REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

MISC CRIMINAL APPLICATION NO. 36 OF 2019

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence of Hon. W. N. Njage (P.M) in Narok PMCR No. 1144 of 2008 on 11th December, 2008 and HCCRA 13 of 2009 at Nakuru

JOHN SEJURA PATIM.....APPLICANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Resentencing

[1] The Applicant moved this court vide undated application filed on 27/08/2019 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 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life sentence by Hon. W. N. Njage on 11/12/2008. He then **preferred an appeal** to the High Court in **Nakuru HCCRA 13 of 2009** in which the conviction and sentence was upheld by Emukule J. on 11/03/2010. The learned judge while dismissing the appeal stated that the trial magistrate was absolutely correct in sentencing the appellant to life imprisonment. The applicant herein has indicated to this court that he filed a second appeal at the Court of Appeal; again, the appeal was dismissed on 21/12/2012.

[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] The applicant has implored this court to find that the sentence imposed on him was a statutory minimum mandatory sentence. That at the time of his trial the judge's hands were tied by the statutory provisions and his mitigation could not have changed the nature of the sentence prescribed.

[6] The applicant submitted further that while in the correctional facility he has embraced fully to the rehabilitative programmes offered and some of his achievements include carpentry, metal grade test iii, welding grade test iii and theological certificates. That now with the said skills he can be integrated back into the society and he will be of great importance.

[7] The applicant also argued that he is in his 30s and a first offender. He is remorseful. He therefore prays that this court be guided by Article 50(2) (p)(q) of the constitution in passing a lenient sentence on him.

[8] Ms. Koina, counsel for the respondent in her written submission opposed the application and submitted that in J**OHN KAGUNDA KARIUKI vs. R**[1] the applicant therein was tried and convicted to serve 20 years' imprisonment under section 8(2) of the sexual offences Act. Being dissatisfied with his conviction and sentence he appealed to the high court. His appeal was dismissed in its entirety. The conviction and sentence were affirmed. The applicant filed a fresh application in the high court seeking a review of his sentence. The application was grounded on muruatetu doctrine. 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 dismiss the application.

ANAYSIS AND DETERMINATION

Nature of resentencing

[9] 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

[10] 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

[11] Jurisdiction is everything. Without it, the court cannot adjudicate over a dispute before it. 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."***
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> [12] 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***:
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> ***"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

[13] Resentencing is aimed at ameliorating an injustice caused by mandatory sentences. It is brought as a redress of a denial of right. Of jurisdiction to redress a denial or violation of a right, under Article 23(1) of the Constitution: -

> ***'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.'***

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

> Subject to clause (5), the High Court shall have—
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> ***(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*

[15] 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 or less severe sentence. The denial or violation of right consists in the fact that mandatory sentences preordained by statute deny the accused benefit of court's discretion to impose appropriate or less severe sentence according to 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]***

[16] 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)***.

[17] 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

[18] In this case the applicant was charged under section 8(1) as read with section 8(2) 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.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***

[19] The applicant claims that the minimum sentence provided in law 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.

[20] Minimum sentences in Sexual Offences Act are indicative of the seriousness of the offence and society's strong disapproval of the criminal conduct or act that constitute sexual offence. Of particular emphasis is the nature and effects of defilement; the offence; (a) is committed against children who are vulnerable and in need of protection of the law and society; and (b) leaves an indelible life-long insidious injury on the child. My view is that it is possible to provide for minimum sentences in such legislative craft as a consideration and expression of aggravated circumstances. However, where the minimum sentence plainly deprives the court of discretion to impose appropriate sentence, such sentence is inconsistent with the Constitution. In this case, what is appropriate sentence?

Re-sentencing

[21] 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 that may be viewed as a slap on the hand. But at the same time, a person should not be penalized beyond what his misdeed befits. Punishment should also offer hope for rehabilitation of the offender.

[22] In passing the sentence the court will not lose sight of the pre-trial and during trial incarceration.

[23] I have carefully considered the application, the written submission on mitigation, and the aggravating circumstances in this matter.

[24] I have also considered the age of the child victim who was defiled. From the evidence on record, the Applicant lured the girl into his house and defiled her. The applicant pleaded in mitigation that he was sorry. He committed the offence because he was drunk. The applicant knew that the complainant was a child and he went ahead to defile her. This is the kind of conduct that the SOA was intended to punish. It bears repeating that, 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.

[25] The Appellant claims that he was in his 30s when he was convicted while that of the victim was stated to be of eleven or less years. The applicant has managed to utilize the time he has spent in custody to improve his skills.

[26] 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. In the law, the victim had no legal capacity to make a decision to engage in sexual intercourse. 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, and demeans self-esteem. It is time courts in exercise of delegated judicial authority by the society deal a with the perpetrators through deterrent sentence.

[27] Considering all the above circumstances, the justice of this case, therefore, suggests that the sentence of life imprisonment imposed herein may not give any opportunity for rehabilitation and re-integration of the accused back to the society. Therefore, a subtle balance of tension between the objective of deterrence and rehabilitation of offenders in this matter favours the setting aside of the life imprisonment which I hereby do, and in lieu thereof, I sentence the accused to 30 years' imprisonment. The sentence will commence from the date of initial conviction. Right of appeal 14 days.

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

F. M. GIKONYO

JUDGE

In the presence of:

1. The applicant

2. Ms. Torosi for the Republic

3. Mr. Kasaso CA

F. M. GIKONYO

JUDGE

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[1] **[2019] eKLR**