



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 1 OF 2019

(FORMERLY MISCELLANEOUS APPLICATION NO. 79 OF 2018 AT KITALE)

BETWEEN

KL.....APPLICANT

AND

REPUBLIC.....RESPONDENT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Introduction

1. The application before court is the Notice of Motion dated 11th July 2018, being an application seeking orders that the applicant be granted non-custodial sentence and further that the court considers the period the applicant has spent in prison as a factor in determining the length of the non-custodial sentence sought.

2. The application, which was filed under Certificate of Urgency, is supported by the grounds set out on the face thereof and also premised on the applicant's supporting affidavit. The applicant avers that he has served more than a third out of the 15 years imprisonment imposed upon him by the trial court on 7th October 2013; that he is remorseful for his misdeeds and finally that while in prison, he has learnt his lesson and finally he avers that he has undergone various theological courses while in prison that will help him to be self-reliant once he is set free.

Background

3. The background to this application is that the applicant was arraigned before the Senior Principal Magistrate's Court on a charge of ***incest by a male contrary to section 20(1) of the Sexual Offences Act, number 3 of 2006***, it being alleged that on the 10th day of August 2013 at about 3.00pm within West Pokot County, he intentionally caused his penis to penetrate the vagina of FC aged 14 years who to his knowledge was his daughter.

4. The applicant faced the alternative count of committing an ***indecent act with a child contrary to section 20(1) of the Sexual Offences Act, no. 3 of 2006***. It was alleged that he committed the said offence on the 10th day of August 2013 at the same place and time against FC, a child aged 14 years and who to his knowledge was his daughter.

5. The applicant denied the charges but after full trial, he was found guilty as charged on the main count, convicted and sentenced to 15 years imprisonment.

The Issues, Analysis and Determination

6. Though the applicant does not explicitly say so, he is seeking a review of the sentence passed upon him. The relevant provision of the law under which this court has the power of revision is found under ***section 362 of the Criminal Procedure Code***. This court has power to call for any file either on its own volition or on the application of any party for purposes of review in its supervisory capacity or on any issue that may have been raised by an applicant. I have read the relevant section of the Criminal Procedure Code above cited in light of the circumstances of this case and the grounds set out in support of the application. I have also considered ***Article 50 of the Constitution*** under

which this application was conceived.

7. After considering all the above, I find and hold that the applicants Notice of Motion dated 11th July 2018 has no merit. First, and foremost the offence of which the applicant was convicted and which carries a statutory mandatory sentence is a serious offence and demeaning to the victim, FC. Though the applicant may have been drunk as alleged, an allegation that was not proved his conduct as a father was so irresponsible that no amount of remorse can heal the victim of the psychological torture which her father caused her by defiling her. As a result of the applicant’s conduct, the victim has been forced out of the family home and now lives with her grandmother. Clearly this is a violation of the victim’s rights under the *Children’s Act* where she is entitled to the care and instruction of both parents. Further, this case does not fall for consideration under the *Murutetu & Another versus Republic [2017] eKLR* which specifically deals with death sentence for capital offences.

8. I also find the length of the sentence already served will not serve as a deterrent against the applicant and others like him. The quest for the applicant’s liberty cannot override the interests of the victim which are paramount.

9. For the above reasons, the application is dismissed in its entirety.

10. It is so ordered.

Ruling delivered, dated signed in open court at Kapenguria on this 27th day of March 2019.

RUTH N. SITATI

JUDGE

In the presence of

.....for applicant

.....for respondent

.....court assistant