



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 144 OF 2019

PETER WAINAINA KINGARAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant Peter Wainaina King'ara was charged in Nakuru Chief Magistrate's Criminal Case Number 1115 of 2009 with **defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act**. He was found guilty, convicted and sentenced to life imprisonment.

2. He filed High Court Criminal Appeal Number 343 of 2017 against the conviction and sentence.

3. It had not been determined when he filed High Court Miscellaneous Application Number 144 of 2019 where through Notice of Motion filed on 28th August 2019 he seeks orders;

1. THAT this Hon. Court be pleased to determine my application for re-hearing of the sentence review imposed against me.
2. THAT it is within the rules of law for the same to be considered.
3. THAT this application is grounded upon me annexed affidavit of PETER WAINAINA KINGARA and other further ground to be adduced at the hearing of this application thereof.

It is supported by his affidavit sworn on 8th March 2020 where he depones;

1. THAT I am a Kenyan male adult of sound mind hence competent to make oath.
2. THAT I was charged with the offence of DEFILEMENT C/S 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve LIFE imprisonment.
3. THAT I humbly make this application in regard to the above mentioned articles in reliance of article 165(3) (b) of the Constitution which empowers this Honourable Court to handle application of this nature.
4. THAT I am the applicant who has NOT exhausted all appeals.
5. THAT the life sentence is too harsh and excessive in nature thus seek appropriate sentence.
6. THAT I the applicant herein was not accorded fair trial of sentencing from the trial court to the last court of appeal thus contravening article 50(2) (q) of the constitution while relying on the case of GUYO JARSO GUYO VS REP (PETITION NO. 6 OF 2018 AT MARALAL HIGH COURT) AND FRANCIS KARIOKO MURUATETU VS REP (SUPREME COURT PETITION NO. 15 OF 2015) that mandatory life sentence is excessive in the circumstances and too harsh thus seeking appropriate sentence.
7. THAT further grounds to be adduced at the hearing of this application.
8. THAT what I have deponed herein is true to the best of my knowledge, information and belief.

4. During hearing of the application, he made oral submissions to the effect that he was serving a life sentence and had already been in custody for nine (9) years, during which time he had improved himself by attending various trainings for which he had been certified. That he needed a second chance, and given which he would be the exemplary citizen. In line with the holding in **Francis Muruatetu**, he rendered his mitigation that he was a father, and his children risked falling out of school.

5. The application was opposed by the state through Ms. Wambui prosecuting counsel. That the applicant did not deserve the prayers sought because of the nature of the offence. First that the sentence was the lawful sentence, provided for the offence he had committed. Second, that the victims were two (2) children aged ten (10) years old. Third, that the manner in which the offences were committed, one was tied with a rope, the other was defiled twice. Fourth, that the applicant was a neighbour to the victims who trusted him yet he turned against them. Fifth, that the offence had psychological trauma on two (2) young children abused by the very person who was expected to protect them.

6. In response the applicant submitted that he was not in agreement with the prosecution's submissions, that indeed the charges against him were not true, that nothing like what the prosecution had said had actually happened. That the children simply repeated what they had been told to say. That nobody saw the offence being committed, that is that, there were no witnesses. That despite all these he was pleading for leniency.

7. The issue is whether the application has merit.

8. I have carefully considered the application before me, the submissions and the authorities cited, i.e. **Muruatetu & Guyo Jarso Guyo**.

9. In those two (2) cases the courts were dealing with the issue of the sentence meted against the accused.

10. In this case the applicant has raised issue with the conviction. He disputes the factual basis of his conviction in his submissions. To that extent the applicant ought to pursue his appeal.

11. Secondly, in **Guyo Jarso Guyo**, the petitioner had exhausted all his appeals, both to the High Court and Court of Appeal before filing the petition.

12. Regarding the sentence, in this case the applicant has not even pursued his appeal. In any event, it is my view that if the issue is re-sentencing, the Supreme Court in **Muruatetu** at Paragraph 111 stated:-

"It is prudent for the same court that heard this matter to consider and evaluate mitigating circumstances and evaluate the appropriate sentence befitting the sentence committed by the petitioners."

13. My reading of that guide is that the appropriate place for an application for re-sentence *per se* is the court that heard and tried the matter whose duty in re-sentencing is to "*consider and evaluate mitigating circumstances and evaluate the appropriate sentence befitting the sentence committed by the petitioners.*".

14. Nevertheless, for the applicant herein, he has not exhausted his appeals. It is my considered view that the issue of sentence would be best addressed in the appeal. It is therefore only prudent that he pursues his appeal and address the issue of his sentence within the appeal.

15. For now, the application for review of this life sentence to a non-custodial sentence is without merit and is dismissed.

Dated, delivered and signed at Nakuru this 3rd August 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state: Ms. Wambui

Applicant: Present