



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CORAM: R. MWONGO (J)**

**PETITION NO. 12 OF 2019**

**SAMUEL MUNYAO MUTIE.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The applicant's petition herein is for re-sentencing. He was convicted on 13<sup>th</sup> March, 2014, for defilement of a minor - aged 12 years - who was a pupil in the school where he was the head teacher. He was sentenced on the same day to the maximum term of 20 years imprisonment. His appeal in the High Court was unsuccessful.
2. The DPP opposes the application for sentence review essentially on the ground that the petitioner was a head teacher in the school in which the complainant was a student and he used his office and status of authority to defile her. As such that his sentence should serve as a deterrent to others similarly placed.
3. In support of his petition, the Petitioner relies on **Article 165 (3) (b)** of the **Constitution** which grants the High Court jurisdiction to determine whether a right or fundamental freedom has been infringed. He asserts that in light of the **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, his sentencing did not take into account his mitigation.
4. Whilst in the High Court in HCCRA No. 76 of 2014 the appeal was unsuccessful, no question was raised therein concerning the propriety of his sentence. The High Court did not therefore deal with that aspect in its judgment of 26<sup>th</sup> June, 2018.
5. Accordingly, in light of the guidance given by the Supreme Court in the **Muruatetu case**, and subsequent cases extending the principles to statutory mandatory sentences, the first port of call is to determine whether the trial court followed the appropriate sentencing procedures. If so, did the trial court properly exercise its discretion in meting sentence?
6. In **Dismas Wafula Kilweke v Republic 2018 eKLR** the Court of Appeal, extending the **Muruatetu** principles to sexual offences under the Sexual Offences Act stated:
7. I have perused the record of proceedings in the lower court file in Naivasha CMCRC 2210 of 2012. The accused shows that after sentencing, the following transpired:

***“Prosecutor : He is a first offender.***

***Accused in Mitigation : I have 3 children in school. One is an orphan who also depend on me. I support my ailing mother I have a wife and support my two brothers.***

***Court : I have considered the mitigation. This is a serious offence which carries a minimum sentence of 20 years imprisonment, given that the survivor was 12 years old at the time of the offence.***

***The accused is sentenced to serve 20 years imprisonment.”***

8. Under **Section 8 (3)** of the **Sexual Offences Act**, the penalty for defilement of a child aged between twelve and fifteen years is that the offender is:

***“liable upon conviction to imprisonment for a term of not less than twenty years.”***

There is no question that this is a minimum statutory sentence.

9. A close perusal of the learned trial magistrate’s record shows that although he recorded the mitigation he did not make any comment on it at all, nor acknowledge it. Certainly, there is nothing to indicate that he took the mitigation into account. Instead, it is evident that the learned magistrate peremptorily meted the sentence, aware that it was a statutory minimum sentence. This court is therefore entitled to intervene in the aspect of sentence review.

10. The offender has, in his submissions, expressed remorse and supplied documents intended to show that whilst in prison he has been rehabilitated. He says:

***“.....I have been fully rehabilitated following a vigorous psychosocial support in prison and I that I have undergone a psychological counselling training and graduated as a peer counsellor and psychological first-aider. In addition, I have written a counseling aid known as “chains of freedom” which is set to be published among other four books namely:***

- a) Poetry Syndrome Dose***
- b) The River of Makatiat***
- c) Exegesis of the Sacrament***
- d) Lopsided Justice”***

The offender emphasises that he is a first offender, and seeks that the Court accord him the benefit of the period remanded in custody as part of his sentence in terms of **Section 333 (2)** of the **Criminal Procedure Code**.

11. The Prison Service filed a report dated 10<sup>th</sup> November, 2020 stating that during his incarceration period, the offender had:

***“.....taken full advantage of the rehabilitation programmes offered. He has been a voluntary teacher and Deputy Principal Primary at the Naivasha Inmate Education Centre. He is currently English language and literature teacher forms 3 (three) and 4 (four)***

***In view of the above, I acknowledge that he is disciplined, hardworking, dependable, cooperative and innovative. He can serve the community if offered a second chance.”***

12. Similarly, the Probation Officer filed a report dated 30<sup>th</sup> March, 2020. He reported that as a result of the offence, the offender’s family broke up with his wife filing for and obtaining divorce. He had two sons who now have no father figure in their lives. The victim’s father was still bitter on account of the offence. His own family members are keen that he be released.

13. In his conclusion and recommendation, the Probation Officer stated as follows:

***“He (Offender) is a resourceful and an industrious individual with a rich talent in teaching. He has garnered additional Diplomas and Certificates as aforementioned; this possibly will form a basis of a new establishment and focus in his future life. We learnt that he got a dismissal from the T.S.C.***

***The family of the victim girl has no objection over his appeal, considering that he may have learnt his lesson the bitter way.***

***In view of the underlying, we propose to the honourable court to consider reviewing his sentence in leniency.”***

14. I have taken all the foregoing factors and information into account. I agree with the DPP that the **Muruatetu** Case recognized the Judiciary Guidelines on sentencing where the sentencing objectives are stated as follows:

***“Sentences are imposed to meet the following objectives:***

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.***
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.***
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.***

**5. Community protection: To protect the community by incapacitating the offender.**

**6. Denunciation: To communicate the community's condemnation of the criminal conduct."**

15. However, it is not only a single objective that must be taken into account in sentencing. The Guidelines require that a multiplicity of the objectives be considered in sentencing.

16. Accordingly I determine that the applicant has learnt some useful lessons so far; that he is on the path to rehabilitation; and that he ought to be encouraged, being a professional teacher, to publicly demonstrate such rehabilitation and remorse. I will therefore review his sentence accordingly.

17. Ultimately, I sentence the applicant to fourteen (14) years imprisonment with effect from 27<sup>th</sup> July, 2012 when he was first remanded in custody. The sentence shall be served as follows:-

a) The first eight (8) years shall be served in prison.

b) The next two (2) years shall be served in non-custodial probation in a programme to be designed and facilitated by the Probation Officer Naivasha. A record of such programme and time spent shall be maintained and may be demanded by the court.

c) The remaining years of the sentence term shall stand suspended; provided that if the offender is charged and convicted of any crime before the end of his probationary period, the suspended sentence shall stand revoked and he shall be arrested and incarcerated forthwith to complete the remaining term of his sentence.

#### **Administrative directions**

18. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

19. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

20. Orders accordingly.

**Dated and Delivered in Naivasha by teleconference this 1<sup>st</sup> Day of March, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Maingi for the Respondent
2. Mr. Mutie - Applicant present in person
3. Court Assistant - Quinter Ogutu