



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS APPLICATION NO. 252 OF 2019

VINCENT NGESA NYEREKWE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] The Notice of Motion dated **20 November 2019** was filed herein by the applicant, **Vincent Ngesa Nyerekwe**, for an order that the remainder of his custodial sentence be commuted to a non-custodial one. His application was premised on the grounds that, since his conviction and sentence on **22 July 2016**, he has served a substantial part of his sentence; and that he has attained various life skills that put him in good stead for life outside the prison. He relied on his Supporting Affidavit, sworn on **14 November 2019** and the documents annexed thereto.

[2] The applicant urged his application by way of written submissions filed herein on **5 November 2020**. He relied on **Articles 2 (1) and (3)** as well as **Article 27 (4)** of the **Constitution** in urging the Court to uphold his constitutional rights as set out in the Bill of Rights. In particular, he argued that he is entitled to be released under **Section 39 (2) and (3)** of the **Sexual Offences Act, No. 3 of 2006**, so as to accord him his right to dignity under **Article 28** of the Constitution.

[3] The application was opposed by **Mr. Mugun**, Learned Counsel for the State. He took the view that the applicant is merely looking for a backdoor to appeal the sentence, which has already been reduced to 15 years' imprisonment. He submitted that the applicant ought to have appealed to the Court of Appeal if he was not satisfied with the decision of the High Court on appeal. Accordingly, it was **Mr. Mugun's** prayer that the application be dismissed.

[4] The applicant has approached the Court for reconsideration of his appeal pursuant to the provisions of the **Constitution** and on the basis of the fact that, since the determination of **Eldoret High Court Criminal Appeal No. 252 of 2019**, he has served a substantial part of his sentence and is therefore qualified for remission. Having relied on **Articles 2 (1) and (3), 27 (4), 28 and 50 (2)** of the **Constitution**, it would go against the spirit of the **Constitution** to deny the applicant a hearing. Indeed, **Article 22 (3) (b)** of the **Constitution** is explicit 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;”

[5] 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.”

[6] The same approach was taken by **Hon. Majanja, J.** in **Ezekiel Oramat Sonkoyo vs. Republic** [2019] eKLR, albeit within the backdrop

of an application for re-sentencing following the decision of the Supreme Court in the case of Francis Karioko Muruatetu & Others vs. Republic [2017] 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.

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.”

[7] Thus, in so far as the applicant has raised the issue of violation or threatened violation of his constitutional rights, he is entitled to a hearing on the merits. To that end, I have perused and considered the application, its Supporting Affidavit as well as the written submissions filed herein by the applicant. The record of Eldoret High Court Criminal Appeal No. 83 of 2016 was also availed; and a perusal thereof shows that the applicant was charged, jointly with another, with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, one count of gang defilement contrary to **Section 10** of the **Sexual Offences Act**. In the alternative to **Count III**, he was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The offences were alleged to have occurred on **20 March 2016** at Turbo in Eldoret West District within Uasin Gishu District; and, although the applicant denied the charges, he was found guilty and accordingly convicted by the lower court of the substantive counts after trial.

[8] The applicant appealed the sentence, whereupon his appeal against conviction was dismissed and the death sentence set aside and substituted with imprisonment for 10 years for Counts I and II, and 15 years' imprisonment for Count III, in a Judgment delivered on **21 February 2019**. In the premises, the issue for determination is whether he has recourse to non-custodial sentence under **Section 39(2) and (3)** of the **Sexual Offences Act**, on the basis of the period so far served. That provision states that:

(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--

(a) more than one conviction for a sexual offence;

(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or

(c) been convicted of a sexual offence against a child

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."

[9] It is manifest therefore that, whereas the Appellant qualified for declaration as a dangerous sexual offender for purposes of **Section 39** of the **Sexual Offences Act**, granted the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the court that convicted and sentenced him. **Section 39(2)** of the Act is explicit that:

"...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence..." (Emphasis added)

[10] Hence, **“the court”** for the purposes of the aforementioned provision is the trial court. Therefore, in the absence of an order of the trial court, made as part of the applicant's sentence pursuant to **Section 39** of the **Sexual Offences Act**, it was misconceived for the applicant to seek succor under the aforementioned provision. Moreover, the object of that provision is to provide a mechanism for the supervision of dangerous offenders and not to secure their release. I am of the view that the orders sought by the applicant are untenable under **Section 39** of the **Sexual Offences Act**. It is also significant that this is a matter in which the applicant was charged with two substantive counts of robbery with violence, in addition to the offence of gang defilement. **Section 39** of the **Sexual Offences Act** is not applicable to those two counts.

[11] In the light of the foregoing, it is my finding that the application dated is entirely misconceived and therefore untenable. The same is accordingly dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JULY 2021

OLGA SEWE

JUDGE