

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR REV. NO. E002 OF 2020

PKNAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The applicant has come to this court through an application filed on 25/09/2020 asking the court to review his sentence under the provisions of section 333(2) of the Criminal Procedure Code (Cap. 75), which requires trial courts to take into account the period he was in custody during trial, in sentencing him. Secondly, the applicant seeks that this court finds the period of 11 years he has served in prison custody to be sufficient sentence.

2. The application was brought under Article 22, 258(2)(c) of the and 165(3)(d) of the Constitution, and is grounded on the reasoning in the case of **Francis Muruatetu & Another –vs- Attorney General – Supreme Court Petition 15 of 2015**.

3. The application has been opposed by the Director of Public Prosecutions through a replying affidavit sworn on 5th February 2021 by Ann Penny Gakumu the Senior Principal Prosecuting Counsel, in which it was deponed that the trial court and High Court, as well as the Court of Appeal considered all relevant factors regarding the sentence imposed, and thus the application herein is unmerited. In addition, it was deponed that the application did not fall within the ambit of the Muruatetu case reasoning which related to the mandatory death sentence only, not other sentences.

4. The application proceeded by way of filing written submissions. I have perused and considered the written submissions of both the applicant and the Director of Public Prosecutions.

5. In my view, this application is not merited. This is firstly, because it does not fall within the ambit of the Muruatetu case reasoning as the Muruatetu decision was premised on the constitutionality of the mandatory death sentence while this case relates to a minimum prison sentence. The section under which the applicant was charged was 20(1) of the Sexual Offences Act, which provides as follows –

20(1) Any male person who commits an indecent act or act which causes penetration with a female person whom to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 years.

Provided that: if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person 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.

6. Thus the sentence herein had a latitude from 10 years up to life imprisonment, and the court could impose any sentence within that range.

7. Secondly, all the three courts that is the trial court, the High Court and Court of Appeal considered all relevant factors regarding sentence before coming to the conclusion that the life sentence imposed was the appropriate sentence. In particular, the High Court stated as follows with regard to sentence -

“Appellant scared his eleven year old daughter for life and the only reason for the act was because he had quarreled with the child’s mother and in defiling the child he kept telling her that she will become his wife in place of her mother. Such a person deserves no mercy and is entitled to the maximum punishment allowed by law”.

8. I thus cannot be said that section 333(2) of the Criminal Procedure Code was ignored by the trial court, High Court and Court of Appeal.

9. In conclusion, I find no merits in the application and dismiss the same.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF SEPTEMBER 2021, IN OPEN COURT AT MAKUENI

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GEORGE DULU

JUDGE