



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION 24 OF 2020

JULIUS MWANGI KAMAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The applicant Julius Mwangi Kamau was convicted and sentenced to imprisonment for life in Nakuru Chief Magistrate's Criminal Case Number 9 of 2009 for the offence of **Defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act**.
2. He has not filed an appeal but comes before me via his undated Notice of Motion seeking orders that this court be pleased to **review the sentence** imposed against him.
3. His application is premised **Article 165 (3) (b) of the Constitution** and the holding in Supreme Court Petition – **Francis Karioko Muruatetu v Republic [2017] eKLR**, where the court declared the mandatory nature of the death sentence to be unconstitutional, **Guyo Jarso Guyo v Republic [2018] eKLR** where Chitembwe J reviewed the sentence of life to one of 20 years imprisonment and the Court of Appeal decision in **Dismas Wafula Kilwake v Republic [2018] eKLR**, where the court determined that the principle in Muruatetu was applicable to the mandatory nature of sentences in the Sexual Offences Act, **Evans Wanjala Wanyonyi v Republic [2019] eKLR** where the Court of Appeal set aside the 'mandatory' 20 years' imprisonment imposed by the High Court on appeal.
4. In his supporting affidavit he deponed that the life sentence was too harsh in nature and substance and sought an appropriate sentence.
5. He also deponed that he had not been accorded fair trial in the sentence contrary to **Article 50(2) (g)** of the Constitution
6. During the hearing of the application the appellant submitted that he had been in prison for eleven (11) years had attained certain skills through trainings in prison, including literacy because when he was arrested he did not know how to read but had now acquired the said skill, that he had old parents, who needed his care, and that he had now reformed.
7. In opposition on behalf of the state, Ms Wambui opposed the petition;
 - ü That appellant had defiled a seven (7) year old child

ü That the child was traumatised

ü That the applicant had not expressed any remorse

8. In response the applicant submitted that he objected to the prosecution submissions because nothing was placed before the trial court to prove the charges of defilement.

9. That no evidence was placed before the trial court to prove that the child was defiled. That when he was arrested he knew nothing.

10. He urged this court to ignore and the prosecution's submissions.

11. The only issue here is whether the application is merited.

12. **Article 165 (3) (b) of the Constitution provides:**

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

(a) ...;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ...

(d)...

(e).....

Article 50(2) (q)

(2) Every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

13. The applicant appears to be saying that his right to a fair trial was violated by the nature of sentence meted to him by the learned trial magistrate. He wants this court to review the said sentence on that and other ground as set out herein above.

14. In the same breath the applicant is challenging both the conviction and sentence submitting that the conviction was not based on evidence, and that the sentence ought to be re-considered under **Muruatetu** principles.

15. My view is that if we are to apply **Muruatetu** Principles of sentence re-hearing then this court is the wrong forum. **See paragraph 111** of the **Muruatetu** case.

16. I find that the authorities cited are distinguishable. In **Guyo Jarso Guyo**, the petitioner had exhausted all his appeals, in **Dismas Wafula Kilwake** and **Evans Wanjala Wanyonyi** the court set aside the 'mandatory' sentences on appeal from the High Court. I do not find in these principles for sentence re-hearing in sexual offence matters. It appears to me that the Court of Appeal provided a basis for review of the sentences on appeal while at the same time opening the floor for trial courts to consider the circumstances of the offence at the initial trial stage, and to mete out the appropriate sentence.

17. The tenor of the applicant's submissions herein is a challenge of both the conviction and sentence. These cannot be addressed in the application before me as the applicant can only raise the two issues in an appeal.

18. In the foregoing circumstances the application is not tenable and the same is dismissed.

Dated Delivered and signed at Nakuru this 29TH September, 2020.

Mumbua T Matheka

Judge

29/09/2020

VIA ZOOM

Edna CA

Ms. Wambui for state

Applicant Present