REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. E004 OF 2020

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS

UNDER ARTICLE 22, 91, 23 (1), 51 (2) AND 165 (3) (a) (b) (d)

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 20 (1) (2) (4), 21(1), 50(1)

AND 258 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER ARISING FROM CRIMINAL CASE NO. 987 OF 2009

AT MERU LAW COURT, H.C

CRIMINAL APPEAL NO.215 OF 2010 AT MERU AND

CRIMINAL APPEAL NO. 49 OF 2014 AT NYERI

BETWEEN

JOHN KITHINJI MUNGANIA...APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

1. The applicant herein filed an application on 21/09/2020 seeking review of sentence of 20 years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The request is premised on the grounds that having been sentenced to the 20 years, he has served twelve and that the remnant term of 8 years should be substituted with a non-custodial sentence. The applicant relies on the provisions of Article 27(1) (2) (4) of the Constitution and points out the fact that he is now reformed, remorseful and has earned skills in tailoring and carpentry. He urges the court to consider the period he has been held in incarceration as enough punishment.

2. The court, on 25/5/2021, heard oral submissions from both parties when the applicant requested that the remainder of his sentence be served outside prison as he was 60 years old, having been in prison for the last 12 years. He contended that he had a wife and 4 children, and wished to be granted an opportunity to practice the skills he had acquired in prison outside.

3. Mr. Maina for the respondent, in opposition to the application, contended that the mandatory prescribed sentence for the offence the applicant was charged with is life imprisonment. He viewed the sentence of 20 years meted out to the applicant to be very lenient. According to him, the applicant was unremorseful and thus he should serve the remainder of the sentence.

4. I have given due consideration to the application for revision of sentence as well as the oral submissions by the parties. The applicant is seeking a review of his sentence and has put a lot of emphasis on the provisions of Article 27(1)(2)(4) of the Constitution which stipulate that **“Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

> **(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**
>
> **(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**
>
> **(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”**

5. The applicant had been convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years’ imprisonment. It is also not in doubt that under section 8(2) of the Sexual Offences Act, a person found guilty of defiling a child aged 11 years or less is liable upon conviction to imprisonment for life. That being the position, the only issue for determination is whether the revision sought is merited.

6. It is trite law that sentencing is a matter of discretion of a trial court as was decided in **<u>Sayeka vs R</u>.(1989)KLR306** where the court said: -

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error principle must be interfered."**

7. In this case, the trial court in exercising that discretion took into account the gravity of the offence, the circumstances under which it was committed, its implication on the victim, the applicant’s mitigation and handed him a sentence of 20 years’ imprisonment. Those are the factors the court was mandated to consider. It is not the applicant’s case that any impropriety or illegality was committed to warrant the conventional revision of the sentence by this court. It is also not the case that a new trial is being sought on the basis and prescription of article 50 (6) of the constitution. Rather, I understand the applicant to say that the 8 years’ remainder of his sentence should be substituted with a non-custodial sentence owing to his advanced age and the fact that he has gained a skill while in prison which he ought to use meaningfully for his own good and for the good of the society. He however leaves it to court without proposing the type of non-custodial sentence he considers appropriate. According to the Sentencing Policy Guidelines, non-custodial sentence, except fines, is best suited for minor offences and prescribed limited length of sentences. The offence of defilement, and particularly of a child aged 11 years is quite grave and serious. I take the view that the applicant already benefitted from the trial court’s leniency in handing him a 20 years’ sentence, for an offence whose prescribed minimum sentence is life imprisonment. He does not deserve a none custodial sentence.

8. It is of note that the conviction and sentence has been the subject of two appeals to this court and the court of Appeal, both of which appeals failed. The question one has to ask, is whether it is right, procedural and indeed lawful to pursue resentencing as alternative to appeal after such appeal fail. Even criminal litigation must at some stage be brought to an end. Having been afforded the opportunity to vent and pursue the challenge on the conviction and sentence, it is now not open for the applicant to seek review of the sentence only, unless he fits himself within the confines of article 50(6) of the Constitution. In my opinion, the applicant’s current attempt is a very undesirable and unprocedural way to apply the law.

9. In light of the foregoing observations, the application for review of sentence has no merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY, THIS 15TH DAY OF SEPTEMBER, 2021.

PATRICK J O OTIENO

JUDGE