Applicant told her that, since he had many clients, she should wait. She obliged and waited inside the Kibanda. That after all the clients left, the Applicant went to check, if there was anyone outside the Kibanda, and returned and closed the door. The complainant asked him what he wanted and he answered the complainant "nimfanyie sex".

9. That, the complainant flatly refused the advances and attempted to flee but the Applicant pushed her back, put her on something like a mattress, removed her clothes and put his penis into her vagina. He then threatened to stab her with a knife if she screamed. Thereafter, he

gave her the vegetables and Kshs. 50 and opened the door for her to leave.

10. The complainant stated that, this particular incident of 17th August, 2016 was the first and the second was on 1st October, 2017, when the Applicant called her and said he wanted to have sex with her but she refused. The complainant later informed her parents about the incident and was taken for treatment. She was examined by; PW 3 Dr. Maundu on 5th October, 2017 and a clinical officer from MSF. Both produced the respective medical reports. The matter was reported to the police and the Applicant was arrested and charged.

11. However, the accused denied the offence and told the court that, the mother of the complainant wanted to have a love affair with him and he refused. She then planted the charges on him and later demanded a lot of money from him. He refused to pay and he was arrested and charged. He denied committing the offence and told the court that he doesn't know the complainant.

12. The trial court evaluated the evidence and found that, the prosecution had proved the case beyond reasonable doubt and convicted the Applicant. I note that before the trial court sentenced the Applicant, it ordered for the pre-sentencing report but was not availed due to Covid- 19 challenges. The court noted and considered that, the Applicant was in custody for a period of two (2) years, eleven (11) months and twenty (20) days and he was a first offender and sentenced him to serve seven (7) years in prison.

13. However, the Applicant still prays that the period he was in custody be considered, the sentence be revised accordingly or be converted to a non-custodial sentence. The power of the court to revise a sentence passed by the lower court is provided for under section 364 of the Criminal Procedure Code, as follows: -

> *(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*
>
> > *(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*
> >
> > *(b) In the case of any other order other than an order of acquittal, alter or reverse the order.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*
>
> *Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned".*

14. The Applicant was convicted of the offence of; defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act, No. 3 of 2006. The victim was aged 13 years. The sentence provided for the offence is stated as follows:

> *"A person who commits an offence of defilement with a child between the age of, twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."*

15. As such based on the aforesaid, the Applicant should have been sentenced to a minimum of; twenty (20) years. In fact, the Respondent has sought that, the sentence be enhanced accordingly. However, it suffices to note that, on **14th December, 2017**, *the Supreme Court of Kenya in;* ***Francis Karioko Muruatetu & Another v Republic (2017) eKLR,*** *held that; the mandatory nature of the death sentence as provided for under; section 204 of the Penal Code (cap 63) Laws of Kenya, is unconstitutional.* The court stated that: -

> *"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 the accused persons under Article 25 of the Constitution; an absolute right."*

16. The courts have applied the principles in Muruatetu's case to sexual offences and imposed sentences below the minimum sentences provided for under the law. In the case of; *Dismas Wafula Kilwake v R (2018) Eklr*, the Court of Appeal stated as follows; -

> *"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court (In* ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015****), 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. 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".*

17. Similarly, in the case of; *Christopher Ochieng v Republic (2018) eKLR* the Court of Appeal stated that:

> *"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. Bearing this in mind, the Appellant was provided an opportunity to mitigate in the trial court where he stated that he is a sole bread winner, and was taking care of his two children, as well as his late brother's wife and three children, he craved for leniency. However, the converse is also true, the Appellant has committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions have demonstrated that around him, young and vulnerable children could be in jeopardy.*
>
> *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 imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."*

18. It suffices to note that, t**he Applicant was sentenced on; 1st October, 2020 after the decision in the Muruatetu's case. Therefore, the sentence meted of; seven (7) years imprisonment is legal and/or lawful. Therefore, the Respondent's plea for enhancement of sentence fails. Even then there is no formal application for the same.**

19. Be that as it were, I find as aforesaid, the trial court considered the period the Applicant was in custody before sentencing him. From the record, the Applicant was arrested on the 5th October, 2017 and arraigned in court in 10th October, 2017. He was released on a bond of; Kshs. 300,000 with one surety of a similar amount but he was unable to meet the bail terms. On 11th October, 2018, he requested for revision of bail terms and it was revised to Kshs. 100,000, with one surety without any option for a cash bail. However, he stayed in custody until the date of sentencing. That period is well calculated by the trial court. I therefore, find no merit in the argument that, the same period be reconsidered.

20. Further, the grounds the Applicant is relying on herein are a replica mitigating factors he offered to the trial court and was considered. Finally, the offence the Applicant was convicted of, is serious by all means and nature. The sentences provided for it, speaks to that. Therefore, the plea for non-custodial sentence lacks seriousness and is not tenable.

21. The upshot of the aforesaid is that; the application herein lacks merit and is dismissed. The Applicant shall serve the full sentence meted upon him.

22. It is so ordered.

Dated, delivered and signed on this 24th day of February, 2021, virtually.

GRACE L. NZIOKA

JUDGE

In the presence of;

Applicant in person

Mr Chege for the Respondent/State

Yusuf Kandoro – Court Assistant