REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 20 OF 2020

PATRICK KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant herein was on the 6th day of June, 2011 arraigned in the Senior Principal Magistrate's court at Siakago and charged with the offence of defilement Contrary to Section 8(1) (2) of the Sexual Offence Act No. 3 of 2006.

The particulars of the charge were that; on the 3rd day of June 2011 at [particulars withhld] village Ntharua location in Mbeere North District within Embu County caused his penis to penetrate the vagina of KN a child aged 4 years.

He also faced an alternative charge of Indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the 3rd day of June, 2011 at [particulars withheld] Village, Ntharua Location in Mbeere North District within Embu County committed an indecent act with a child aged 4 years namely KN by removing her under pant and touching her vagina with his hands and penis.

The trial court found him guilty of the main charge and sentenced him to life imprisonment. He appealed against the conviction and the sentence in criminal appeal no. 34 of 2012 at Embu but his appeal was dismissed on the 25th day of June, 2015.

He has now moved this court by way of the petition dated 7th day of February, 2020 for revision of the sentence.

In his submissions, he has urged this court to reconsider his sentence under the Supreme Court's guidance in petition number 15 and 16/2015. He submitted that his case before the trial court and the appeal were decided before petition number 15 and 16/2015 (***Francis Karioko Muruatetu & Another Vs. R.*** and due to the mandatory nature of the sentence before the Muruatetu case, the two courts did not have the discretion to impose a lesser sentence under Section 8(1) (2) of the Sexual Offences Act no. 3 of 2006 which he was charged with.

He avers that due to the mandatory nature of the sentence, the two courts failed to conform to a fair trial in sentencing him, which is Contrary to Article 25 (C) and 50 (2) of the Constitution hence urges this court to consider the legality of the mandatory life sentence that was imposed on him. He relied on the case of ***Christopher Ochieng vs. R. (Criminal Appeal No. 202 of 2011*** and that of ***Jared Koita Njiri v. R (criminal Appeal No. 93 of 2014)*** where the court of appeal considered the legality of Mandatory sentences under the Sexual Offences Act No. 3 of 2006.

He submitted that the sentence imposed on him is arbitrary, harsh and cruel due to its indefinite nature.

Counsel for the Respondent did not oppose the revision application as regards the sentence. She agreed with the applicant that the court should set aside the life sentence imposed on the applicant and give a definite sentence. She referred the court to the case of ***Dismas Wafula vs. R. (2018) eKLR*** which set out the facts to be considered by the court when sentencing in sexual offences but she invited the court to consider the circumstances under which the offence was committed. She also urged the court to apply the sentencing policy guidelines and specifically the community protection and give the applicant a sentence that will protect the victim.

The court has considered the application and the submissions of both the applicant and counsel for the respondent.

The powers of the High Court in revision is contained in section 362 through to 366 of the Criminal Procedure Code (Cap 75) Section 362 provides as follows;

> ***"362. The High Court may call and examine the records 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. Under Section 364 of the CPC the High Court in its revision Jurisdiction cannot reverse or alter an order of acquittal.***

The court can also not make an order that is likely to cause prejudice to the accused person without according him an opportunity to be heard either personally or by an advocate. It is also clear from that section that when an appeal lies from such sentence, finding or order of the trial Magistrate and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed. See the case of ***R. vs. Samuel Gathuo Kamau (2016) eKLR.***

As already stated herein above, the Appellant filed an appeal against the conviction and the sentence but the High Court sitting in Embu dismissed the appeal having found no merit in the appeal.

However, as rightly argued by the applicant in his submissions, due to the mandatory nature of the sentence provided for in Section 8(1) and (2) of the Sexual Offences Act no. 3 of 2006, the two courts did not have jurisdiction to impose a lesser sentence.

This position changed with the supreme court decision in the ***Francis Karioko Muruatetu*** case (Supra) in which the court held that the mandatory death sentence prescribed for the offence of murder, under Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

Guided by the foresaid 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 Offices Act, and if the reasoning in the supreme court was applied to this provision, it too should be considered unconstitutional on the same basis……. Needless to say pursuant to the supreme court decision Francis Karioko Muruatetu (supra) we would set aside the sentence imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of the sentence by the trial court."***

In the case herein, the court has considered the mitigation put forth by the applicant. I have also looked at the Medical Board proceedings dated the 7th November, 2019 which show that he is suffering from permanent disability. The report also show that the applicant has to be assisted to do his daily. The report also show that the applicant has to be assisted to do his daily duties like washing his clothes, he has difficulties in walking long distance and carrying or holding heavy objects using his right hand.

The court has also considered the submissions by the counsel for the respondent and in particular the circumstances under which the offence was committed and the age of the complainant.

Being guided by the authorities cited hereinabove, and considering all the circumstance of this case, this court sets aside the life imprisonment imposed by the trial court. The same is substituted with an order sentencing the applicant to serve 20 years imprisonment with effect from the date he was sentenced by the trial court.

It is so ordered.

Dated, signed and delivered at NAIROBI this 23rd day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent