



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 20 OF 2018**

**SUSAN WANJIKU KAMAU.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The applicant was charged in the lower court together with one Mary Wanjiku Muigai with the offence of administering a substance with intent to stupefy contrary to **Section 27 (1) (a)** of the **Penal Code** as read with **Section 27 (3)** of the **Sexual Offences Act**. The particulars were that on 20<sup>th</sup> September 2014 at [particulars withheld] Estate, she caused a concoction of alcoholic drink to be drunk by MWK with intent to stupefy her so as to enable James Ndungu Kariuki to have sexual intercourse with the said MWK.
2. It may be noted that their co-accused James Ndungu Kariuki was charged with defilement of the said MWK and committing an indecent act.
3. The lower court file CMCRC (S.O.) No. 26 of 2014 could not be traced for more complete records. A skeleton file was opened pursuant to a break-in at the courts. The Occurrence Book report of the break in is number OB 18/28/12/2016. The report indicates that the original file in this matter was one of the files missing. Investigations so far are inconclusive.
4. The three accused had sought to file an appeal in Nakuru but the absence of the file hindered any progress on that option.
5. According to the applicant, and from the scanty documents in the skeleton file, she was convicted and sentenced to ten (10) years imprisonment on 15<sup>th</sup> September 2015. The skeleton file also shows that at one stage she (as third Accused) jumped bail so it is clear that she was not incarcerated continuously from the time of arrest.
6. This court made numerous unsuccessful efforts to trace the lower court file from 2<sup>nd</sup> July, 2018 up to the time of hearing the application in December 2020. Following the applicant's withdrawal of the proposed appeal and her request to proceed with re-sentencing, the court ordered the matter to proceed as application for review of sentence.
7. Accordingly, the court ordered reports to be filed by the Probation Officer and the Kenya Prisons Service and that the Applicant do file mitigation submissions. These were filed respectively on 5<sup>th</sup> February 2020, 11<sup>th</sup> November 2020 and 14<sup>th</sup> January 2021.
8. In her submission the applicant seeks to serve the remaining period of her sentence on probation. Her personal statement on the crime is as follows:

***“i) Your Honour, after a thorough soul searching and reflection on the facts adduced during trial, the applicant takes full and personal responsibility for the crime as charged. The applicant has undergone punishment repercussions and felt the effects of the offence over the 6 years 4 months.***

***ii) It is her profound regret and apology for having taken part in the commission of the crime in question.***

***iii) She is remorseful and greatly repentant for the inconveniences incurred by the victim of the crime, to the society and fellow Kenyans for creating a sense of insecurity.***

***iv) That 6 years and 4 months in custody has served the purpose of sentencing as it has given her an opportunity to transform her entire life.”***

9. She offers her mitigation stating: that she was a single mother of one (now deceased), and negative peer pressure drove her to acquire life's necessities; that she was naive and lacked wisdom and innovation to make ends meet; that she has maintained a good record and would pose no danger to society; that nothing justifies the commission of the crime or as an excuse to escape punishment.

10. She prays for opportunity for a second chance and states that she has undergone substantive rehabilitation with total behavioural change; that she understands that the innocent should be set free while the guilty ought to be punished. She sets out the various programmes she has attended in prison and the skills she has acquired.

11. The Prisons Report attaches a host of testimonial certificates of courses she has successfully attended. The Report shows she was 25 years old at conviction, and has served one year in remand and 4 years of her sentence term as at 5<sup>th</sup> February, 2020. She has at the date hereof thus served 5 years of her term and 1 year in pre-sentence custody.

12. Further the Report indicates that the applicant is well disciplined, has no problem following instructions or obeying and respecting officers; that she is regularly visited by her family members, the last visit being 19<sup>th</sup> January, 2020. In its conclusion the report states:

***“She is remorseful and regrets to what the offence has cost her while in prison. She has spent the time in prison very well in learning courses that are very beneficial to her life later outside the prison. She hopes to utilize the skills she has acquired here to provide for herself and her son.***

***She can be a good citizen if given the opportunity outside the prison and we can say that she has been rehabilitated.”***

13. The Probation Officers Report gives her background information including the fact that she was a single mother of a three year old who recently died. She had been an alcoholic and engaged with bad company which influenced her negatively.

14. The probation officer interviewed the family, found out that they keep regular contact with the applicant, and reported that she was wounded psychologically by the death of her only son. The community believes she has reformed after 5 years in prison, and she has no other criminal records with the community.

15. The victim's mother was contacted, and the victim family have forgiven the applicant. She and the victim are cousins. The victim was 17 years old at the time and moved on and is now a married woman with two children. The victim's family have no objection to the release of the applicant.

16. The Probation report concludes:

***“The appellant appeals for her release on account of the years served; and that she has fully transformed her former behaviour to being a spiritual leader.***

***The court could also take note that the inmate has recently her only son Wyne Kamau (10) years after a short illness that was described as Meningitis after a postmortem was carried out. He was buried at Naivasha Cemetery on 24<sup>th</sup> October, 2020. The inmate was informed of his unfortunate incidence. From the welfare department, Women Prison, we got the information that she appeared traumatized and in disbelief. She is undergoing psychological counselling in the prison.***

***In view of the underlying circumstances, we propose to the honourable court to consider skewing her remaining sentence to a Probation Order Supervision for a period of 2 years. Our Department shall device and accord her necessary counsels as per the assessed needs.”***

17. I have taken the above reports into account. I have further considered objectives of Sentencing under Paragraph 4 of the **Sentencing Policy Guidelines, 2016**, which are as follows:

***“4.1 Sentences are imposed to meet the following objectives:***

***1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***

***2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.***

***3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.***

***4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.***

**5. Community protection: To protect the community by incapacitating the offender.**

**6. Denunciation: To communicate the community's condemnation of the criminal conduct.**

**4.2 These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality.”**

18. I am of the view that this is a proper case for review of the applicant's sentence in light of the information availed. In particular, I note that the applicant has served over half of her sentence, six of ten years; that she lost her only child, a boy aged 4 during her period of incarceration. Now at age 29, she has matured and appears to have learnt her lesson. The psychological wound of losing her son during incarceration may lead her to guilt trips about how she ought to have been present for her child. Counselling in prison has helped, but a more re-assuring home environment could help heal the wounds and restore her emotionally.

19. Taking all the foregoing into account, I think the apt orders to make as follows:

1. The applicant shall serve a one (1) year probation sentence with immediate effect under a probation program designed by the Probation Officer.
2. The applicant's attendance in the said programme shall be maintained through a record to be kept by the Probation Officer and be available to the court on demand.
3. Upon successful completion of the probation period the applicant shall be deemed to have served her full sentence.

**Administrative directions**

20. 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.

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

22. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 29<sup>th</sup> Day of April, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Susan Wanjiku Kamau - Applicant present in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu