



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

MISC. CRIMINAL APPLICATION NO. 165 OF 2018

AOG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, **AOG** was charged and convicted on two counts of the offence of **defilement of a child** contrary to **Section 8(1) as read with 8(3)** of the Sexual Offences Act. The prosecution was able to establish that on the 10th and 14th day of April 2012 within Trans Nzoia County, the Applicant intentionally caused his penis to penetrate the vagina of SNS a child aged 13 years. The trial court sentenced the Applicant to serve 20 years imprisonment on both counts. The sentence was meted out on the 16th day of August 2013.

Aggrieved by the sentence, the Applicant lodged a revision before this court inviting it to re-look at the sentence with a view to reducing the same. He claimed to have been arrested when he was 16 years of age and seeks the court to reduce his sentence of 20 years to a non-custodial sentence. In mitigation, he contended that he was an only son and he needed to join his family having lost his father while in prison.

In response, Mr. Omooria for the State opposed the application and contended that the Applicant did not appeal the judgment of the trial court. He also averred that this court had no jurisdiction to commit the Applicant to a non-custodial sentence.

“Under section 8(4) of the SOA a person who commits an offence of defilement with a child between the age of 12 to 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.”

The punishment prescribed by the Law for this offence is a minimum of 20 years imprisonment which may be enhanced to life. Consequently, the Applicant was committed to serve imprisonment for 20 years.

The court in **James Lemisho Samuria v Republic [2020] eKLR** the court addressed itself to the sentiments of the trial court during sentencing where the court addressed itself thus;

“It is clear that the court tied itself to the minimum sentence provided in Law for the offence herein. In light of the decision in Francis Karioko Muruatetu –vs- Republic this is no longer good Law. The decision of the Supreme Court removed the shackles of minimum sentences leaving it to the court to mete out sentences based on circumstances of the case.”

In his application for resentencing, the Applicant averred that he had been rehabilitated and had reformed during the period of his incarceration. He was a first offender. He was remorseful and regretted the act that had led to his conviction and prayed for pardoning. During his incarceration, he had lost his father. While in prison, he had undertaken various theological courses that would enable him to be self-reliant and a better person if the court was minded to release him.

He was remorseful and was ready to be re-integrated back to the society. He urged the court to favourably consider his application and reduce his sentence to a non-custodial one.

The Court of Appeal in Christopher Ochieng v Republic [2018] eKLR applied the reasoning of the Supreme Court in the *Francis Karioko Muruatetu & Another vs Republic SC Pet. No. 16 of 2015* to the Sexual Offences Act and held that;

“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.”

The reasoning in *Muruatetu Case* was also extended to sentences imposed under the Sexual Offences Act – and possibly all other statutes prescribing minimum sentences. The Court of appeal in *Dismas Wafula Kilwake v R [2018] eKLR*, the Court of Appeal sitting in Kisumu had the following to say about 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.*

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.

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 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.”

This Court’s understanding of the *Muruatetu* case is to the effect that the Supreme Court did not outlaw minimum sentences. The Court only extended the discretion of the courts while sentencing even for those convicted under the **Sexual Offences Act** where there are compelling reasons, to depart from the prescribed minimum to a different sentence based on circumstances of each case.

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.”

In the present application, it is clear that the Applicant has made a case for appropriate resentencing. At the time of his arrest the Applicant claims he was 16 years of age. The Complainant was 13 years old. It was however not established that the Applicant was below the age of

majority at the time. He did not tell the court that he was below the age of majority at the time. Indeed, in the court's proceedings of 29th May 2012, he told the trial court that he was 18 years old at the time. The issue of the Applicant being underage at the time does not therefore arise.

The Applicant has been in prison as a convict since his conviction on 16th August, 2013.

The Applicant has been in prison for a period over eight (8) years. This court is persuaded that during the period of his incarceration, the Applicant has learnt his lesson. He has reformed. He is unlikely to commit another offence if released. To the extent that the trial court bound itself to the minimum sentence as said to be provided in law, the court is persuaded that there is good ground to interfere with the sentence.

The court however is quick to note the seriousness of the offence herein and the impact on the victim. There is evidence that, though prohibited, the Applicant and the victim were in some sort of romantic relationship. The sentence of 20 years that the Applicant is serving is inappropriate in the circumstances and is set aside and substituted by a sentence of this court commuting the custodial sentence of the Applicant to the period served.

He is ordered set at liberty forthwith and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT KITALE THIS 10TH DAY OF MAY 2021

L. KIMARU

JUDGE