REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. 3 OF 2019

MIRIAM AMAI ORUCHUM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is a ruling for the application dated the 29th January, 2019 filed by the applicant seeking revision of her ten (10) years sentence emanating from her conviction.

The applicant was charged with the Offence of Sexual Assault Contrary to Section 5(1) (b) of the Sexual Offences Act No. 3 of 2006, the particulars being that; on the 9th May, 2014 at [Particulars Withheld] Estate within Embu township unlawfully and intentionally inserted her fingers causing penetration of the genital organ namely vagina of E.N. a child aged 2 years.

Upon hearing the case, the learned Magistrate convicted her of the offence and sentenced her to ten (10) years imprisonment.

In her application for revision, she states that she pleaded not guilty to the charge, she is a first offender and that she is truly remorseful and regret having committed the offence. She further states that she has since become a better person having undergone counseling services and she has tapped various recreational skills which have transformed her fully.

She further states that she is willing to continue with her secondary education if she is given an opportunity. She has urged the court to consider her health that has deteriorated.

On her part, counsel for the respondent opposed the application and urged the court to consider the circumstances of the offence and especially the age of the complainant who was 2 years at the material time.

She submitted that the trial court acted judiciously and lawfully when it convicted the applicant and that the sentence meted out on the applicant was fair. She urged the court not to interfere with the sentence but let the applicant serve the whole term.

The court has considered the application and the submissions by both parties. The powers of the High Court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (Cap 75). Section 362 specifically provides as follows;

> ***"362 The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court"***

Section 364(5) provides as follows;

> ***"Unless an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed".***

Going by the provisions of Section 364(5) (supra) the revisionary jurisdiction of the High Court can only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal.
In the case of ***R. Vs. Samuel Gathuo Kamau (2016) eKLR*** the court stated;

> ***"Needless to say that supervisory jurisdiction is exercised as may be provided by the law by way of appeal, revision etc it does not include any power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals, the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the criminal procedure code). As for revision, the supervisory jurisdiction is exercised in respect to finding, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code".***

As regards the sentence the learned Magistrate imposed the mandatory sentence of 10 years provided for in the Sexual Offences Act. This court notes that the Supreme Court in ***Francis Karioko Muruatetu & Another vs. R Sc Petition no. 16 of 2015*** held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of a fair trial that accrue to the accused person under Article 25 of the Constitution.

Guided by the aforesaid Supreme Court decision, the Court of Appeal in the case of ***Christopher Ochieng vs. R.*** stated;

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the supreme court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court's decision in Francis Muruatetu & Another vs. Republic (supra), we would set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of the sentence by the trial court."***

In this application, guided by the merits of the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs. R*** and persuaded by the decision of the Court of Appeal in the ***Christopher Ochieng*** case (supra) and that of ***Jared Koita Injiri vs. R. (Kisumu criminal Appeal no. 93 of 2014)*** in relation to sentencing. I am convinced and satisfied that the mandatory sentence of 10 years imprisonment is excessive and cannot stand. I am inclined hereby set aside the 10 years terms of imprisonment and substitute it with a term equivalent to the term the applicant has already served.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated, Delivered and signed at EMBU this 23rd day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent