REPUBLIC OF KENYA

CRIMINAL REVISION No. 14 of 2019

B E T W E E N:

SAUL KALAMA MASENGE.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Being an application for a review of the sentence of Hon Orenge K.I. Acting Principal Magistrate

at the SPM's Court Wundanyi on 9th April 2014 in **Criminal Case 417 of 2013** *and confirmed*

by the High Court on 31st March 2016 in ***Criminal Appeal No 141 of 2014****)*

J U D G M E N T

1. The Court has before it an application for a revision of the sentence. The Application states:

> "I humbly wish to submit my application for revision of sentence and orders on the following grounds

GROUNDS

> · *Your Ladyship, I was sentenced to 15 years imprisonment of which I has served 5 years with good conduct which has prompted the prison authorities to bestow leadership of other inmates on me.*
>
> · *I wish to assure you your Ladyship that I am fully rehabilitated and have gained useful skills in prison which will assist me once I am discharged. I acquired Grade 3 in Carpentry and Joinery, Diploma in Theology and several certificates in the same subject of which I have attached copies.*
>
> · *Your Ladyship, I have since reconciled with the victim and with the family and they even visit me in prison.*
>
> · *Your Ladyship, I am the sole breadwinner in my family and they have suffered immensely during my incarceration.*
>
> · *I am a first time offender and don't have previous criminal record.*
>
> · *That the sentence of 15 years imprisonment is too harsh and it's causing me immense suffering.*
>
> · *That in the event my humble appeal may find merit, I wish to be allowed to be present during the hearing of my review.*
>
> *I humbly pray that your Ladyship considers my application and revise the sentence to a lesser period or set it aside as you may deem fit.*

2. Before he made this Application, the Applicant had appealed against the decision of the Lower Court, principally on the grounds of the harshness of the sentence. He was unsuccessful and the sentence was confirmed at appeal. The Applicant was charged in 2013 and convicted in 2014. He then Appealed and the Appeal was dismissed on 31st March 2016 in ***Criminal Appeal No 141 of 2016***. On 21st May 2019 he filed this Application.

3. The Application is opposed by the State. The Respondent filed its Submissions on 29th January 2020. It opposes the Application inter alia on the ground of the seriousness of the offence. It is also submitted that the Applicant is attempting to use the Supreme Court decision in ***Muruatetu*** to his benefit, without explaining why that would be wrong.

4. The Applicant was convicted of the charge of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. He was Accused of having sexual intercourse with a Margaret Mkamari who was then 16 years of age and therefore a Child. The Applicant pleaded not guilty but accepted that they were in a relationship. However, he continually denied the charge stating that he had been set up by the Mother of the Child. In sentencing the Trial Court said:

> ”*The mitigation is considered but the offence is serious and the hand of the court are tied. The law provides for a minimum sentence of 15 years which the court will order that the offender serves in prison…”*

5. The facts as they appear from the Trial are that the Complainant was born on 19th January 1997. Around 2013 her Mother ran a bar/pub. Although she should have been a school going child, she used to assist her Mother to sell alcohol. It was during this time that she befriended./was befriended by the Applicant. They started a relationship. The Applicant seems to admit and deny this at the same time. It seems to be suggested that he was also in a relationship with the Mother but that does not come out of the proceedings clearly.

6. During the course of the relationship the Complainant became pregnant. It was only at this stage that the Mother even noticed that something was amiss. Her solution was to send the Child off to the grandmother with KShs.200/= in her pocket. The Child instead went to the Applicant and they went to stay in his house in Rombo. The Complainant gives evidence that they stayed there “as man and wife” confirming that the intercourse continued. They were discovered on 29th October 2013 and arrested. The Child given a P3 to go to the Hospital for a medical check which included an inquiry into defilement including whether the hymen was broken. Given that the Complainant was by then several months (perhaps visibly) pregnant, the purpose of that test is unclear at the very least.

7. Unfortunately, the Applicant defended the Charge in a surprisingly, infantile manner. At first he denied the Charge and the facts, which were true, then he attempted to say he was set up and malign the mother to say that he had a relationship with her, then he said he believed that the Complainant was 18 years old. Finally, he relied in mitigation that he had a wife and child who he needed to provide for. It is unclear whether that was the Complainant and her Child or another. Unsurprisingly, the Trial Court did not believe the Applicant and he was convicted of the main charge. The presumed age of the Complainant having become immaterial because as a child she does not have capacity to consent to an act of intercourse with an adult.

8. The Applicant now seeks review of his sentence, he says that he is now reformed after serving 5 years out of his sentence and that he has learnt useful skills in prison. He also states that he has since reconciled with the complainant who even visits him in prison. He also states that he was a first offender, a sole bread winner and so the 15 year sentence is too harsh.

9. Notwithstanding, the conviction and the conduct of the Accused during the trial, it is a characteristic of a fair judicial process that the punishment. Since the Supreme Court decision in ***Francis Karioko Muruatetu and Another v Republic [2017] eKLR***, it is settled that mandatory sentences are unconstitutional. In addition, the use of a mandatory or fixed sentence is a blunt instrument. The facts and circumstances of an offence must be taken into account in sentencing. In this case the Complainant and the Applicant believed themselves to be in a relationship. The Mother does not seem to have been concerned until the Child became pregnant. Even then the remedial action she took was surprisingly lax.

10. In view of the circumstances, is the mandatory sentence which is intended to provide retribution and a deterrent at the same time be the most appropriate. The Applicant argues that it is not.

11. Since his incarceration, the Applicant states he has undertaken various carpentry courses and is therefore reformed. The Applicant may have learnt a skill and reformed in that sense, but he does not seem to have learned the seriousness of the offence with which he was charged and in particular the result that a child would end up having a child. The Applicant states that the Parties are now reconciled.

12. In the circumstances of the scenario set out above, it is clear that Applicant deserves a punishment that send the message of society’s revulsion with his crime. However, his offence does not rank as the most heinous of offences of this kind. He did not stalk his victim. He did not entrap her, or keep her away from her family. In fact, it was the Mother who sent her away. The Submissions on behalf of the State make clear their position that reconciliation is not an effective way for the Applicant to atone for his actions.

13. The Respondent’s submissions rely principally on authorities relating to re-sentencing on an appeal, however, this is a review. The Respondent insists that sentencing is an exercise of the discretion of the lower court and should not be interfered with lightly. Relying upon; **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error principle must be interfered (see also Sayeka -vs-R.(1989KLR306)"**

14. However, it does attach to the submissions the Judgment in Simon Kipruir Kimori v Republic [2019] eKLR which sets out a number of relevant authorities. The salient parts are:

> *23. However, to treat offences as the same notwithstanding the aggravating circumstances, clearly violates the right to dignity as the offenders are thereby treated as a bunch rather than as individuals.*
>
> *24. This does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentence.*
>
> *26. In the case **R Vs. Scott (2005) NSWCCA 152Howie** **J Grove and Barr JJ** stated:*
>
> ***"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective***

seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed.... One of the purposes of punishment is to ensure that an offender is adequately punished..... a further purpose of punishment is to denounce the conduct of the offender."

29. The Supreme Court in ***Francis Karioko Muruatetu & Another Vs. Republic****,* ***Petition No. 15 of 2015****, set out the following guidelines with respect to sentencing:*

"(71)...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-adaption of the offender

h) any other factor that the court considers relevant.

30. As appreciated by the Supreme Court in ***Muruatetu Case****(Supra):*

"In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein V. Republic Criminal Appeal No. 1 of 2015: (2015)eKLR , where the High court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows;

"Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal Conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict"

15. In the circumstances, the considerations that apply to this case must firstly be the protection of the community and in particular the protection of young girls. The Court takes judicial notice of the prevalence of defilement convictions in this County. The Applicant's approach to his conviction was to firstly blame his victim for misleading or trapping him and secondly, suggesting that if she worked in a bar she was easy prey. He also attacks her character by suggestion the pregnancy was as a consequence of a relationship with another person. Despite all that he makes the bald assertion that he has reconciled with the victim. He provides absolutely no details of the form that such reconciliation takes. There is no independent proof of that or of which family visits him. He says he is rehabilitated. His rehabilitation is said to have taken the form of Bible Study and expertise in carpentry. Although those are both noble attributes, there is nothing to show that they go anywhere close to making the applicant understand his offending behaviour including his dismissive attitude to his victim. Further there is nothing to show that he has gained any understanding or appreciation on how to prevent reoffending.

16. For those reasons, the sentence handed down is susceptible to review. Any sentence to replace the original sentence must take into account the seriousness of the offence and the lack of appreciation by the Applicant of the seriousness of his wrongdoing. Taking into account the age of the Applicant. He was 30 at the time of the offence. Although that is significantly older than his victim, he was a young

adult. He still has many years when he could be a useful member of society. However, his victim was a Schoolchild. By pleading not guilty he put her through the trauma of giving evidence. He then denied the offence and sought to vilify his victim. It seems to this Court that the Applicant could benefit from further reflection and counselling.

17. The Applicant has not demonstrated any reason to the Court that warrants or justifies interference with the sentence save that the Trial Court simply applied the statutory minimum and did not exercise her/his discretion. The facts of the case are that the Offender was convicted of defilement. His victim was much younger than him. He was a fully mature adult in gainful employment. She was a schoolchild. By pleading not guilty he put her through the trauma of giving evidence. He then denied the offence and sought to vilify his victim.

18. In the circumstances, his sentence is reviewed to a period a 12 years. Taking into account, remissions, the Applicant is due to serve another 12 months or so. This Court takes the view that is a sensible length of time for him to reflect on his own crime and also the issue of the protection of a child including his own.

19. It seems to this Court that the Applicant could benefit from further counselling and the Probation Service is hereby directed to provide him with such counselling.

Order accordingly,

Farah S. M. Amin

JUDGE

Dated 23rd July 2020

Dated , Signed and Delivered on-line in Mombasa on 27th October 2020

In the Presence of

Court Assistant: Daniel Njuguna

Applicant: In person virtually

Respondent: Ms W. Otieno ODPP Mombasaon-line