



**REPUBLIC OF KENYA**

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

**CRIMINAL PETITION NO. NO. 96 OF 2019**

**(From original conviction and Sentence in Kitale Criminal case No. 928 of 2010 in Chief Magistrate's Court)**

**NOAH MWAITA AINEA.....APPLICANT**

**VERSUS**

**REPUBLIC.....-RESPONDENT**

**RULING**

The Applicant, Noah Mwaita Ainea was convicted of the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The trial court found as a fact that the Prosecution had established, to the required standard of proof beyond any reasonable doubt, that the Applicant indeed defiled the Complainant who was a girl fourteen (14) years of age at the time. He was sentenced to serve twenty (20) years imprisonment. His Appeal to the High court was dismissed. He has filed an application before this court seeking to be resented pursuant to the Supreme Court decision **of Francis Karioko Muruatetu –V- Republic [2017] eKLR.** The Applicant was convicted on 12<sup>th</sup> August 2011 which was before the above decision was rendered by the Supreme Court.

The Applicant told the court that he had substantially served his sentence. If the period he is expected to benefit from remission is taken into account, he has three (3) years and seven (7) months remaining to serve. He was 76 years old and was at risk of contracting COVID 19 if his application was not favourably considered. He was pleading with the Court to consider his request to serve the remainder of his sentence at home. He told the court during his incarceration both his parents, wife and two children had died. He is now remaining with grandchildren. He was of the view that he had been sufficiently punished. He had reformed and was ready to return back to the society. Mr. Omooria for the prosecution was not opposed to the Application. He was of the view that the court should exercise its discretion as it deems appropriate in the circumstances.

The Supreme Court decision of **Francis Karioko Muruatetu –V- Republic [2017] eKLR** declared mandatory death sentences to be unconstitutional. In **Jared Koita Injiri –Vs- Republic [2019] eKLR**, the Court of Appeal held thus:

**“ In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court ..... 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 Provision of the Sexual Offences Act, which do exactly the same thing. Being so persuaded, we hold that the Provision 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.”**

This court agrees with the above holding, nay, is bound by the decision.

In the present applications, this court is indeed satisfied that the Applicant has been sufficiently punished. The Applicant has been in Prison for a period of more than ten (10) years. Taking into consideration his age (He is 76 years old) this court is persuaded that his continued incarceration will not serve the ends of justice. During his incarceration, he lost a substantial part of his nuclear family. In the view of this court, that constitutes psychological punishment for the offence that he committed. The prosecution is not opposed to the court favourably reviewing the Applicant's custodial sentence.

In the premises therefore, the application for resentencing is allowed. The custodial sentence imposed on the Applicant is commuted to the period served. He is ordered set at Liberty forthwith and released from Prison unless otherwise lawfully held. It is so ordered.

**DATED AT KITALE THIS 10TH DAY OF MAY, 2021.**

**L. KIMARU**

**JUDGE**