



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 27 OF 2019

IN THE MATTER OF: ARTICLES 48, 50, 51 OF THE CONSTITUTION OF KENYA AND SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTISE AND PROCEDURE RULES 2013).

IN THE MATTER OF: THE JUDICIAL SERVICE ACT 2011 (SENTENCING POLICY GUIDELINES 2016), ARTICLES 23, 25, and OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF: FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC PETITION NUMBER 15 OF 2015

IN THE MATTER OF: RESENTENCING OF DAVID KIPKOECH MUTAI.

BETWEEN

DAVID MUTAI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The petition emanates from the Judgment of **Hon. P.N. KYAMBIA (Principal Magistrate)** wherein the petitioner was charged and convicted on three counts of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act. He was sentenced to **serve 15 years imprisonment**. Being dissatisfied with the trial court's judgment, he appealed to the High court via **Eldoret High Court Criminal Appeal No. 136 of 2013**. His appeal at the high court was heard and the court established that there was overwhelming evidence against him to sustain the conviction. His appeal was therefore dismissed. The petitioner then filed his second appeal via **Kisumu Criminal Appeal No. 109 of 2017**. His second appeal was heard and on **28th June, 2019** the court delivered its Judgment by dismissing the appeal against both the conviction and sentence.

On **12/11/2020**, the Petitioner filed the instant petition seeking for the following orders;

1.spent
2. THAT the Petitioner/Applicant herein, serving a jail term of **15 Years at Eldoret G.K Prison** having been found guilty of the offence of defilement contrary to **Section 8(4)** of the **Sexual Offences Act**, be resentenced.
3. THAT the Petitioner/Applicant's current sentence be reduced to the period/term already served.
4. THAT the Petitioner/Applicant herein be admitted to probation and/or non-custodial sentence for the aforesaid offence.
5. THAT costs of this Application be provided for.
6. Any other order that this court deems fit.

The application is anchored on the provisions of **Articles 23, 25, 48, 50, 51 And 165 (3A) Of the Constitution of Kenya And Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms Of The Individual (High Court Practice And Procedure Rules (2013) and The Judicial Service Act 2011 (Sentencing Policy Guidelines 2016).**

When the application came up for directions before the Judge virtually on **19/11/2020**, it was agreed that the application be canvassed by way of written submissions. **Ms. Limo counsel** who was appearing for the state indicated that they won't file submissions in respect of the application but shall instead leave it to the discretion of the court to decide on the application. The applicant through his counsel filed his submissions on **23/12/2020**.

THE PETITIONER /APPLICANT'S SUBMISSIONS

Counsel for the Petitioner, Mr. Towett in his submissions has come up with two issues for determination as follows; -

- 1. Whether this Honourable Court has discretionary powers in resentencing.**
- 2. Whether the applicant's petition is meritorious.**

On whether **this Honourable court has discretionary powers in sentencing**, Counsel relied on the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where the supreme court stated that the mandatory **nature of death penalty as stipulated under Section 204 of the penal** code denies the Court its legitimate jurisdiction to exercise its discretion in sentencing. That still on the same issue, the honourable Court in **Dismas wafula Kilwake CA NO. 129 of 2014** extended the reasoning in the above cited case(**petition no. 15 of 2015**) to apply to Sexual Offences Act by stating that the mandatory sentences provided under the Sexual Offences Act **under Section 8 of the Act** must be interpreted in a way that does not take away the discretion of the Court in sentencing. It was thus stated;

"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....."

His submission is 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 and that those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. That 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.

He further submitted that the court cannot be constrained by **Section 8 of the Act** to impose the provided sentences if the circumstances do not demand it. That 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, given the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

He submitted that the **Sentencing Policy Guidelines require the court**, in sentencing an offender to take into account both aggravating and mitigating factors and that the aggravating factors include **use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. That among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.**

He cited the case of **Morris Mukhebi Muhanya v Republic (2020) eKLR** where the court referred to **Muruatetu's case** and exercised its judicial discretion in re-sentencing the Appellant while noting:

".....I would, in the circumstances of this case, exercise judicial discretion and re-sentence the appellant to a prison term equivalent to the period already served in prison and warn him that the law and the society at large wholly abhor sex predators....."

That Article **165 (3)(a)** of the Constitution gives the High Court Unlimited Original Jurisdiction in Criminal matters. He cited the court's decision in **Marsabit Criminal Petition No. 6 of 2018; Guyo Jarso Guyo v Republic [2018] eKLR** where the court stated;

"...The unlimited original jurisdiction in criminal matters of the High Court should not be limited by statutory provisions which calls upon the Judge to impose a specific sentence. In that case, the unlimited jurisdiction becomes a limited one in relation to sentencing. The jurisdiction of the High Court under Article 165 (3)(a) in relation to criminal matters includes the power to pass a sentence which the Court deem as appropriate given the circumstance of the case..."

He invited the court to be guided by the above authorities in re-sentencing the applicant.

As to whether the Applicant's petition is meritorious. Counsel submitted that he has been rehabilitated and has since acquired skills during his stay in the prison.

That his decision to approach this court through a re-sentencing petition resonated from the decision of justice **H.A. Omondi in Eldoret Criminal Appeal No. 104 of 2012 Emmanuel Kibet Lagat vs. Republic** where she stated;

".....would under the circumstances direct that the appellant files a petition for re-sentencing so as to capture correct facts such as period spent, whether there has been any change within the time he has been in rehabilitation, reports from prison, and

any other life changing skill acquired.

That the petitioner during his stay in prison has positively benefited from the courses offered inside the facility and that in his petition he has annexed various certificates to confirm the same. That the petitioner as a ***National Trade Test Certificate in Carpentry and Joinery issued by the National Industrial Training Authority, Certificate in New Behavior, Certificate in Gospel Faith Messenger Ministries, Certificate in Alcohol and Drug Abuse Prevention and Treatment, and Certificate in resources Oriented Development Initiatives.***

That the Petitioner is currently offering ***voluntary teaching in school-based services at the Eldoret C.R. Prison learning Centre where he has risen to the rank of Deputy Head Teacher.*** Due to his zeal and positive output he has shown at the Eldoret G.K Prison, the officer in charge at the said facility has written a recommendation letter indicating how the petitioner has positively impacted on the welfare of his fellow inmates.

He submitted that the petitioner acknowledges the fact that it is not right for someone who has offended the society to go scot free and escape with trivial sentence, but also contends that the same person should not at the same time be penalized beyond what his misdeeds merit.

That Courts in Kenya have severally highlighted several positive aspects that come along with prison sentences.

He cited the case of ***Dahir Hussein Vs Republic CA NO. 1 OF 2015 eKLR*** where the High Court noted that the objectives of prison sentences include: ***deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done on the victim.***

He also cited the ***Judiciary of Kenya Sentencing Policy Guidelines of 2016 at page 15, paragraph 4.1.*** where the importance of sentencing has been highlighted and that as far as rehabilitation is concerned, the Petitioner through the skills acquired as annexed in his supporting affidavit has achieved that objective.

That the petitioner has also expressed his remorse and that given a second chance, he will be an upright, productive and law-abiding citizen.

On this he relied on the case of ***Elisha Oloo Oyugi V Republic (2019) eKLR*** where while re-sentencing the Petitioner, the Court of Appeal took into account his remorsefulness as well as rehabilitation and noted.

“.....The Appellant has served 9 years. He has expressed remorse and has been rehabilitated. I resentence him to 10 years from when he was convicted...

That the petitioner with a view of reforming his character and/or behavior and getting rehabilitated has equipped himself with skills that will benefit himself as well as the society and that the officer in charge at the Eldoret Main Prison wrote him a recommendation letter, vouching for his good conduct.

That in his petition he has vowed that he's ready to turn a new leaf and start a new life in Bomet County using the skills he has acquired in prison.

He cited the ***Muruatetu case at Paragraph 71***, where the ***Supreme Court set down the mitigating factors that are applicable in a re-sentence hearing.***

He concluded by submitting that The Petitioner is remorseful for his action(s) and has learnt from his mistake(s). That he has taken imprisonment positively and has also taken full advantage of the opportunities available in prison to not only reform his character and/or behavior but to also gain skills which will help him impact the society positively.

He also relied on a judgment by ***Hon Rachel Ng'etich J.*** through a Judgment read by ***Hon. Omondi J*** in the case of ***John Chidia Lwaina vs Republic CA 29 of 2020*** where it was held as follows; -

“....I have also considered the fact that the appellant took imprisonment positively and took advantage of opportunities available in prison to reform and gain skills which will help him impact on the society positively. I have considered his age. In my view, the appellant will be more beneficial to his family and society while out of prison. I note that the appellant has already served 6 years imprisonment. He has served two-thirds of the sentence- From his submissions and certificates availed to Court, there is no doubt that he has reformed. I am of the view that the period he has served in prison is sufficient'.

He then urged the Court in view of the foregoing, to re-sentence the Petitioner to the time already served in prison.

ANALYSIS AND DETERMINATION

The major issue for determination in this case is whether the petitioner applicant is entitled to a re-sentencing having gone to the Court of appeal and lost on the appeal.

Petitioner lodged an appeal via ***ELDORET HIGH COURT CRIMINAL APPEAL NO. 136 OF 2013*** which by a judgment delivered on ***29th October 2015***, the court upheld the conviction and sentence of ***Hon. F. N Kyambia (Principal Magistrate).***

The Petitioner /Applicant subsequently appealed to the Court of Appeal via ***KISUMU CRIMINAL APPEAL NO. 109 of 2017*** which via a

judgment dated **28th June, 2019** similarly the court upheld the conviction and the sentence.

In the instant application, the applicant has petitioned this Honourable Court seeking for re-sentencing to the number of years that he has served in jail. He states that he has since reformed and he is now a better person. He has based his petition on the principles set out in **Muruatetu's** case.

It is trite law that even an appellate Court cannot interfere with the sentencing Court's discretion unless it is established that there was real error on application of the sentencing principles. It would therefore be ridiculous for the High Court to interfere with a settled upon sentence by the trial Court, High Court and Court of appeal.

Though the High Court has unlimited original jurisdiction in Criminal and Civil matters under Article 165(3)(a) of the Constitution, holding it that it encompasses revisiting issues dealt with by the same Court and a step higher by the Court of Appeal, is equivalent to according the High Court cosmic jurisdiction of which it doesn't have. Litigation just like everything else bad or good, has an end. The end point in this one was at the Court of Appeal, but probably there's a slight vent to the supreme Court.

Having observed the foregoing, I do find that this Court lacks jurisdiction to re-sentence the petitioner as urged. The petition therefore lacks merit and is hereby dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 18th day of March, 2021

In the presence of:-

Adv. Towett for the petitioner

Ms. Limo for state

Gladys - Court assistant