REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 257 OF 2019

SNM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Notice of Motion dated **4 December 2019** was filed herein by the applicant, **SNM**, pursuant to **Articles 22(1), 19(3), 25, 26, 27(1), 28, 29, 50(2)(q), 160(1), 159(1) and 165(3)(b)** of the **Constitution of Kenya; Section 39** of the **Sexual Offences Act, No. 3 of 2006** and **Section 333(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He prayed for orders that the Court be pleased to conduct a sentence re-hearing in this matter, in which he had been sentenced to life imprisonment for defiling a 9-year-old minor.

2. The record of the lower court shows that the applicant pleaded guilty to the substantive charge of defilement, contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act,** and his appeal to the High Court was dismissed summarily by **Hon. Angawa, J.** on **24 March 2010.** He has since been serving his sentence, and it was not until **4 December 2019** that he filed the instant application pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic** [2017] eKLR.

3. The application was urged by way of written submissions; and in his written submissions, the applicant conceded that he pleaded guilty to the substantive charge of defilement, following reconciliation with the victim's mother, who is his sister-in-law. He further submitted that he is an orphan; and that his wife is jobless; and therefore that his family has had to undergo penury on account of his incarceration. He also pointed out that his health has deteriorated, having contracted TB for which he has been undergoing treatment. He urged that these additional mitigating factors, including the fact that he has reformed and received training of different kinds while in prison, be taken into account. The applicant also relied on his Supplementary Affidavit filed on **21 October 2020** to which he annexed copies of medical documents and correspondence, to demonstrate that he has been ailing for three years. On the basis thereof, he urged for leniency.

4. The main thrust of the applicant's submissions however, was the contention that life imprisonment, as a sentence, ought to be declared unconstitutional, granted the decision of the Supreme Court in **the Muruatetu Case**. He further relied on **William Okungu Kittiny vs. Republic** [2018] eKLR; **Henry Katap Kipkeu vs. Republic** [2009] eKLR; **Ben Pkech Loyatum vs. Republic** [2019] eKLR; **Moses Kitui Barasa vs. Republic [2020] eKLR**, and the aforementioned provisions of the Constitution, in urging the Court to allow his application. The applicant concluded his submissions by stating that it is necessary to have a legal definition of what constitutes a life sentence following **the Muruatetu Case.**

5. **Mr. Mugun,** counsel for the State, opposed the application. His submission was that the applicant is guilty of laches; and that he had an option to appeal against the sentence but did not do so for 12 years. He urged the Court to consider that the victim was not only small girl who was then aged 9 years old, but was also a special needs child who relied on those around her for her well-being. He further pointed out that the victim's mother is the applicant's sister in law; being the sister to the applicant's wife. Counsel therefore submitted that, given the circumstances of the case, the sentence imposed on the applicant is not only lawful but also warranted; and therefore that no sufficient cause has been shown for interference.

6. The sentence re-hearing has been precipitated by the decision of the Supreme Court in **the Muruatetu Case** wherein the Supreme Court declared unconstitutional the mandatory nature of the death sentence. That decision was made on **14 December 2017,** long after the summary dismissal of the applicant's appeal to the High Court; and therefore, it was the submission of **Mr. Mugun** that the applicant is guilty of laches and therefore ought not to be entertained. I however take the view that, since this is a matter that is hinged on the provisions of the **Constitution**, as opposed to the appellate process where strict timelines are provided for, the applicant is entitled to a hearing and determination on the merits. He cited, *inter alia*, **Section 27(1)** of the **Constitution,** which stipulates that:

> **"Every person is equal before the law and has the right to equal protection and equal benefit of the law."**

7. Hence, just like other convicts who have had their sentences reconsidered after exhausting their options on appeal, the applicant is entitled to a sentence re-hearing, notwithstanding that he opted not to appeal the summary dismissal of his appeal. I note too that the applicant also relied on **Article 165(3)(b)** of the **Constitution**, by which the Court is imbued with jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. To this end he hinged his application on **Articles 19(3), 22(1), 25, 26, 28, 29, 50(2)(q), 160(1) and 159(1)** of the **Constitution**; and therefore, it has to be viewed from that prism; notwithstanding that it was not specifically crafted and styled as a constitutional petition. The **Constitution** itself is explicit, at **Article 22(3)(b)** that, when it comes to enforcement of fundamental rights and freedoms, it is imperative that:

> **"…formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;"**

8. Thus, in **ANM & another (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) vs. FPA & another** [2019] eKLR **Hon. Odunga, J.** took the view, with which I entirely agree, that:

> **"It must therefore be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former."**

9. The same approach was taken by **Hon. Majanja, J.** in **Ezekiel Oramat Sonkoyo vs. Republic** [2019] eKLR. He held that:

> **"9. Since the High Court is the court that has unlimited jurisdiction in civil and criminal matters and the court imbued with jurisdiction to enforce fundamental rights and freedoms under Article 165(3) of the Constitution, it is the proper forum for re-sentencing. I also add that the petition herein falls within the purview of Article 22 of the Constitution seeking relief for what the Supreme Court and Court of Appeal have held to be an unconstitutional state of affairs. This court is therefore mandated to grant such relief to ameliorate such a violation under Article 23 of the Constitution.**
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> **10. By re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory minimum sentence. For the reasons I have set out I am satisfied that I have jurisdiction to consider this petition for re-sentencing."**

10. This being an application for the vindication of constitutional rights, the question of laches is not, strictly speaking, applicable, unless the delay is so inordinate as to be inexcusable. In **Eluid Wefwafwa Luucho & 3 others v Attorney General** [2017] eKLR it was held that:

> **"28. The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defense and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice..."**

11. Similarly, in **Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others** [2018] eKLR it was stated thus by the Court of Appeal:

> **"Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003)… Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done."**

12. More recently in the case of **Zipporah Seroney & 5 others v Attorney General** [2020] eKLR, **Hon. Korir, J.** held thus in respect of a delay of 45 years:

> **"The petitioners have explained through their pleadings, evidence and submissions why they filed this petition after the enactment of the 2010 Constitution. It is also observed that the Respondent has not stated that he has not been able to proffer his defence because of the time lapse. Indeed this petition relates to events that occurred during the presidency of Mzee Jomo Kenyatta. The petition has been brought about forty five years after the deceased was allegedly arrested and**

detained. It is, however, appreciated that the window for redressing violation of rights was provided when the 2010 Constitution came into force. The petition was filed in 2013 about three years after the promulgation of the Constitution of Kenya, 2010. There was therefore no inordinate delay in the filing of the petition. In the circumstances of this case, it is not too late to peer into the past and correct the injustices that may have occurred in our history. I therefore reject the Respondent's assertion that this petition is time-barred. I will therefore proceed to consider the petition on its merit."

13. In this case, it has been 11 years since the applicant's appeal to the High Court was summarily dismissed; and although no explanation was given by the applicant for the delay, it is understandable that he could only seek re-sentencing after **the Muruatetu** decision. Accordingly, the Court is, in effect, looking at a delay of about two years between **14 December 2017** when the determination was made by the Supreme Court and **4 December 2019** when the instant application was made. I am, in the circumstances, not convinced that the delay is inordinate, from a constitutional perspective. Moreover, no prejudice of any kind was alleged or even alluded to by counsel for the State. I therefore find no merit in the argument that the applicant is guilty of laches.

14. Turning now to the merits of the application, there is no gainsaying that **the Muruatetu Case** targets, with equal force, the mandatory minimum sentences provided for under the **Sexual Offences Act**. Hence, in **Jared Koita Injiri vs. Republic** [2019] eKLR, for instance, the Court of Appeal held that:

Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**

> *"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*

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."**

15. Thus, the Court of Appeal focused its attention, not on the constitutionality of the sentence of life imprisonment as such, but on the mandatory nature of the sentence as a minimum sentence for purposes of **Section 8(2)** of the **Sexual Offences Act.** Needless to say therefore that life sentence is, of itself, a lawful sentence; and although it may appear harsh due to its indeterminate nature, it is now settled that it is not immutable or irreducible. While I agree that there may be need for certainty as to what amounts to life sentence, that certainty can only be furnished through legislative intervention and not by this Court. Indeed, in **the Muruatetu Case**, the Supreme Court made this clear thus:

[87] In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.

[88] Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

[89] In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the Constitution, which reads:.

> ***"51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.***
>
> ***(3) Parliament shall enact legislation that—***
>
> > ***(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and***
> >
> > ***(b) takes into account the relevant international human rights instruments*.**
>
> **"**

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

> ***"As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.***
>
> ***76. …. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for***

the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

16. In the light of the foregoing, it cannot be argued that life imprisonment *per se* amounts to a violation of the applicant's constitutional rights as was herein urged by him. It is therefore my finding that the sentence imposed on the applicant is not in any way inimical to the constitutional provisions that the applicant relied on herein. Indeed, as I have endeavoured to show, it is only the mandatory aspect of the penalty, as stipulated in **Section 8(2)** of the **Sexual Offences,** that is open to challenge on the basis of the **Muruatetu Case**.

17. In this case, there appears to be no reference, by the learned magistrate, to the mandatory aspect of the sentence. To the contrary, the record shows that she was convinced, after taking into account the mitigating and aggravating circumstances, that the sentence was deserved owing to the peculiar circumstances of the case. Here is what she had to say before sentencing the applicant to life imprisonment:

> **"The court herein had to start this hearing after realizing that the child is an Autism Child i.e. mentally challenged. In between the hearing the accused person has accepted that he defiled the child after buying them goodies. The child is vulnerable considering that she is mentally challenged, yet the accused has a wife and children. This court herein convicts the accused person on his own plea of guilty and sentences the accused person to serve a life sentence. This should serve as a deterrent measure to like minded people…"**

18. As to whether, given the particular facts of the applicant's case, the sentence of life imprisonment was warranted, it must, first and foremost, be acknowledged that sentence is a matter within the discretion of the trial court; and that an appellate court ought not to interfere simply because it would have meted a lesser or stiffer sentence. Hence, in **Bernard Kimani Gacheru vs. Republic** [2002] eKLR, the Court of Appeal restated that:

> **It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist**.

19. Accordingly, in **Dismas Wafula Kilwake vs. Republic** [2018] eKLR the Court of Appeal held that:

> **"…the provisions 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…"**

20. Similarly, in **Jared Koita Injiri vs. Republic (supra)**

> **28. It therefore goes without say that the mandatory life sentence imposed by Section 8(2) of the Sexual Offences Act cannot stand. However, that is not to say that a court cannot render a life sentence upon convicting an accused person where the victim is of the age of 11 years old and below. A court must always reserve its discretion to consider the circumstances of each case independently and set an appropriate sentence. What the Constitution contemplates is that the sentence of life imprisonment cannot be the only sentence as currently proclaimed by Section 8(2) of the Sexual Offences Act. A court has discretion to render a life sentence as one of the lawful sentences upon consideration of mitigations and properly directing its legal mind on the factors for consideration in sentencing.**

21. It is with the foregoing in mind that I have reconsidered the circumstances at play before the sentencing court. The applicant was married to the complainant's aunt. On the fateful day, he collected the complainant, a special needs child aged 9 years, along with his children, from his mother in law's house. On arrival at his rented house, he got hold of the complainant, locked the door and proceeded to defile her in his house. It took the intervention of members of the public to have the complainant rescued from the applicant's clutches. Hence, having given consideration to the reasons given by the learned magistrate for imposing the sentence of life imprisonment on the applicant, as replicated at paragraph 17 herein above; and having paid attention to the authorities relied on by the applicant, I find no reason to interfere with the sentence of life imprisonment imposed on the applicant. His application for re-sentencing is completely devoid of merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1ST DAY OF JULY 2021

OLGA SEWE

JUDGE