REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.559 OF 2018

MOSES NATO RAPHAEL.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Moses Nato Raphael was convicted of the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 5th September 2007 at [particulars witheld] Estate in Kiambu County, the Applicant intentionally committed an act which caused penetration with his genital organ with MW, a girl aged eleven (11) years. When the Applicant was arraigned before the trial magistrate's court on 28th September 2007, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve life imprisonment. His appeal to the High Court was dismissed. His appeal to the Court of Appeal was similarly dismissed. That would have been the end of the matter but for the avenue opened for review of sentence by the Supreme Court in the decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. The Applicant has applied to this court to be resentenced.

In his application, the Applicant told the court that he was ailing and was currently under medication for three ailments while in prison. He was HIV positive, had diabetes and had ulcers. During the period of his incarceration, his mother, wife and three children have died. He had four remaining children. He urged the court to give him an opportunity to take care of the said remaining children. He was of the view that the period of twelve (12) years that he had been in lawful custody is sufficient punishment. He presented a report from prison which indicated that the Applicant had chronic back pain and peptic ulcers which were being treated while he is in prison. Ms. Akuja for the State was not opposed to the Applicant's application for resentencing provided that the period that the Applicant has been in lawful custody is taken into consideration.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

> ***"[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable 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;***

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

"25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.""

Although the above decision related to those sentenced to suffer the death penalty, the decision was extended by the Court of Appeal to sexual offences in the case of **Evans Wanjala Wanyonyi –vs- Republic [2019] eKLR**. The court held thus:

"24. On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng –v- R [2018] eKLR Kisumu Criminal Appeal No.202 of 2011 and in Jared Koita Injiri –v- R, Kisumu Criminal Appeal No.93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another –v- Republic SC Petition No.16 of 2015 held 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 fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng –vs- R (supra) 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 Karioko Muruatetu & another –v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

In the present application, three concurrent courts confirmed that indeed the Applicant had defiled a child of eleven (11) years. The sexual assault was such that the victim of sexual assault was infected with a sexual transmitted disease. Whereas this court appreciates the ailments that the Applicant is suffering from, and the fact that he has been in lawful custody for a period of twelve years, this court has not been distracted from the fact that the Applicant was convicted of a heinous crime. Guided by the above decision of the Court of Appeal, this court forms the view that the period that the Applicant has been in prison is not sufficient punishment for the crime that he committed. However, this court is of the opinion that the sentence of life imprisonment is harsh and excessive in the circumstances. The same is set aside.

The Applicant shall serve a sentence of thirty (30) years imprisonment with effect from the 29th September 2007 when he was placed in lawful custody. The Applicant therefore shall serve the remainder of his custodial sentence. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF DECEMBER 2019

L. KIMARU

JUDGE