REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC. CRIMINAL APPLICATION 4 OF 2020

(CORAM: F.M. GIKONYO J.)

Revision from Original Conviction/Sentence in Criminal Case No. 28 Of 2015

of the Chief Magistrate's Court at Narok and HCCRA 47 of 2017 at Narok

EMMANUEL OPENDA WAFULA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RE-SENTENCING

Resentencing

[1] The Applicant moved this court vide an application dated 23/12/2019 seeking for orders for a re-sentencing hearing.

[2] The applicant was convicted for the offence of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act no. 3 of 2006. He was sentenced to serve 15 years' imprisonment by Hon. W. Juma on 20/08/2016. He then **preferred an appeal** to the High Court in **Narok HCCRA 47 of 2017** in **which the sentence was upheld by Bwonwong'a J. The learned judge while dismissing the appeal stated that the sentence of 15 years' imprisonment is merited.**

[3] He has now applied for resentencing pursuant to the Supreme Court decision in the matter of ***Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR.***

[4] The Applicant's case is that the sentence meted on him is harsh and excessive considering the circumstances and recent developments of the law. He argued that the decision by the supreme court in ***Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR*** **removed the fetters put on magistrates and judges in making judgments and under Article 163(7) of the Constitution of Kenya 2010 this court has powers to order for resentencing hearing. In his oral submission the Applicant sought a reduction of sentence on the basis that, at the time of sentence the law did not allow for discretion in sentencing. He further averred that the developments in law are recent and were not available at the time of his appeal. He therefore did not appeal to the court appeal.**

[5] Ms. Koina, counsel for the respondent in her oral submission opposed the application and submitted that in ***Dismas Wafula Kilwake v Republic [2018] eKLR*** the court held that courts had discretion in sexual offences act cases. In ***John Kaguanda V Republic [2019] eKLR*** the court held that ***Dismas Wafula*** does not operate retrospectively as decision was based on was common law and therefore not all convicted persons will benefit from the decisional law. She continues to state that persons whose appeals were heard are not to reap the benefit of the said decision. In this case the appeal to the High court and a subsequent one to the court of appeal were both dismissed. The learned counsel insisted that the applicant does not have recourse before this court as the same will lead to ungovernable situation. She urged the court to reject the application.

ANAYSIS AND DETERMINATION

Nature of resentencing

[6] The application before me is for resentencing. Re-sentencing hearing is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding *inter alia,* are the penalty law, mitigating or aggravating factors, and the objects

of punishments. In re-sentencing **proceedings**, conviction is not in issue.

Issues

[7] I have considered the application, the relevant law herein as well as the submissions by the Applicant and the Respondent. From the arguments presented especially by the DPP, jurisdiction of the court to adjudicate this application has been questioned. Accordingly, I see two issues for determination to be: -

> ***1. Whether this court has jurisdiction in this matter.***
>
> ***2. Whether the applicant is entitled to the orders sought.***

JURISDICTION

[8] Jurisdiction is everything. Without it, the court cannot adjudicate over a matter. See the famous words of **Nyarangi, J.A**. in the case of ***The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1*** at page 14:

> ***"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

[9] And, according to the Supreme Court of Kenya in the case of ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011***:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…"***

Of Jurisdiction to redress denial or violation of right

[10] Of jurisdiction to redress denial or violation of a right, Article 23(1) of the Constitution provides: -

> ***'The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.'***

[11] Article 165(3)(b) of the Constitution provides that:

> Subject to clause (5), the High Court shall have—
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

Application of principle in Muruatetu

[12] The decisional law on Muruatetu brought about resentencing hearings. It opened up a Pandora's box. Cases of resentencing are now becoming the order of the day. Yet no strategic procedure was formulated to guide such hearings. Confusion may not be avoided and sometimes embarrassment may ensue. That notwithstanding, parties are seeking pursuant to the Supreme Court decisional law in Muruatetu case, redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights- right to appropriate sentence. The denial or violation of right consists in denial of discretion in sentencing by the mandatory nature of sentence preordained by statute regardless of the circumstances of the case. This principle has been applied to the mandatory minimum sentences under the SOA. In ***William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*** held that;

> ***The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases. [Emphasis mine]***

[13] See also ***Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*** and in ***Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014)***. In any case, provisions of existing law which provides for mandatory sentence should be put to the litmus test; the Constitution which requires under clause 7 of the ***Transitional and Consequential Provisions*** that: -

> ***All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.***

[14] In light thereof, this court has jurisdiction to determine this application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Minimum sentence

[15] In this case the applicant was charged under section 8(1) as read with section 8(4) of the ***Sexual Offences Act.*** The said provisions states:

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

[16] The applicant claims that the minimum sentence provided denied the trial court discretion to mete out appropriate sentence. Therefore, he seeks the sentence so imposed to be set aside for being inconsistent with the Constitution.

[17] Such sentences deny the court discretion to impose appropriate sentence. What however is appropriate sentence in this case?

Re-sentencing

[18] I have considered the sentence imposed on the Applicant by the trial court. There are certain considerations in sentencing. The penalty must fit the crime. The age of the offender is relevant. The objectives of punishment should be met. It is not right that someone who has offended society should go scot free, or escape with a trivial sentence. But at the same time he should not be penalized beyond what his misdeed befits. Punishment should also offer hope for rehabilitative.

[19] In passing the sentence the court will not lose sight of the pre-trial and during trial incarceration. The court is alive to the fact that prison life is not easy.

[20] I have carefully looked at the Petition, the oral submission on mitigation, and the aggravating circumstances in this matter.

[21] I have also considered the age of the child victim who was defiled. From the evidence on record, the Applicant told the girl that she was going to replace his wife. The minor slept with the applicant on 3/12/2014 and 31/12/2014 and it was also the evidence of the minor that her father told her that if she had decided to get married to the applicant then there was no problem as at that time she was staying with applicant as his wife. According to the facts of the case, the applicant lured the complainant into a "marriage" while she was in school. He was later discovered and prosecuted. The applicant knew that the complainant was a child and was still in school and he went ahead to "marry" her. This is the kind of conduct that the SOA was intended to punish. The sentences enacted in the SOA reflect a deliberate intention by the legislature to protect the rights of the child and to emphasize the seriousness of such violations of children.

[22] The age of the Appellant was not stated while that of the victim was proved to be 16 years. It came through the evidence of the prosecution witnesses that the Applicant and the victim lived in the same locality and were known to each other.

[23] In aggravation the applicant used an unfair advantage to secure and satisfy sexual desires on the minor. This Court considers that the offence was quite an egregious act on a child. In that respect there is need to protect children from sexual predators.

[24] There is no evidence of remorse by the Applicant.

[25] Needless to state that, in the law, the victim had no legal capacity to make a decision to engage in sexual intercourse sex or live with man or marry. Children cannot even cede away the protection granted by the law. Other than offending the law and the Constitution, defilement only steals the victim's innocence, sabotages their education and self-development, demeans self-esteem, and predispose them to early child marriage. I also do note that, the child marriage is notorious in many African societies. The practice is cruel and down-right violation of rights of girl child. It is time courts in exercise of delegated judicial authority by the society deal a deadly blow on the practice through deterrent sentence to perpetrators of the pernicious practice.

[26] Considering all the above circumstances, the justice of this case, therefore, suggests that the sentence of 15 years' imprisonment imposed herein was appropriate to the offence committed. Accordingly, I sentence him to 15 years' imprisonment.

[27] I should however consider Section 333(2) of the Criminal Procedure Code. The Applicant was out on bond during trial. Nonetheless, for the sake of fairness and the law, the sentence shall commence from the date of conviction that is; **20th May 2016**.

DATED AND DELIVERED AT NAROK THIS 19TH DAY OF APRIL 2021 THROUGH MICROSOFT TEAMS ONLINE APPLICATION

F. M. GIKONYO

JUDGE

In the presence of Court Assistant Mr. Kasaso, Ms. Torosi for the state, Mr. Kamwaro for the accused persons and DPP holding brief for Mr. Masikonde for Victims.

F. M. GIKONYO

JUDGE