



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MISC. CRIMINAL APPLICATION NO. 173 OF 2018.**

**DANIEL WANJALA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the sentence of the Honourable Senior Resident Magistrate Hon. M. Cheronno delivered on 6<sup>th</sup> of September 2016 in Kapsabet PM's Court Criminal Case No. 483 of 2016.)***

**RULING**

1. The Applicant filed a **Notice of Motion** dated 15<sup>th</sup> November 2017 seeking for resentencing. The appellant was charged with **defilement contrary to Section 8(1) and 8(3) of the Sexual Offences Act**, he was convicted and sentenced to serve 10 years imprisonment which was enhanced to 15 years imprisonment on appeal.

**APPLICANT'S SUBMISSION**

2. The applicant submits he was young when he was arrested, he was convicted and sentenced for the offence of defilement and has been in prison for 7 years where he has learnt and has certificates in upholstery, tailoring, masonry and theology. He submitted he be allowed to join the society as he has reformed as per his recommendation letter from prison. He prays to the Court to be lenient and give him non custodial sentence; allow him to serve the remaining part of his sentence under probation.

3. The applicant invokes **Section 39(2) of the Sexual Offences Act** which provides:-

**“Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.”**

4. The applicant in mitigation states he is remorseful for the offence, has repented and now he is a reformed person and a born again Christian having been ordained to serve God as a Pastor. He is a first born in a family of 8 children, he is an orphan and his young siblings depended on him.

**RESPONDENT'S SUBMISSIONS**

5. The Respondent through the state counsel submitted that the applicant was sentenced to 10 years and after an appeal it was enhanced to 15 years. The Applicant in his application relied on the case of **Francis Muruatetu**, he urges the Court to look at the circumstances of the offence and if the Court is inclined to reduce the sentence the Court can reduce it to the initial 10 years; that from the certificates and recommendations the Court can give the applicant a benefit of doubt and reduce his sentence to 10 years as the same is sufficient.

**ANALYSIS AND DETERMINATION**

6. The applicant's appeal is premised on the Supreme Court's decision in the **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. Where the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down **Section 204 of the Penal Code** to the extent that it prescribed mandatory death sentence upon conviction for murder. The reasoning in **Muruatetu** Case was also extended to sentences imposed by the **Sexual Offences Act** and possibly all other statutes prescribing minimum sentences.

7. The Court of Appeal, sitting in Kisumu, in the case of **Dismas Wafula Kilwake v R [2018] eKLR**, had the following to say about the mandatory minimum sentences prescribed in the **Sexual Offences Act**:

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.

Being so persuaded, we 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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

8. The Courts are required to pay attention to individual aspects of the case while sentencing even for convictions under the **Sexual Offences Act** which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

9. In the instant case the appellate court enhanced the sentenced to the minimum provided by statute. On looking at circumstances of this case, age of the child and the fact that the appellant has positively taken imprisonment and taken advantage of opportunities available in prison to improve himself, I am of the view that he should benefit from decision in **Muruatetu** case and have his sentence reduced. I am inclined to reduce sentence to 10 years.

10. **FINAL ORDERS**

1. Application is allowed.
2. Sentence reduced to 10 years imprisonment.
3. Sentence to run from date of sentence by the lower court.

**Ruling dated and signed at Nakuru this 28th day of October, 2020**

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**RACHEL NGETICH**

**JUDGE**

**Ruling dated, signed and delivered at Eldoret this 29th day of October, 2020**

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**HELLEN OMONDI**

**JUDGE**

**In the presence of:**

Komen - Court Assistant

Miss Okoth for State

Appellant in person