REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

REVISION NO E 025 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

ERIC KIPCHUMNA KIPRONO.....ACCUSED

(Being revision of the Sentencing Ruling of 8th February 2021 by Hon. G. Omodho (PM) in Kiambu Chief Magistrate's Court Criminal Case No. 6 of 2019)

R U L I N G

1. **ERIC KIPCHUMNA KIPRONO** was charged before the Kiambu Chief Magistrate Criminal Case No. 6 of two offences. The first count was a charge for robbery with violence contrary to Section 296 (2) of the Penal Code. On the second count he was charged with the offence of compelling an indecent act contrary to section 6 (a) of the Sexual Offences Act No. 3 OF 2006.

2. By that Court's judgment dated 26th November 2020 Eric was convicted for both those offences. The court's ruling on his sentence was on 8th February 2021. By that Ruling the trial magistrate inadvertently sentenced Eric only on the first count. He was therefore not sentenced on the second count on which count he was also convicted for. This matter has therefore been referred to this count under the provisions of Section 362 of the criminal Procedure Code for revision orders. That section provides:

> ***The High Court may call for and examine the 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.***

It is the above section that empowers this court to revise the sentence of the trial court. The power of the High Court in considering revision applications was discussed in the case **Joseph Nduvi Mbuvi v Republic [2019] eKLR** as follows:

> *"As was stated by the High Court of Malaysia in* ***Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:***
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> ***"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".***

3. The trial court ought to have sentenced Eric on the second count having convicted him on that count. This is provided under Section 14 of the Criminal Procedure Code as follows:

> ***(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently***

Under section 6 (a) of The Sexual Offences Act on conviction one is liable to a sentence of imprisonment for a term which shall not be less than five years. However, in view of the Supreme Court decision in the case **Francis Karioko Muruatetu & another v Republic [2017] eKLR** were mandatory sentence was declared unconstitutional and the Court of Appeal following that Supreme Court decision held in the case **Dismas Wafula Kilwake v R [2018] eKLR**, and in **Jared Koita Injiri v Republic [2019]e KLR** on the mandatory minimum

sentences prescribed in the Sexual Offences Act:

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***
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> ***Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***
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> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological***
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> ***effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."***

4. It follows that this court is not bound by the mandatory sentence under section 6 (a) of The Sexual Offences Act.

5. Accordingly considering the mitigation by Eric, that he is a sole bread winner of his family and also considering the nature of the offence committed against a daughter while the mother watched that sexual offence I will sentence **ERIC KIPCHUMNA KIPRONO** on count two of the offence of compelling an indecent act to **serve Four (4) years imprisonment.** That sentence shall run currently to the sentence of 8th February 2021 before Kiambu Chief Magistrate in the **Criminal Case NO.6 of 2019.**

Orders accordingly.

DATED AND SIGNED AT KIAMBU THIS 11th DAY OF MARCH 2021.

MARY KASANGO

JUDGE