REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 53 OF 2020

ADENAS JOEL MURUMBA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This petition was filed by **Adenas Joel Murumba** for sentence review. He cited the provisions of **Section 39 (2) and (3)** of the **Sexual Offences Act, No. 3 of 2006** as well as **Sections 333 (2), 362, 364 (1)** and **365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya.** He also relied on the case of **Francis Karioko Muruatetu & Others vs. Republic** [2017] eKLR and **Articles 2 (3), 2 2(1), 24 (1), 25, 27 and 50 (2),** among other provisions of the **Constitution of Kenya**. His basic prayer is that the Court be pleased to allow his petition and set aside the sentence imposed on him, or reduce it by the pre-trial detention period, or substitute it with a non-custodial sentence.

[2] The petition was premised on the grounds that the petitioner is a first offender and that the sentence is too harsh; that he has been in prison for a long time; that he is remorseful, repentant and reformed; that he has acquired various skills while in prison; and that his pre-trial detention period was not taken into account in his sentence as required by **Section 333** of the **Criminal Procedure Code**. In his Supporting Affidavit, the petitioner averred that he was charged, tried and convicted of the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act** and was sentenced to 15 years' imprisonment; and that upon appeal to the High Court, the sentence was reduced to 10 years' imprisonment. He now seeks that the 10 years be reduced further by the period of his pre-trial detention, pursuant to **Section 333 (2)** of the **Criminal Procedure Code.**

[3] The petition was urged by way of written submissions; and the petitioner reiterated therein his argument that his rights to fair trial are guaranteed by the **Constitution**; and therefore, that he is entitled to equal protection of the law for purposes of **Articles 27 (4)** and **50 (2) (p) and (q)** of the **Constitution**. He submitted that he is a first offender who has since learnt from his mistakes. He referred to the case of **Thomas Patrick Gilbert Cholmondeley** [2009] eKLR whose was sentenced to 8 months' imprisonment for the offence of murder; the Court having taken into consideration the period the offender spent in pre-trial detention.

[4] The petitioner also mentioned that, during the period of his incarceration, he has benefitted from various rehabilitation programmes offered to inmates and graduated with certificates in proof of his reformation. Consequently, he urged the Court to invoke the **Judiciary Sentencing Policy Guidelines, 2016,** to further reduce his jail term of 10 years. He relied on the following authorities:

[a] Eldoret High Court Petition No. 24 of 2019: Ben Pkiech Loyatum vs. Republic;

[b] Eldoret Criminal Appeal No. 32 of 2019: Samuel Nyongesa vs. Republic;

[c] Geoffrey Makokha vs. Republic [2020] eKLR;

[d] Guyo Jarson Guyo vs. Republic [2018] eKLR;

[e] Johana Lwebe Mayugo vs. Republic [2019] Eklr

[5] **Mr. Mugun,** counsel for the State, opposed the petition. He relied on his written submissions, filed herein on **23 February 2021;** and advanced the view that this petition is devoid of merit and therefore ought to be dismissed. He reasoned that since the petitioner's appeal has already been determined, whereupon his sentence of 15 years' imprisonment was reduced to 10 years, he has no recourse to the Court for further a sentence review. He therefor submitted that if the petitioner was dissatisfied with the decision of the appellate court then he ought to have preferred an appeal to the Court of Appeal instead.

[6] A perusal of the record shows that the petitioner was arraigned before the subordinate court on a charge of defilement, contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act.** He also faced an alternative charge of indecent act with a child, contrary to **Section 10 (1)** of the **Sexual Offences Act**. Although he denied the allegations against him, he was found guilty of the substantive count after trial and due process. He was accordingly convicted thereof and sentenced to the mandatory penalty of 15 years' imprisonment on **24 August 2016.**

[7] Being aggrieved by his conviction and sentence, the petitioner filed **Eldoret High Court Criminal Appeal No.102 of 2016**. The said appeal was likewise heard and determined on **22 January 2019**. While his appeal against conviction was dismissed, the appellate court reduced his sentence to 10 years' imprisonment to be reckoned from the date he was sentenced by the trial court. He has now come back before a court of concurrent jurisdiction for the review of the sentence, as reduced by the High Court, citing **Section 333 (2)** of the **Criminal Procedure Code**. And although he also relied on **the Muruatetu Case**, he did not demonstrate in what way the decision is applicable to this petition; seeing that his sentence has already been reduced to 10 years from the 15 years provided for in **Section 8 (4)** of the **Sexual Offence Act.**

[8] It is also instructive that the Supreme Court has since pronounced itself that **the Muruatetu Case** was not intended to apply to offences under the **Sexual Offences Act**. In its Directions dated **6 July 2021** the Supreme Court made it explicit, at paragraphs 11, 12 and 14 that:

> **[11] The ratio decidendi in the decision was summarized as follows;**
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> **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**
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> **[12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute.**
>
> **…**
>
> **[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."**

[9] It should therefore be apparent to the petitioner that, within the backdrop of the new directions by the Supreme Court, he has no cause for complaint at all; and that on that account his petition has no merit. Thus, without further ado, it is my finding that the instant petition is devoid of merit and is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY 2021

OLGA SEWE

JUDGE