REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

MISCELLANEOUS CRIMINAL APPLICATION NO. 40 OF 2020

JKR..APPLICANT

-VERSUS-

REPUBLIC...RESPONDENT

JUDGMENT

1. The applicant was charged and convicted for the offence of defilement of a child aged ten years. He was sentenced to life imprisonment on 13th February, 2017. He was aged 52 years at the time.

2. The particulars were that the accused on the 19th day of October 2015, at [Particulars Withheld] village Murungaru location in Kinangop within Nyandarua County, intentionally caused his penis to penetrate the vagina of EW a child aged 10 years.

3. In the appeal in the High Court in HCCRA No. 8 of 2017, the applicant was unsuccessful as shown in the judgment rendered on 13 th May, 2019. However, the issue of appropriateness of sentence or procedure never arose there, and was not dealt with in the High Court.

4. In his application for re-sentencing he says that he has spent 6 years in custody; he urges that the mandatory nature of the life sentence handed to him was inappropriate. He asks the Court to review the sentence under its original jurisdiction under **Article 165** of the **Constitution** and also in line with the principles established by the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic [207] eKLR**.

5. The applicant cites various authorities in which the courts reviewed sentences including:

a) **Haron Kipkemboi Kiprotich v Republic [2020] eKLR** where the Petitioner's life sentence was set aside and replaced with a sentence of twenty (20) years.

b) **Guy Jarso Guyo v Republic [2018] eKLR** where Odunga J substituted a life sentence with one of 15 years.

c) **Johana Lwebe Muyugo v Republic [2019] eKLR** where the Court of Appeal reduced a life sentence to a sentence of 25 years.

d) A list of other cases disclosing mandatory sentences substituted with lesser terms.

6. The applicant goes on to argue that under the **Sentencing Policy Guidelines 2016** the principles of consistency, transparency and fairness in sentencing ought to be promoted. He cited **Michael Kathewa Laichena & Another v. Republic [2018] eKLR**.

7. In addition the applicant cited **Dismas Wafula Kilwake v Republic [2018] eKLR** where the Court of Appeal extended the **Muruatetu** principles to the serious offences with mandatory minimum sentences under the Sexual Offences Act.

8. The applicant also cites **Dennis Kibaara v Republic [2019] eKLR** where the High Court at Chuka substituted the appellant's sentence of 20 years with one of five (5) years. In that case, of course, the appellant was 19 years old and the defiled victim was a girl whose age the appellant may have mistaken, but the court found she was a willing partner, though not an adult.

9. The applicant did not file any mitigation submissions.

10. The Court ordered Kenya Prisons Service Report on the applicant as well as a Probation Officers Report.

11. The brief Prison Report states that the applicant is well disciplined and has undergone rehabilitation programs, but does not indicate the nature of the programmes and how they have impacted the applicant. The report concludes that:

> ***"The inmate is reformed and ready to re-integrated back to society for his well-being he will require a counsellor and a role mode to motivate him to live all active and happy life. We propose that he may be considered. "***

The report does not lay any substantial basis for the recommendation.

12. The Probation Officer's Report gives the applicants family background, personal circumstances, circumstances of the offence, prison rehabilitation. In brief circumstances the report states:

> ***"The appellant had some domestic quarrels with his family. The appellant alleges that his wife filed false allegations that he defiled her daughter who in this case was a step daughter to him. Though he was charged and convicted with the offence of defilement the appellant still denies having committed the offence."***

13. Under Attitude of the appellant towards the offence and sentence the Report states:

> ***"The appellant held that his wife (now separated) had a conspiracy to make him rot in jail by advancing false and grave allegations against him. The family had domestic misunderstandings then.***
>
> ***Hence he stated that he is suffering in jail for no apparent reason; the court to be kind to release him. He is now at the age of 55."***

14. Similarly, in the family's and community's view section, the applicant's family blames the applicant's wife and aunts for the case, asserting that it arose from a family quarrel. The applicant's wife was not reached.

15. There are no views of the community expressed in the report. In addition, the victim's statement was unavailable as efforts to reach the victim were fruitless.

16. In the conclusion of the Report, the Probation Officer indicates that the applicant's family appeals for his release on account of the three (3) years he has served in prison and notes underlying domestic problems. In its recommendation, it states:

> ***"In view of his age we propose to the honorable court to consider reviewing his sentence to Probation Order Supervision for a maximum period of 3 years. From assessment, he is not a flight risk. Our department shall assist him resettle back in the community."***

17. The state opposes the sentence review. The DPP submits that the lower court's determination was upheld on appeal. It is pointed out that the applicant was living with complainant, aged 10 years, as a boyfriend to her mother. As such he was a father figure to her, and instead defiled her as found by the courts. The DPP asked the Court to take into account the following matters following the **Muruatetu** decision:

> ***"i). This was gender based violence offence.***
>
> ***ii) Applicant was subsequently given a chance to mitigate and the same was considered by the trial Magistrate. The trial court also considered his age, and the fact that he was entrusted to take care of the minor.***
>
> ***iii) After consideration of the above the trial magistrate proceeded to sentence him to life imprisonment. It is our humble submission that that this sentence is appropriate for the offence. The applicant is neither remorseful (even at the lower court), nor has he shown this court that he takes responsibility for his action and how he is reformed. This goes to possibility of reform and social i.e. adaptation of offender and remorsefulness.***
>
> ***iv) It would therefore not be in the interest of the victim or the community to interfere with the sentence imposed on the applicant.***
>
> ***v) The trial magistrate did not impose the life sentence because it was mandatory but because the circumstances of the offence dictated the same. Therefore the court was executing full discretion in sentencing the applicant."***

18. I have carefully considered the application and all the information availed. I note that there has been no mitigation by the applicant himself speaking of his circumstances. His written submissions appear more like an appeal against sentence. His sentiments expressed through the Probation Officer's Report blame others for his actions, or blame conspiracy. The victims and the community have not been heard because they were apparently untraceable. Read together with his submissions, they exude a sense of anger.

19. The only truly compelling ground for review of sentence, my view was that of the applicant's age: that he is 52 years old.

20. I have perused the record of the trial court and it is apt to place on record how the mitigation proceedings were conducted:

"Mitigation : I suffer from ulcers. My mother is very old and I take care of her.

My wife ran away and there is no one at home….

Court : How old are you?

Accused : I am 52 years old.

Court : The accused person is 52 years old man. From the evidence he was the man entrusted with the welfare of the complainant who was for all intents and purpose, a father figure to the complainant. He turned on her and defiled her. His mitigation noted. Therefore, accused person is hereby sentenced to serve life imprisonment."

21. Looking at the mitigation in the lower court, I do not think that the trial magistrate can be accused of not conducting a proper mitigation hearing. He went as far as asking pertinent questions to enable him to better understand the accused's situation.

22. I have anxiously organized over the course of action I should take in this review. The aggravating factors appear to me to overweigh the mitigating factors. In the circumstances, I decline to review the sentence in terms of the Probation Officer's Recommendation at this time. This will enable the applicant to heal and rehabilitate further, to pre-empt retribution on his part as against those he blames for his woes.

23. The orders I think are appropriate, though, include to issue a determinate sentence as I consider an indeterminate sentence to be unfair and inappropriate.

24. Accordingly, the applicant's life sentence is reviewed and substituted with a sentence of twenty (20) years with effect from the date of incarceration.

Administrative directions

25. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

26. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

27. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 29TH DAY OF APRIL, 2021.

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. JKR - Applicant present in Naivasha Maximum Prison

3. Court Assistant – Quinter Ogutu