REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO 63 OF 2020

FOO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner herein was tried and convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act. He was sentenced to Life imprisonment.

2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court, **Kisumu Criminal Appeal No 52 of 2017** where on 28th February 2018, Majanja J upheld his conviction but set aside his sentence of life imprisonment and substituted it with a sentence of twenty (20) years imprisonment.

3. On 20th August 2020, he filed an application for review of the sentence. He relied on the case of **Francis Karioko Muruatetu & Another vs Republic, Petition No 15 of 2015**. In his affidavit in support of his said application, he stated that while in prison, he had undergone several rehabilitation and reformation programmes.

4. In his Written Submissions, he further explained that he had enrolled and fruitfully engaged in spiritual training and had acquired Diploma and Certificate in Bible Studies in various levels such as Association of Faith Church Ministries (AFCM), International School Ministries (ISOM), Prisoners Journey, Nuru Lutheran correspondence, Lamp and Light Bible correspondence courses, prison fellowship courses and Mindset Education where he had attained Diploma and Certificates. He added that currently he was a spiritual teacher, church elder, usher, interpreter and an evangelist at a church located within the prison facility.

5. He contended that he was a first offender and remorseful and that he was ready to resettle after his rehabilitation. He pointed out that he was arrested at the age of thirty two (32) years and was a family man therefore his children and siblings are overwhelmed with the responsibilities due to his incarceration and his health status has since deteriorated. He pointed out that he had been in incarceration for four (4) years.

6. The State opposed his Petition for review of sentence. It pointed out that although the Petitioner relies on the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra), the sentence provided for under Section 20(1) - proviso thereof, of the Sexual Offences Act was not a mandatory sentence but only the maximum sentence that a trial court can impose. In support of this point, it relied on the case of **M K vs Republic [2015] eKLR** and **Opoya vs Uganda (1967) EA 752.**

7. It asserted that the sentence of twenty years (20) years imprisonment was lawful, fair and commensurate to the offense in this instant case. It urged this court to uphold the same taking into account the period the Petitioner had spent in custody pursuant to Section 333(2) of the Criminal Procedure Code.

8. Reading the Judgement on Petitioner's Appeal delivered on 28th February 2018, this court rendered itself as follows:-

> **"The Appellant was sentenced to life imprisonment. Under Section 20(1) of the *Sexual Offences Act,* an accused is liable to life imprisonment if the victim is under the age of 18 years. In *MK v Republic* NRB CA Crim. App. No. 248 of 2014 [2015] eKLR, the Court of Appeal held, following *Opoya v Republic* [1967] EA 752, that the meaning of the word "liable to" in section 20(1) of the *Sexual Offences Act* means that the sentence is the maximum and not mandatory hence the court misdirected itself. Since there was penetration, I would impose the minimum mandatory sentence commensurate with the**

defilement of a child aged 13 years under section 8(3) of the *Sexual Offences Act* which is 20 years' imprisonment."

9. Having said so, this court noted that the Petitioner's application for review of sentence had already been dealt with on appeal and this court cannot therefore sit on appeal of its own decision.

10. Notably, the Petitioner was not sentenced to death thus rendering the case of **Francis Karioko Muruatetu and Another vs Republic** (Supra) irrelevant in the circumstances of the case.

11. In **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under Sexual Offences Act. It observed as follows:-

> **[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**

12. Having said so, on 6th July 2021, the Supreme Court clarified the import case of **Francis Karioko Muruatetu & Another vs Republic** (Supra). It gave the following guidelines:-

> **i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;**
>
> **ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;**
>
> **iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.**
>
> **iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.**
>
> **v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.**
>
> **vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.**
>
> **vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;**
>
> **a. Age of the offender;**
>
> **b. Being a first offender;**
>
> **c. Whether the offender pleaded guilty;**
>
> **d. Character and record of the offender;**
>
> **e. Commission of the offence in response to gender-based violence;**
>
> **f. The manner in which the offence was committed on the victim;**
>
> **g. The physical and psychological effect of the offence on the victim's family;**
>
> **h. Remorsefulness of the offender;**
>
> **i. The possibility of reform and social re-adaptation of the offender;**
>
> **j. Any other factor that the Court considers relevant.**
>
> **viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.**

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu.

13. In view of the fact that the Petitioner had been charged and convicted of the offence of incest and not murder, the issue of reviewing the sentence that was meted upon him as was set out in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra)did not arise herein and this court could not review the sentence of twenty (20) years that was imposed on him by Majanja J in place of the sentence of life imprisonment that was imposed by the Trial Court.

14. The fact that the Petitioner was remorseful and there was a letter dated 15th October 2020 and filed in court on 10th November 2020, the officer in charge Kisumu Maximum Security Prison vouching for his good conduct could not assist him in view of the guidelines that were issued by the Supreme Court on 6th July 2021.

15. Having said so, this court could still address its mind to Section 333 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) as in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR**, the Court of Appeal reiterated that where a convicted person had spent time in custody, that period had to be taken into account while computing his sentence.

DISPOSITION

16. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of the sentence that was filed on 20th August 2020 was partially successful. His prayer for review of the sentence was unmerited and the same be and is hereby dismissed.

17. However, his prayer that the court considers the provisions of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was merited and the same be and is hereby allowed.

18. Accordingly, the court upholds the conviction and sentence of the Petitioner for the offence of incest. The period that he spent in custody shall, however, be taken into account when computing his sentence in accordance with Section 333 (2) of the Criminal Procedure Code.

19. It is so ordered.

DATED and **Delivered** at **KISUMU** this **29th** day of **July 2021**.

J. KAMAU

JUDGE