



**REPUBLIC OF KENYA**

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

**CORAM: HON. JUSTICE R. MWONGO, J**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 22 OF 2019**

**EMMANUEL NATO SIMIYU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT ON REVISION**

1. The Applicant was charged, convicted and sentenced to 30 years imprisonment by the lower court on 7<sup>th</sup> April, 2011 for defilement of a girl aged one (1) year. Dissatisfied, he appealed to the High Court in HCCRA No. 33 of 2017. His appeal was dismissed by Meoli J. in a judgment dated 3<sup>rd</sup> April, 2018.

2. I consented to hear this review despite conclusion of the High Court appeal, because the appeal did not delve into the aspect of sentence, but dealt only with the grounds of appeal raised therein.

3. The Applicant has applied for review herein only in respect of the sentence. The State opposes the review.

4. In his submissions on sentence the Applicant cites the famous case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** arguing that he was not accorded his full constitutional right to mitigate. He has also invoked **Article 165 (3) (a)** of the **Constitution** arguing that this Court can invoke its original jurisdiction to re-sentence where a mandatory sentence has been imposed.

5. In this regard, he also cited **Guyo Jarso Guyo v Republic [2018] eKLR** where the court found that it does not matter whether the victim of defilement was aged one year or eleven years since the mandatory sentence cuts across the board. Further, and that the mandatory nature of the sentence has the effect of taking away the court's discretion.

6. The State's opposition is contained in their written submissions. The DPP argues that the **Muruatetu Case** does not apply here because there was no mandatory sentence meted; and secondly because the Applicant's mitigation was considered prior to sentencing by the lower court.

7. The State argues that **Section 8 (2)** of the **Sexual Offences Act** provides for a life sentence; that at the time of sentencing in the lower court the trial magistrate stated:

***“All considered accused is sentenced to serve 30 years imprisonment.”***

I understand the DPP to be saying that since a fixed term sentence of 30 years was imposed this does not amount to a life sentence.

8. Further, the DPP argued that at the time of sentencing the trial court ought, and did, to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. In this case, she argued, the trial magistrate used her discretion and issued a lenient sentence of only thirty years.

9. I have considered the parties' representations and the documentation availed including the lower court and High Court appeal files, including a Report of the Kenya Prisons Service dated 6<sup>th</sup> November, 2020, on the Applicant.

10. I note that the trial magistrate at the time of sentencing in those **Pre-Muratu** days, took into account the circumstances and nature of the evidence. As for mitigation, the only material available on it was the following:

***“Prosecution: No records, First offender.***

***Accused in Mitigation: I have 2 wives and 2 children.”***

The trial court took these into account.

11. In the Kenya Prisons Report on the accused, the Officer-in-Charge stated:

***“Ref: Kenya Prisons Report***

***Introduction***

***We are in receipt of a court order from you honourable court requiring us to furnish the court with a report of the above appellant by the name; Emmanuel Nato Nasimiyu.***

***Source of Information***

- ***Records***
- ***Interviews***
- ***Observations***

***Records***

***Prison No*** : ***NAV/700/011/LS***

***Name*** : ***Emmanuel Nato Nasimiyu***

***Offence*** : ***Defilement***

***Court*** : ***SPM’s Naivasha***

***Cr. Case*** : ***3482 of 2010***

***Convicting Magistrate*** : ***Hon. Wamae, SPM***

***Date of Conviction*** : ***07-04-2011***

***Sentence*** : ***30 Years***

***Age at Conviction*** : ***31 Years***

***Period spent prison*** : ***9 Years***

***Area of Development in Prison***

- ***Educational Centre***

***The inmate is deployed at school where he opted to join Madrasa where he took Islamic Education offered in the Institution and has been there since 2011 and has achieved certificate in the same.***

- ***Spiritual***

***He is a member and a student of the Muslim community in the prison he associates well with both student and teachers.***

- ***Discipline***

***He is a well behaved prisoner, has kept his record clean and has never committed an offence against prison discipline***

- ***Social Welfare***

***Before Covid-19 pandemic he used to be visited by his mother and his siblings.***

- **Health**

*He is of good health and has no known health issues.*

**Observation and Conclusion**

*The inmate is remorseful and regrets for the consequence of his acts, however he has learnt through a hard way on the benefits of being a good citizen. He yearns to be with his family and take care of his child who is not getting good care and parental love.”*

12. Whilst I note in particular that the inmate is remorseful and regrets the consequences of his acts, it is also stated that he “*yearns to be with his family and take care of his child who is not getting good care and parental love.*” I find this particular last statement rather disconcerting because in acting as he did by defiling another mother’s one year old child, he was not displaying good care and parental love.

13. I also note the point made in the Prison’s Report by the Officer-in-Charge that:

*“before Covid 19 pandemic he (the Applicant) used to be visited by his mother and siblings.”*

There is no mention of whether any of his two wives have visited him in the (9) years he has been in prison. I also note that the Prisons Report has not made any specific recommendation concerning his sentence review application.

**Disposition**

14. In the end, and taking all matters into account, I am satisfied that the sentence meted was justified and more lenient than a maximum sentence to which the Applicant was liable.

15. The Applicant, if he maintains good conduct, will benefit from the Prisons Statutory remission by which his sentence will be reduced by one-third of the sentence term. Accordingly, the review is declined and dismissed.

**Administrative directions**

16. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

17. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

18. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 19<sup>th</sup> Day of November, 2020.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the DPP
2. Emmanuel Nato Nasimiyu - Applicant in Naivasha Maximum Prison
3. Court Clerk – Quinter Ogutu