



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

MISC. CRIMINAL APPLICATION NO. 35 OF 2019

(Being an appeal from the Judgment of CM’s Court at Kitui dated 5th April, 2019 in Sexual Offence No.104 of 2014, by Hon. R. Ombata-RM)

NK.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. NK, the applicant herein, was charged with the offence of incest by a male person contrary to **Section 20(1)** of the **Sexual Offence Act No. 3 of 2006** vide Kitui Chief Magistrate’s Court **Sexual Offence Case No. 104 of 2014**.

The particulars of the charge were that on 3rd of December, year 2014 at around 6pm at [Particulars Withheld] Village, Kalimani Location, Matinyani District within Kitui County, he defiled a girl (name withheld) aged three years who to his knowledge was his granddaughter.

2. The applicant, was found guilty after trial and was convicted and sentenced to serve ten years’ imprisonment.

3. The applicant has now approached this court with this application for re-sentencing asking this court to be lenient with him by reducing the sentence imposed.

4. He says that due to his age, he is unlikely to survive 10 years’ imprisonment particularly owing to the fact that he suffers from terminal ailment. He has however, not stated the nature of ailments afflicting him.

5. The Applicant further adds that he has a family who are going to suffer due to his incarceration saying that he was their bread winner.

6. The Respondent through the Office of Director of Public Prosecution represented by Mamba the learned counsel from that office, has not opposed this application for the record. However, that notwithstanding this court has considered this application on its merit.

7. The applicant, as I have observed above was charged and convicted of incest by a male person contrary to **Section 20(1) of the Sexual Offence Act**. That section provides as follows: -

*“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece or aunt or grandmother, is guilty of an offence termed incest and is liable to imprisonment for a term of **less than ten years**”. (Emphasis added).*

The second part of the Section is even more telling in so far as this matter is concerned. It reads;

*“..... provided that, if it is alleged in the information or charge and proved that the female person **is under the age of 18 years, the accused shall be liable to imprisonment for life** and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.” (Emphasis added).*

8. This court called for the lower court file in respect to this application with a view to satisfying itself on the legality, correctness and

propriety of the sentence imposed by the trial court.

I have perused through the proceedings and this court is satisfied that the age of the minor/victim was ascertained by both the age assessment **(Exhibit 1)**, **P3 form (Exhibit 2)** to be 3 years of age. The conviction is not being challenged here what the applicant is asking this court to do, is to review his sentence albeit downwards. But the provisions of the law cited above demands that the sentence imposed should, as a matter of law and in accordance to **Section 362** and **364** of the **Criminal Procedure Code**, to be specific, should be revised and set aside on account of legality. The trial court imposed a minimum sentence of 10 years which is the minimum sentence prescribed by law in respect of incest against victims aged 18 years and above but in this instance, the victim was aged 3 years in age and **Section 20 (1)** prescribes a sentence of life imprisonment. The trial court certainly passed a sentence that is way below the lawful prescribed sentence which I find erroneous because the second part of **Section 20 (1) of Sexual Offence Act** may have escaped the mind or the attention of the trial court.

This court, looking at the facts and the law which I have alluded to above is left with no other option other than do what is right and what the law provides. The applicant for the record expressed no remorsefulness for his despicable act that he committed against his granddaughter. The physical scars and psychological impact he left on that child will probably remain with her for the rest of her life and it is for that very reason, that the law prescribes a deterrent sentence to discourage other would be sexual predators against minors. This court is surprised that the Respondent through the Office of Director of Public Prosecution did not view this matter in the right perspective.

9. The Applicant is complaining that the 10 years' imprisonment was too much but he certainly deserves more. The law prescribed life imprisonment but since he complains that he is an old man though he did not show any proof that he is 70 years of age but nevertheless, this court will exercise its discretion guided by the supreme court's decision in the celebrated case of **Francis Karioko Muruatetu (2017) eKLR**. The 10 years' sentence imposed by the lower court is hereby set aside and in its place the applicant is hereby sentenced to 20 years' imprisonment.

DATED, SIGNED AND DELIVERED AT KITUI THIS 20TH DAY OF APRIL, 2021.

HON. JUSTICE R. K. LIMO

JUDGE