



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL REVIEW NO. 40 OF 2020

PAUL MWAKUSANYA.....APPLICANT

VERSUS

STATE..... RESPONDENT

R U L I N G

1. The matter is for hearing of the application by way of **Chamber Summons** filed on **8th September, 2020** in which the Applicant is seeking for a review of his sentence in accordance with **Sections 264 and 333(2)** both of the **Criminal Procedure Code** as well as **Article 50(2) (p)** of the **Constitution of Kenya**.
2. At the hearing, the Applicant relied on his written submissions filed on **5th July, 2021** in which he implored the court to consider that the **Ruling** in the **Petitions No.15 and 16, both of 2015** by the Supreme Court, outlawed all the mandatory minimum sentence as they did not meet the dictates of the Constitution of Kenya.
3. In the submissions, the Applicant has stated that he is remorseful and regrets his actions which he blames on drunkenness. He states that his dignity has been lowered amongst his friends and society at large and that he has brought shame to his family. The Applicant has also submitted that he is a 1st offender and the Magistrate failed to give him the benefit of this and consider the period he had stayed in custody during trial as per the provisions of **Section 333(2)** of the **Criminal Procedure Code** and **Article 50(2)(p)** of the **Constitution**.
4. In his oral submissions, the Applicant has stated that he wished to have his sentence reduced to a probation period.
5. The prosecution's counsel, **Mr. Chirchir** submitted that the Applicant's application is based on the **Muruatetu** decision on sentencing and yet he had lost his appeal at the High Court. He has sought court's discretion.
6. The Applicant was charged, tried and convicted for the offence of defilement contrary to **Section 8(1) as read with 8(2)** of the **Sexual Offences Act No.3 of 2016**, whereby it is alleged that on the **20th day of April, 2015** at Tausa village within Taita Taveta County, he intentionally caused his penis to penetrate the vagina of the complainant, **Agnes Wakio** (hereinafter referred to as "PW4") who was aged fourteen (14) years. He was sentenced to serve twenty (20) years imprisonment. Dissatisfied with this decision, the Applicant appealed the conviction and sentence vide **High Court Criminal Appeal No.16 of 2016 at Voi** but the appeal was dismissed and conviction and sentence upheld on **10th October, 2017**.
7. I have considered the prayer being sought and find that the Applicant is seeking review of the sentence that was meted against him, after the same had been subjected to an appeal before the High Court. Faced with similar application, Hon. Justice Joel Ngugi (Prof) had the following to say:-

"8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences....."

10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal...."

8. In the instant case, the Applicant having opted to challenge the conviction and sentence against him by an appeal, he cannot come back and seek to have the sentence reviewed through an application for re-sentencing as this would amount to applying the **Muruateru** decision retrospectively. Furthermore, the Applicant ought to have addressed the issue of the time spent in custody to be taken into account before the 1st appellate court so that Hon Justice Jackie Kamau could deal with it. By bringing the said issue before this court, although through an application, the Applicant is inviting this court to seat on an appeal of Judgment of a court of concurrent competent jurisdiction.

9. The Applicant still has an opportunity to ventilate his grievance over the sentence that was meted against him before the Court of Appeal. I therefore find the application filed herein without merit and dismiss the same accordingly.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS ...8TH DAY OFJULY...., 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Chirchir counsel for State

Applicant in person - present

Court Assistant - Tonny