



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL MISCELLANEOUS NO 263 OF 2019

PETER MORU MERIKOLAPPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. PETER MORU MERIKOL (the applicant) was convicted on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act, and sentenced to serve life imprisonment. The incident which occurred on 16/10/2000 involved the appellant causing his penis to penetrate the vagina of VCM (a minor aged 7 years). He denied the offence, and prosecution called a total of seven witnesses to prove its case. He filed **HCCRA NO. 200 of 2010**, which was dismissed. He has now filed a notice of motion dated 19th December 2019, seeking re-hearing of the sentence imposed on him on grounds that the same was harsh and excessive.

In the affidavit in support of the application, he explains that he has exhausted all avenues of appeal.

2. The evidence presented was that the minor (a standard one pupil), was on her way to school when she met the appellant. As it was raining, he called her to join him in bushes, as a way of shielding from the rain. He pulled her to the path which was along the forest, he then removed his and her clothes, and told her to lie down but she declined. She told the trial court that she felt a lot of pain in her head.

3. Incidentally PW2 who had also sheltered from the rain within the forest saw the applicant going into the forest with the minor, and noted that the applicant was behaving in a rather suspicious manner, and it eventually turned out that the appellant had defiled the minor. This was confirmed by the clinical officer PW4 (Mary Kibor) who found semen on the child's thigh and vulva which was torn. The hymen was also torn and there was spermatozoa inside the vagina. The child also had a urinary tract infection. Age assessment plus the immunization card confirmed that the child was 7 years.

4. The applicant's defence that he had been framed was rejected. Upon conviction the applicant said he had young children who depended on him.

5. In meting out the sentence the trial court pointed out that the applicant's conduct was beastly, and the minor was traumatized, and that the applicant deserved to be isolated from the rest of society.

6. He presented written submissions where he argues that the sentence was merely pegged to the mandatory provision in the statute, and that in the light of his plea for leniency, the sentence ought to be reduced to a period of 30 years, taking into account that he was a first offender. He also points out that he is now rehabilitated, having obtained spiritual and life skills. He invokes the letter of the spirit of the **Francis Karioko Muruatetu & Anor V Republic** which discussed the unconstitutionality of the mandatory sentences, and says he is remorseful for what he did.

7. In opposing the application, Miss Okok on behalf of the DPP submits that the applicant took advantage of a child, defiled her, and scarred her for life. That taking into account the age of the victim, and the circumstances through which the offence was committed, then the life sentence is well deserved. She urged this court not to interfere with the sentence.

8. The emerging jurisprudence from the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU AND ANOR VERSUS REPUBLIC [2017] eKLR** paved way for persons serving mandatory sentences to have their sentences reheard and imposed afresh as appropriate in each situation, and urges this court to reconsider the sentence. The petitioner has relied on several recent decisions which have re-visited the mandatory sentences imposed and in exercise of judicial discretion, substituted with lesser sentences.

9. The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

“[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

10. But sentence is not all about the offender only, the rights and interest of the victim as well as the community must also be considered, as sentence is also for retribution and to act as a deterrence. I have seen the favourable reports and social skills as well as spiritual turnaround of the applicant. I consider he has served 10 years imprisonment. However, in this instance really what fathomable explanation or excuse can a full grown up man have for desiring to have sex with a 7-year old child. Then there is the physiological trauma caused to the child and the rampant breakneck incidences of defilement of children if tender years...under 10 years-even the physiological structure is not fully formed. The applicant cannot wax lyrics about his children and expect mercy when he robbed the young girl of her innocence. I do not think he deserves any mercy whatsoever, the sentence meted out was well deserved, and I decline to review the same. He certainly deserves to be away from the free society for the rest of his life. The application is dismissed.

Delivered and dated this 29th day of October 2020 at Eldoret

H. A. OMONDI

JUDGE

Applicant present

Miss Okok for DPP

C/A Komen Eng/Swa