



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HIGH COURT MISC. CRIMINAL APPLICATION NO. 41 OF 2019

MN.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant **MN** was charged and convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. Upon conviction he was sentenced to life imprisonment. This was by the Tawa acting Senior Resident Magistrate Hon. W.K Cheruiyot on 2nd July 2013 vide Tawa Criminal Case No. 31 of 2013.

2. He filed an appeal (*Machakos HCRA No. 141 of 2013*) against the judgment. The entire appeal was heard and dismissed on 3rd July 2014 by Hon. Lady Justice B. Thuranira Jaden.

3. The Applicant being dissatisfied, moved to the Court of Appeal by filing Criminal Appeal No. 39 of 2016. The same was heard and dismissed in its entirety on 10th February 2017, by JJA Kihara Kariuki, W. Karanja and H.M Okwengu.

4. The Applicant is now before this court for a rehearing on the sentence of life imprisonment meted out on him. The basis of this application is the case of **Francis Karioko Muruatetu & Anor –vs- R, Petition No. 15 of 2015**. He contends that he was given a mandatory sentence without any consideration by the trial court.

5. He has cited a number of cases where the Muruatetu decision has been applied namely:

- **Yawa Nyale –vs- R 2018 eKLR**

- **Daniel Otieno Yugi –vs- R Criminal Appeal No. 8 of 2015 (Machakos)**

- **Evans Wanjala Wanyonyi –vs- R (2019) Eklr**

6. The State opposes the application while relying on the replying affidavit of learned counsel Ann Penny M. Gakumu sworn on 8th May 2020. Counsel has averred that the application is an abuse of the court process. That the Muruatetu decision did not outlaw or make the mandatory sentences unconstitutional but imposes the court's discretion when meting out sentences.

7. It's her contention that the trial court exercised discretion while sentencing the Applicant as he heard the case. Further that there was no error occasioned while the matter was handled in the three previous courts.

8. I have considered all the arguments by both parties. One thing that is clear to me is that the **Francis Muruatetu** decision did not outlaw the mandatory minimum sentence. What it said was unconstitutional is the lack of exercise of discretion by the sentencing courts like was done in this case.

9. Section 20(1) of the Sexual Offences Act provides:

“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, aunt or grandmother is guilty of an offence

termed incest and is liable to imprisonment for a term of not less than ten 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 persons.”

10. The trial court therefore passed the sentence of life imprisonment without exercising any discretion. The final decision by the Court of Appeal was on 10th February 2017 while that of the Supreme Court in Muruatetu was on 14th December 2017 long after the Court of Appeal one. The Applicant is therefore right in seeking a relook at the circumstances and even mitigation preceding the sentencing.

11. I therefore allow the application for rehearing on sentence. I direct the file to be sent back to the SRM's court Tawa before the head of station for that purpose. The Applicant should be availed before the said court for the rehearing on sentence.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge