



**REPUBLIC OF KENYA**

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

**IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 43 OF 2019**

RMN..... PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Mr. Alenga for the state

**RE-SENTENCING**

The petitioner herein was initially charged with Incest Contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. He was subsequently convicted and sentenced to life imprisonment. His sentence was however revised to 15 years imprisonment on appeal. It was substantiated that the petitioner committed an offence known as incest in January 2014 against a minor aged 17. The petitioner has brought this matter for re-sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –Vs- Republic Petition No. 15 of 2015 (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. As a corollary, in the case of **William Okungu Kittiny –Vs- Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR**, the Court of Appeal applied the **Muruatetu decision Mutatis Mutandis** to the provisions of Section 296 (2) of the Penal Code which imposes a mandatory death penalty for the offence of robbery with violence. The petitioner is seeking that the 15 years sentence meted out on him be set aside and for the court to impose an appropriate sentence.

In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (**See Ambani Vs Republic**). The Court of Appeal **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Maharashtra** at paragraph 70-71 where the court held the following on sentencing:-

*“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.*”

In **Francis Karioko Muruatetu & Another –Vs- Republic (Supra)** the Supreme Court stated the following guidelines as mitigating factors 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 and*
- (h) *any other factor that the court considers relevant.*

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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 demand 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.***

In light of the above laid principles, I shall proceed to apply the same to the facts of the incest case. I have considered the petitioner's mitigation. In mitigation, the petitioner is a first offender with no previous criminal records and that the petitioner is aged (55 years old). I have taken into account his six months pretrial incarceration period. He claims to be remorseful and rehabilitated by the vocational training programs he has undergone in prison. In aggravation, the offence is quite unfortunate since the victim was suffering in the very hands, she expected utmost safety. Therefore, this Court considers that the offence was quite an egregious act. Having also taken into account the presentence report, it is also clear that the petitioner does not have a good reputation socially due to the way he treats his daughter. The victim is now well and stable health wise but however she suffers emotional discomfort in recalling her ordeal with the petitioner.

In that respect there is need to protect children from sexual predators. This is because there is a high possibility that they may suffer psychic or physical injury. In my view, the rationale is much broader. It is against morality for a man to have sexual intercourse with a child eighteen years and below. It is therefore for the preservation of society's sense of morality that the offence exists.

In light of the decision in **Muruatetu Case** and **Christopher Ochieng Case (Supra)** the prevailing sentence can not be said to harsh and I have no reason to disturb the same. The sentence be considered inclusive of the period that the petitioner had been in custody.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 23<sup>RD</sup> DAY OF OCTOBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Alenga for the state
2. The Petitioner