REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HIGH COURT PETITION NO 143 OF 2019

GEORGE NJAHI WANJIRU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. GEORGE NJAHI WANJIRU (The petitioner) was convicted the offence of defilement contrary to **section 8(1)** as read with section **8(2) of the Sexual Offences Act no. 3 of 2006 in Eldoret CMCRC No. 6271 of 2014** delivered on 11th December 2014. He was sentenced to life imprisonment and he then appealed to the High Court in **Eldoret Criminal Appeal No 173 of 2015**, and the life sentence was confirmed. He then filed an appeal before the Court of appeal in **CA No 175 of 2017**, and the conviction was upheld, but the sentence was set aside and substituted with 20 years imprisonment. The petitioner filed the present petition seeking a review of his sentence.

2. The evidence was that the petitioner defiled an 8-year-old girl named MA*, who was his neighbour. The petition is premised on grounds that he is a first offender who has never been involved in any criminal activities. He submits that he has spent time in prison for a substantive period and has learnt a lot from his incarceration. He further submits that the sentence meted out was too harsh being that he was young and a first offender. He cites the case of **John Gitonga alias Kados v Rep – Meru High Court in Petition No. 53 of 2018** in support of his submissions.

3. Drawing from the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic SC Petition No. 16 of 2015 (2017) eKLR** and the Court of Appeal in **Jared Koita Injiri v Republic KSM CA Criminal Appeal No. 93 of 2014 (2019) eKLR** which held that mandatory minimum sentences were not tenable under the Constitution, he urges this court to exercise its discretion and impose an appropriate sentence based on circumstances of the case. Following this jurisprudence, he asks the court to consider a lesser sentence considering the circumstances surrounding his case.

4. He cites the cases of **Michael Kathewa Laichena & Another vs Republic (2018) eKLR** on sentencing guidelines and the case of **Moses Kitui Barasa vs Republic – Eld HC Petition No. 7 of 2018** and submits that if the mitigating factors in sentencing guidelines apply to the mandatory death sentence they apply to minimum sentences in the **Sexual Offences Act No.3 of 2006**.

5. He is repentant and remorseful and he has reformed. He is an ordained servant of God serving in his ministry as a pastor and the inmate community protestant church treasures. He has acquired various treasures through the rehabilitation programmes offered within the prisons institution. He has secured various spiritual certificates, diplomas and vocational skills which include Government trade test motor vehicle mechanic grade III and motor vehicle electrician grade III. He contends that he is a completely transformed person and grant him a second chance in life. He relies on the cases of **Ben Pikiech Loyatum v Republic – Eld. HC Petition No, 24 of 2019, Raphael Mutunga Mutinda v Republic (2019) eKLR and Samuel Nyongesa v Republic Eld Cr. Appeal No. 32 of 2019.**

6. He submits that the court has original jurisdiction powers of discretion under section **354 of the Criminal Procedure Code and on reliance on article 23(1), 159(2) a & b, 165(3) a, b & d (6) (7) and 258(1) of the Constitution of Kenya 2010** to deal with matters of this nature.

The petitioner cites the case of **Dismas Wafula Kilwake vs Republic** [2019] eKLR and submits that the court be pleased to allow his petition forthwith and reduce his sentence by the period of time spent under pre-trial custody as under section **333(2) of the CPC**.

ISSUES FOR DETERMINATION

1. Whether the Petitioners sentence should be reviewed.

WHETHER THE PETITIONERS' SENTENCE SHOULD BE REVIEWED

7. I note that the petitioner was sentenced in 2017, he appealed in 2017 and the appeal was determined in 2019.

In **BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, the Court of Appeal has considered the constitutionality of mandatory minimum sentences under the Act. The court adopted what was held by the Supreme Court in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

8. It is settled that the mandatory minimum sentence is unconstitutional and the court is bound to re-examine sentences in view of the position of the legislature takes the position that the offence of defilement is serious and there has to be a good reason to depart from the sentence prescribed. The same was reiterated in **Mohamed Sarah Noor v Republic [2019] eKLR.**

9. In **Dismas Wafula Kilwake vs Republic [2019] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act as follow:

> ***"[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.***
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> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. 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. 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."***

10. The court is required to pay attention to individual aspects if the case while sentencing even for convictions under the sexual offences act which have prescribed minimum sentences. The court can still impose a different sentence where there are compelling reasons to do so.

The petitioner's appeal was already heard and determined. The appellate court reduced his sentence to 20 years. I find no merits in his arguments for a further reduction in sentence. I further stand guided by the decision of Hon. Joel Ngugi in **John Kagunda Kariuki v Republic [2019] eKLR** where he held that;

> **9. To reiterate, only prisoners who had been sentenced to death pursuant to mandatory provisions of the law are entitled to new sentence hearings. For all others, they are entitled to urge the new decisional law in their appeals in a bid to get lower sentences and no more. They cannot bring new applications for re-sentencing.**
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> **10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.**

11. The High Court already heard his arguments for a reduced sentence and made a determination on the same.

In **Wanjema vs Republic (1971) EA 493 the court held;**

> **An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.**

Section 333(2) of the Criminal Procedure Code provides;

> **Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

12. I note that the Court of Appeal reducing the sentence actually drew from the case of **Dismas Wafula Kilwake** (supra) and there is nothing else that would require reconsideration. Indeed, this is an attempt to have two bites at the cherry. I hold that the petition lacks merit and is dismissed.

Virtually Delivered this 17th day of March 2021 at Eldoret

H. A. OMONDI

JUDGE