REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 109 OF 2020

BONIFACE GITONGA MWENDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is an undated notice of motion but which was filed in court on 14/05/2020 in which the applicant seeks reduction of the twenty-two (22) years sentence meted on him by the trial court.

2. The applicant herein was convicted and sentenced for the offence of defilement contrary to Section 3(1) of the Sexual Offences Act No. 3 of 2006 and abducting with intent to confine contrary to Section 259 of the Penal Code in Embu CM's Criminal Case No. 2 of 2017 and sentenced to twenty (20) years and two (2) years imprisonment respectively. He appealed to this court vide Embu High Court Criminal Appeal No. 51 of 2017. He now comes before this court urging the court to exercise its discretionary powers pursuant to **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

3. The application was canvassed orally and the applicant prayed for reduction of his sentence and that the time that he was in custody be taken into account. Ms. Mati for the respondent submitted that she was not opposed to the application for review of the sentence. However, she invited this court to take into account the age of the complainant herein at the time of commission of the offence.

4. As I have stated hereinabove, the instant application is premised on the Supreme Court's decision in **Francis Karioko Muruatetu & Another –vs- Republic (supra)**. In the said case, the Supreme Court held at paragraph 69 that Section 204 of the Penal Code was inconsistent with the Constitution and invalid to the extent that it provided for the mandatory death sentence for murder.

5. The application of **Muruatetu's decision** in sexual offences under the Sexual Offences Act No. 6 of 2003 was considered and applied by the Court of Appeal in **Dismas Wafula Kilwake v R [2018] eKLR**, where the court held that the mandatory minimum sentence under Section 8 of the Sexual Offences Act was unconstitutional as it denies the court discretion in sentencing.

(See **Dismas Wafula Kilwake vs Republic [2018] eKLR).** (See also **B W –vs- Republic [2019] eKLR** and **Christopher Ochieng v Republic [2018] eKLR).**

6. The trial court in sentencing the applicant herein noted that he was a young man with a long life and was not easy to sentence a young man to long term imprisonment but that the law being what it is has to be followed to the letter. This Court (F. Muchemi J) while affirming the sentence by the trial court held that the trial court did not err in meting out sentence which was within the law.

7. It is therefore clear that both the trial court and the High Court did not consider the developing jurisprudence in **Muruatetu's case (supra).** But the two courts cannot be blamed as at the date the trial court was sentencing (on 7/11/2017) the decision in **Muruatetu's case (supra)** had not been delivered (the same was delivered on 14/12/2017). Further, at the time of the decision by the appellate court 28/11/2018, the dictum in **Muruatetu's case (supra)** had not been applied to offences under the Sexual Offences Act. It is thus clear that the court's hands were tied by the mandatory minimum sentence as was provided by the law. The two courts did not benefit from the exercise of the discretion**.** As such, the said sentence is a candidate for revision pursuant to the binding holdings in the mentioned Supreme and Court of Appeal decisions.

8. However, in exercising the discretion in sentencing, the same should be done in the appropriate cases and if the circumstances of the case demands. {See **Dismas Wafula Kilwake –vs- Republic (supra)}.** The court further ought to bear in mind that one of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances in mind. (See **Charles Ndirangu Kibue –vs- Republic [2016] eKLR).**

9. The court must further have in mind the objectives of sentencing as laid down in the Judiciary's Sentencing Policy Guidelines, 2016 (which includes retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation) and also take into account the aggravating and mitigating circumstances in determining the most suitable sentence (Clause 23.4 of the said policy guidelines)**.**

10. The question then which ought to be answered is what sentence ought to be meted out on the applicant.

11. I note that the applicant had mitigated before the trial court and where he stated that he was 24 years old and a builder. In the application herein, he stated that he was convicted at the age of 24 years and had not even started any endeavour in life hence pleaded with this court to reduce the sentence so that he can join the society when he is still energetic and productive in the society. He deposed that he was remorseful for his actions and pleaded with this court to forgive him. He prayed the court to consider a non-custodial sentence.

12. The age of the accused, the accused being a first offender and being remorseful are some of the mitigating factors and which are applicable herein. However, that notwithstanding, I note further that the victim of the offence was 15 years of age at the time of the offence and thus the psychology of the victim was definitely affected. Physical and psychological effect of the offence on the victim is an aggravating factor.

13. Applying the legal principles as was set out in **Muruatetu's case** and its adoption in offences under the Sexual Offences Act No. 3 of 2006 in **Dismas Wafula Kilwake –vs- R (supra)** and in **BW –vs- Republic (supra)** as to the lack of exercise of discretion in sentencing in offences under section 8 and appreciating that the same is applicable herein, considering the objectives of sentencing as laid down in the Judiciary's Sentencing Policy Guidelines, 2016, the aggravating as well as the mitigation factors and further taking into consideration the circumstances under which the offence was committed, the seriousness of the said offence as well as the mitigation by the petitioner herein both in the trial court and in his submissions in support of the application, I am of the considered view that the applicant herein nonetheless deserve a lesser but deterrent sentence.

14. The applicant deposed that he had spent three years in custody pre-sentencing and which time he prayed that it be taken into consideration in sentencing. Indeed, Section 333(2) of the Criminal Procedure Code requires a court, in passing a sentence to take into account the period spent in custody. (See **Bethwel Wilson Kibor vs. Republic [2009] eKLR** and **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR).**

15. However, as I have noted, the applicant herein appealed the trial court's decision to this court. The court in dismissing the appeal against the sentence held that the trial court's sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to record 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. (See **Section 362-364 of the Criminal Procedure Code**).

16. Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail.

17. It is hereby ordered.

Delivered, dated and **signed** at **Embu** this **10th** day of **February, 2021.**

L. NJUGUNA

JUDGE

…….…for the Applicant

…….for the Respondent