



REPUBLIC OF KENYA



KENYA LAW
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**Lagat v Republic (Criminal Petition 87 of 2020)
[2023] KEHC 19746 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 87 OF 2020
JRA WANANDA, J
JULY 7, 2023**

BETWEEN

NICKSON KIPROTICH LAGAT PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was convicted of the offence of defilement of a child aged 12 years old contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* in Eldoret Chief Magistrate's Court Criminal Case No. 40 of 2016. He pleaded not guilty and the matter proceeded to full trial. Upon consideration of the testimonies of the witnesses and the evidence presented, the trial Court convicted him of the offence and sentenced him to 20 years imprisonment.
2. Being dissatisfied with the decision, the Petitioner lodged an appeal, namely, *Eldoret High Criminal Appeal No. 80 of 2017*. The Appeal was dismissed in its entirety vide the Judgment delivered on 19/10/2018 by Hon. Justice H. K. Chemitei.
3. This therefore is the background upon which the Petitioner has now approached this Court vide the notice of motion dated 17/11/2020. He has invoked the provisions of section 39(2) of the *Sexual Offences Act* and seeks that for the remainder of his sentence, he be commuted to a non-custodial sentence.
4. The request is premised on the grounds that he has served more than a third of the sentence, he be now placed on community service or probation, he has been in prison for a period of 5 years, he is remorseful, repentant and reformed, the sentence meted upon him is too harsh considering the fact that he is a first-time offender, his Petition is based on the decision of the Supreme Court in *Muruatetu case*, he is seeking orders for review of sentence under section 39(2) of the *Sexual Offences Act* and that he be admitted to non-custodial sentence community service.



5. Pursuant to directions given, the Petitioner filed his written Submissions on 29/07/2021 whereas Prosecution Counsel Ms Okok for the Respondent filed hers on 15/05/2023

Petitioner's Submissions

6. In his Submissions, the Petitioner has reiterated that he is seeking a non-custodial sentence for the remainder of his sentence under section 39(2) of the [Sexual Offences Act](#). He then cited section 333(2) (b) of the [Criminal Procedure Act](#) and submitted that in his sentencing period that he spent in custody was not considered, he is remorseful, repentant and reformed, he be allowed to serve the remaining part of his sentence under probation, he is a first offender, he is a first-born son and his siblings and family depend on him, he is now religious and has acquired various vocational trainings.

Respondent's Submissions

7. On her part, Senior Prosecution Counsel Ms. Okok appearing for the Respondent quoted the provisions of Section 39(1) and 39(2) of the [Sexual Offences Act](#) and submitted that the same are not applicable since Petitioner was not declared a dangerous sexual offender by the trial Court that convicted and sentenced him, this was despite the fact that he qualified for such declaration by the fact that he was convicted of a sexual offence against a child. Counsel then cited the cases of [Moses Musa Cheptum v Republic](#) [2019] eKLR and [Fred Otieno Odhiambo v Republic](#) [2019] eKLR to support her submission that the Petitioner does not qualify for placement on probation or non-custodial sentence for the remainder of his sentence as urged, the Petitioner is properly serving terms of his sentence as stipulated in law and his constitutional rights have not been violated in any way.

Analysis and Determination

8. I have given due consideration to the application as well as the submissions by the parties. I find that the issues that arise for determination to be as follows:
- a) whether the Petitioner can invoke the provisions of section 39(1) and (2) of the [Sexual Offences Act](#) to seek for non-custodial sentence for the remainder of his sentence.
 - b) Whether the sentence of 20 years imprisonment was too harsh.
 - c) whether the time spent by the Petitioner in custody before being sentenced should be considered in computing the prison term.
9. I now proceed to analyse and answer the said Issues:

a) whether the Petitioner can invoke the provisions of Section 39(1) and (2) of the Sexual Offences Act to seek for non-custodial sentence for the remainder of his sentence

10. Section 39(1) and (2) of the [Sexual Offences Act](#) provide as follows:

- “(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--
- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a child



(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."

11. I straight away find that section 39 cannot apply in this case since nowhere in the trial Court's Judgment or record was the Petitioner declared "a dangerous sexual offender". On that ground alone, I do not see how then he can invoke this provision.
12. Although it is evident that the Appellant qualified for declaration as "a dangerous sexual offender" for purposes of section 39 of the *Sexual Offences Act* since he was convicted of a sexual offence against a child, the trial Court never declared him so.
13. Counsel for the State has also argued that the "Court" referred to in section 39(2) is the "Court" that convicted and sentenced the Petitioner. Indeed, section 39(2) is explicit that:

"...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence..."
14. I therefore find merit in the Prosecution Counsel's submission that "Court" for the purposes of the aforementioned provision is the "trial Court" and not this High Court. Therefore, in the absence of an order of the trial Court made as part of the Petitioner's sentence pursuant to section 39(2) of the *Sexual Offences Act*, it is misconceived for the Petitioner to seek to invoke this provision.
15. In any case, it is clear that the object of section 39(2) is to provide a mechanism for the post-prison supervision of "dangerous sexual offenders" and not to secure their release as wrongly understood by the Petitioner. Clearly therefore, the orders sought by the Petitioner are untenable. Accordingly, I find that the Petitioner cannot invoke section 39(2) of the *Sexual Offences Act*.

b) Whether the sentence of 20 years imprisonment was too harsh

16. Regarding the alleged harshness of the sentence, the principles guiding interference with sentencing by the appellate Court were set out in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, where it was held as follows:

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."



17. In this case, the Petitioner was convicted for the offence of defilement of a child aged 12 years, contrary to Section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) and was sentenced to serve 20 years' imprisonment. Section 8(3) provides as follows:

“ A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
18. The use of the phrase “not less than” means that the trial Court was at liberty to impose a much higher sentence. It is therefore evident that the trial Magistrate possessed the legal discretion to impose the 20 years sentence.
19. I am aware that the logic of the now famous Supreme Court decision of Muruatetu I case ([Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR) is now more regularly being used to challenge the imposition of mandatory minimum sentences. However, I do not find that [Muruatetu I](#) applies in this case since nowhere did the trial Magistrate in his Judgment indicate that the 20 years prison term that he imposed was as a result of the mandatory minimum sentence stated in Section 8(3). Similarly, nowhere did he state “his hands were tied” by the mandatory minimum sentence stipulated therein or that he had no room to exercise his discretion.
20. In any case, it is a matter of judicial notice that the Supreme Court has now clarified in its subsequent Muruatetu II decision ([Francis Karioko Muruatetu & Another v Republic and Katiba Institute & 5 others \(Amicus Curiae\)](#) [2021] eKLR, that the holding referred to and made in [Muruatetu I](#) only applies to murder cases, and does not apply to sexual offences.
21. In this case, I have no material before me to conclude that the trial Court in exercising that discretion did not take into account relevant factors such as the gravity of the offence, the circumstances under which it was committed, its implication on the victim and the Petitioner's mitigation. The Petitioner has also not alleged that any impropriety or illegality was committed to warrant the revision by this Court of the sentence imposed.
22. The Petitioner wants the remainder of his sentence to be substituted with a non-custodial sentence owing to fact that he is now allegedly reformed and has gained new skills while in prison. According to the [Sentencing Policy Guidelines](#), non-custodial sentence, except fines, is best suited for minor offences and prescribed limited length of sentences. The offence of defilement, and particularly of a child aged 12 years is quite grave and serious. Since the trial Magistrate had the discretion to impose a much longer sentence, I find that the Petitioner has already benefitted from the trial Court's leniency in handing him a 20 years' sentence. I am therefore not persuaded that he is deserving of a non-custodial sentence.
23. I am also not persuaded that the sentence imposed by the trial Court was manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle.
24. In light of the foregoing observations, I find that the Application for review of sentence has no merit and the same is hereby declined.



c) Whether the time spent in custody should be factored in sentence

25. Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

“Subject to the provisions of section 38 of the [Penal code](#) (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this [Code](#).

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

26. In [Abamad Abolfathi Mohammed & another v Republic](#), [2018] eKLR, the Court of Appeal stated as follows:

“By dint of section 333 (2) of the [Criminal Procedure Code](#), the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

27. The Petitioner has submitted that he has been in custody since the date of his arrest. From the charge sheet on record, the arrest is indicated to have been on 6/02/2016. In its Submissions, the State has not canvassed this issue nor respond to it. My perusal of the record reveals that indeed and although the Petitioner was granted bail or bond, he appears to have remained in custody throughout the trial. It appears that he was unable to raise a surety. In view of this and since the Petitioner’s allegations have not been challenged, I have no reason to disbelieve him. Since Section 333(2) of the [Criminal Procedure Code](#) is couched in mandatory terms, the period spent in custody must be factored in the sentence.

28. Since, as aforesaid, the Charge Sheet indicates that the Petitioner was arrested on 6/02/2016 and the sentence was delivered on 25/7/2017, the period between arrest and sentence is therefore about 17 months. This period ought to be therefore factored and reduced from the 20 years prison sentence that was imposed by the trial Court.

Final Orders

29. In the end, I issue the following orders:

- i) The conviction is upheld.
- ii) In respect to the sentence, the 20 years prison sentence imposed by the trial Court shall be computed as from the date of the Appellant’s arrest as appears in the Charge Sheet, namely, 6/02/2016.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023



WANANDA J. R. ANURO
JUDGE

