



**REPUBLIC OF KENYA**

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

**MISC CRIMINAL APPLICATION NO. 73 OF 2019**

SW.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

**RULING**

The Applicant, SW was convicted of the charge of **defilement** contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act**. The trial Magistrate found as a fact that the prosecution was able to establish to the require standard of proof that on 21<sup>st</sup> January 2009, at Bikeke Farm in Trans Nzoia County, the Applicant defiled the complainant who was then aged eight (8) years at the time. The complainant is the Applicant's daughter. He was sentenced to serve life imprisonment. The Applicant's appeals to the High court and the Court of Appeal were dismissed. The Court of Appeal's judgment was rendered on 28<sup>th</sup> October 2016 prior to the Supreme Court's decision of Francis Karioko Muruatetu & Others – Vs- Republic [2017] Eklr. It is this decision that has opened the window for the Applicant to mitigate his sentence afresh and seek to be resentenced.

In his application before this court, the Applicant told the Court that he was an old man now aged 67 years. He had been in prison for 11 years. He had reformed. He had learnt his lesson during the period of his incarceration. He was seeking forgiveness from the court. He stated that he was ailing. He was suffering from hypertension and diabetes, back pain and incontinence. As correctly observed by the Prosecution, the Applicant did not present to court any medical evidence to support his assertion that he was indeed ailing. The Applicant pleaded with the court to give him a second chance at life and also give him the opportunity to be treated while at home. In essence, the Applicant is saying that the period that he has been in lawful custody is sufficient punishment. He should therefore be allowed to regain his liberty.

The Supreme court in Francis Karioko Muruatetu & Another – vs – Republic & Others [2017] eKLR declared mandatory death sentences to be unconstitutional as it deprives the court from exercising its sentencing discretion especially after considering the mitigation of the accused. The reasoning of the Supreme Court in the above case was extended to mandatory sentences provided in the **Sexual Offences Act** by the Court of Appeal in Jared Koita Injiri – vs – Republic [2019] eKLR where the Court held thus:

**“ 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.”**

This court therefore has jurisdiction to reconsider the sentence of the Applicant.

In the Muruatetu case, the Supreme Court held that among the factors that the court shall take into consideration during resentence hearing shall include; the age of the offender, whether the offender was a first offender, the character and record of the offender, the remorsefulness of the offender and the possibility that the Applicant reformed while in prison. In the present application, this court has considered the fact that the Applicant has been in Prison for 11 years. The Court has also considered that he is 67 years of age and the fact he is ailing. The court did not receive any negative report from prisons indicating that indeed the Applicant's claim that he is remorseful and has been reformed may well be true. However, this court cannot overlook the fact that the offence committed by the Applicant was serious and deserved an appropriate punishment. The seriousness of the offence was exacerbated by the fact that the victim was the daughter of the Applicant.

All these factors taken into account leads the court into the conclusion that the Applicant's plea to be released from prison cannot be upheld by this court. If the court was to release the Applicant it would be sending the wrong message to the society especially noting the fact that the offence that the Applicant committed is gender based violence and further that there is prevalence of such offences within the Community. A custodial sentence that sends the right message shall be imposed by the court.

In the premises therefore, the sentence of life imprisonment that was imposed on the Applicant is set aside and substituted by a sentence of this court. The Applicant is hereby sentenced to serve 25 years imprisonment with effect from 21<sup>st</sup> January 2009. It is so ordered.

**DATED AT KITALE THIS 10TH DAY OF JUNE 2021.**

**L. KIMARU**

**JUDGE**