



**REPUBLIC OF KENYA**

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

**CRIMINAL PETITION NO. 11 OF 2020**

PN.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

***Being a Petition from the Lower Court Mwingi Senior Resident Magistrate's Court, Criminal Case No. 68 of 2015 Judgement that was delivered on 30<sup>th</sup> November, 2017 by Hon. K. Sambu-SPM)***

**J U D G E M E N T**

1. PN, the Petitioner/Applicant herein, has brought this application for re-sentencing which he has also described as a Petition for re-sentencing following the Supreme Court's decision in the case of ***Francis Karioko Muruatetu and Others Versus Republic (2017) eKLR***.

In my considered view, the form adopted does not really matter because the bottom-line is that the Applicant is seeking to have his sentence revised and probably be given a lesser sentence after factoring in time spent in custody awaiting trial.

2. The Applicant has sought for intervention of this court to re-sentence him contending that his appeal against conviction and sentence to this court was unsuccessful and that he did not to pursue a further appeal to the court of Appeal. Instead he opted to file this petition seeking for resentencing.

3. The Petitioner's ground for this petition is that the Supreme Court in the cited case faulted mandatory nature of minimum sentence by law in capital offences. He contends that *ratio decidendi* in ***FRANCIS MURUATETU*** also applies to sexual offences.

4. He has also pleaded that, the period he spent in custody prior to his conviction should be factored in pursuant to the provisions of ***Section 333(2) of the Criminal Procedure Code***.

5. The Respondent has not opposed this petition and has filed a replying affidavit through Mr. Vincent Mamba, the learned Counsel from the office of Director of Public Prosecution, sworn on 27<sup>th</sup> July, 2020. The Respondent contends that, ***Section 216 and Section 329 of the Criminal Procedure Code*** was violated by the trial court which in its view vitiated the trial of the Petitioner herein.

The Respondent has however, not elaborated how ***Sections 216 and 329 of the Criminal Procedure Code*** were violated and how it impacted negatively on the fair trial of the Petitioner herein.

6. The provisions of *Section 216* provide as follows: -

***“The court may, before passing sentence or making an order against an accused person under Section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed.”***

The provision of ***Section 215*** deals with either acquitting or conviction of an accused person upon trial. The operative word in ***Section 216*** is 'may' which means that the trial court has a discretion to either pass an appropriate sentence straight away on conviction, or wait for a social inquiry to inform itself on mitigating circumstances. It is not mandatory for a trial court to do so and it is incorrect to term lack of social inquiry as a violation of the law. I also note that the provision of ***Section 329 of Criminal Procedure Code*** provides for the same as it states:

***“The court may, before passing a sentence receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.”*** Again the operative word is not “SHALL”.

The word used is “May” which again gives discretion to the trial court. In the face of the above, I find the Respondent's assertion that the trial Court's failure to apply ***Sections 216 and 329*** vitiated the whole trial to be a bit misleading and without legal basis. The record shows

that the trial court gave a chance to the Petitioner to mitigate upon conviction and the Petitioner did so through Counsel. The trial court duly considered mitigation which in my view was in compliance with the above cited provisions and the trial court cannot be said to have violated the said provisions in anyway.

7. This court has carefully considered the sentence meted out visa vis the offence committed and I must say that the Office of the Director of Public Prosecution expressed no opposition to this petition for re-sentencing, which I found perplexing notwithstanding the Supreme' Court's decision in *Francis Muruatetu*. That decision in my considered view is not *carte blanche* for reduction of all sentences meted out as a result of the minimum sentence principle. The Supreme Court decision simply found that the hands of a trial court is not tied by the mandatory nature of a statute that provide a mandatory sentence or by construction of a minimum sentence.

8. In this matter, the proceedings from the trial court reveals evidence that I find quite adverse to the Petitioner's case. The Petitioner was charged with defiling a girl that was his own daughter. The Petitioner readily conceded in his defence that the victim was indeed his own daughter. The evidence shows that the victim (own daughter) actually conceived out of the act of defilement. Dr. Mwendu Muthini (Prosecution Witness 1), a medical expert who conducted DNA test on the Petitioner, the victim and the child born during the course of the trial.

9. The DNA test revealed that, the Petitioner was the biological father of the infant and the forensic report was tendered as Prosecution Exhibit 1. That evidence in my view, shows that the offence committed was more serious than just defilement.

10. It was incest Contrary to **Section 20 (1) of the Sexual Offence Act**. This court finds that though the forensic expert also testified that the DNA examination of the victim and the Petitioner also revealed that the Petitioner was not the biological father of the victim, it was immaterial because the Petitioner took the girl as his daughter and he said as much in his statement of defence. This is what he said is his own word: -

“It is true that .....(name withheld) is our first born daughter with my deceased wife..... according to me. I am the biological father to all the children. We (sic) sired with my late wife.....”

The provisions of **Section 20 (1) of the Sexual Offence Act** state as follows: -

“**Any person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge, his daughter.....is guilty of an offence termed as incest.....” (emphasis added).**

11. It is certainly clear from the proceedings from the trial court, that the Petitioner stayed with his children after the demise of his wife and unfortunately used the opportunity to do the despicable act out of which his daughter conceived and gave birth during the course of trial. The victim age was established to be 16 years of age through the evidence of Dr. Mwangi Kiema (Prosecution Witness 8) who tendered P3 form which indicated that the victim had been defiled and was 34 weeks pregnant at the time of examination. The P3 form was tendered as Prosecution Exhibit 4, while the Radiology Report Form and age assessment report was tendered as Prosecution Exhibit 5.

12. The age of the victim having been established and proved to be 16 years of age, the provisions of *Section 20 (1) of Sexual Offence Act* provides that the penalty of a person found guilty committing incest with a female person under the age of eighteen years shall be sent to jail for life.

13. The proceedings from the *Lower Court Mwingi Senior Resident Magistrate's Court, Criminal Case No. 68 of 2015*, where the Petitioner was charged, indicates that whereas the Petitioner was initially charged with defilement, *Contrary to Section 8 (1) (4) of the Sexual Offence Act Number 3 of 2006*, later on 25<sup>th</sup> January, 2016 the prosecution applied to substitute the charge to that of incest which was allowed by the trial court. The basis for the first substitution was given by the prosecution as the discovery of the fact that the Petitioner was the father of the Complainant.

14. However, on 17<sup>th</sup> May, 2016 the Prosecution again inexplicably, applied to substitute the charge from incest to the original charge of defilement. Again, the trial court allowed the State to substitute the charge. The prosecution stated that, owing to DNA results, it was substituting the charge but as clearly observed above, the DNA results showed beyond doubt that the Petitioner herein, was the biological father of the infant born as a result of the act of incest.

15. That was not all. This court has also found some troubling evidence indicating that the victim was mentally challenged. The trial court took judicial notice of that fact when the trial commenced and correctly found it fit, to have the child undergo mental assessment to ascertain her mental state. The complainant was subsequently escorted to Mathari Mental Hospital and a consultant Psychiatrist found her to suffer from intellectual disability vide its report dated 14/06/2016, which report, formed the basis for the victim to be declared as a vulnerable witness under **Section 31 of Sexual Offence Act** by the trial court and allowed to testify through an intermediary which she did.

16. It is a distinct offence known in law to have carnal knowledge of a person with mental disabilities. **Section 146 of the Penal Code** provides that anyone who defiles an imbecile or an idiot is guilty and liable to imprisonment with hard labour for fourteen years. That offence in my considered view, ought to have been preferred by the prosecution as an additional count against the Petitioner.

17. To make the matter or the offence even more worse, is the fact that the Petitioner knew very well that he was a person living with H.I.V. Aids. He testified to that fact and called a witness (RM) (Defence Witness 2) to testify. The said Rachel Munyao testified that she was a Clinical Officer at Mwingi District Hospital and confirmed that the Petitioner was HIV positive patient who was on ARV treatment, and was enrolled on 8<sup>th</sup> December, 2009. This troubling fact clearly indicates that, at the time the Petitioner defiled his own daughter, he knew very well that he was HIV positive and was more likely to infect the hapless victim with AIDS. The provisions of **Section 26 of the Sexual Offence Act** in my view, applied in the circumstances. The Section provides: -

*‘26. (l) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know- (a) will infect another person with HIV or any other life threatening sexually transmitted disease;*

*(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;*

*(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.’*

18. In the light of the above facts and the clear provisions of the law, this court is a bit dismayed that the Petitioner still found it viable to approach this court for re-sentencing on the basis of the *Muruatetu’s case*. What is even more startling is that, despite the glaring facts and circumstances obtaining the Respondent represented by Office of Director of Public Prosecution found reason to support this petition. The trial court too appears to have missed this crucial aspect in this case. This court has a duty to ensure justice is not only done but seem to be done. Where an offence is committed against a child, the law is even more explicit on the need for protection. **Article 53 (1) of the Constitution** provides that: -

*“every child has a right to be protected from abuse, any form of violence, sexual exploitation and inhuman treatment.”*

This court finds that the Petitioner through his heinous acts violated that right. That child deserves justice and protection more; given that she is a vulnerable person with a certified mental disability.

I find that, the sentence of 15 years meted out against the Petitioner, was far too lenient and not commensurate with the offence he committed against his own daughter. As I have observed, it was both inhuman, degrading, and traumatizing and humiliating. It exposed her to risk of being infected with HIV and the father, the Petitioner herein, was deliberate and reckless to say the least. It is on that basis that I will set aside the 15-year sentence meted out against him and sentence him to 25 years’ imprisonment because of his medical condition. He spent 2 years in custody awaiting trial so under **Section 333 (2) of the Criminal Procedure Code**, that period shall be factored in the computation of the period he will serve which means he will serve a period of 23 years in jail from the time of conviction 30<sup>th</sup> November, 2017.

**Dated, Signed and Delivered at Kitui this 3<sup>rd</sup> day of May, 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**