REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CRIMINAL APPLICATION NO. 140 OF 2019

JULIUS KIPLIMO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] The applicant, **Julius Kiplimo**, approached the Court by way of the Notice of Motion dated **25 June 2019**. The said Motion was expressed to have been filed under **Articles 49(h), 50(2)** of the Constitution as well as **Section 357(1)** of the **Criminal Procedure Code**, Chapter 75 of the **Laws of Kenya**. He prayed for orders that:

[a] the application be certified urgent and that service thereof be dispensed with in the first instance; (spent)

[b] that the applicant's remaining sentence be commuted and/or reduced, or be substituted with a non-custodial sentence;

[c] That a probation officer's report or a report on the applicant's conduct while in prison be availed.

[2] The application was premised on the grounds that the applicant was convicted of the offence of defilement contrary to **Section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**, and was sentenced to serve a lengthy term of 30 years' imprisonment; and that he had served a substantial part of that sentence by the time the instant application was filed. He further averred that, he is ailing and that although he filed an appeal, the same was mistakenly withdrawn owing to lack of legal advice. The applicant further stated that he has been of good conduct while serving his sentence and that it is in the interest of justice that his application be allowed.

[3] He relied on his Supporting Affidavit sworn on **28 June 2019** to which he annexed a copy of the Charge Sheet in respect of **Eldoret Chief Magistrate's Criminal Case No. 162 of 2007** as well as a copy of the Judgment delivered in the matter. He averred that he is ready and willing to comply with any directions or conditions that the Court may deem fit to impose on him.

[4] The applicant filed an additional document on **23 November 2020** which he described as Grounds of Mitigation. He thereby contended that he pleaded not guilty; that he is a first offender; that the sentence imposed is too harsh; that he is remorseful and repentant; and that he has reformed as a result of his incarceration and is willing to be re-integrated for social re-adaptation. He consequently prayed that the Court be pleased to set aside his sentence and substitute it with an appropriate lesser term.

[5] The application was urged by way of written submissions. To that end, the applicant filed his written submissions herein on **23 November 2020**. He basically reiterated his averments that, being a first offender the sentence imposed is too harsh, unjust, unfair and inhumane considering that the main purpose of sentencing is to rehabilitate offenders. On the authority of **Muruatetu**, the applicant sought for leniency and stated that he has learned his lesson. He pointed out that he has been in prison from the age of seventeen (17) years and that, at the age of thirty (30), he is now ready to be reintegrated into the society. He proposes to be a mentor and a role model to others henceforth.

[6] The applicant relied on **Article 27 (1) (2) (4)** and **28** of the **Constitution of Kenya**, in urging the court to look at sentences imposed by other courts on sexual offences and apply the same to his case in light of **Section 354 of the Criminal Procedure Code**. In addition to **Muruatetu**, the applicant relied on:

[a] Jared Koita Injiri vs. Republic [2019] eKLR

[b] Dismas Wafula Kilwake vs. Republic [2018] eKLR

[c] Guyo Jarso Guyo vs. Republic [2018] eKLR

[d] Baraka Safari vs. Republic [2018] eKLR

[e] Johana Lwebe Muyogo vs. Republic [2019] eKLR

[f] Eliud Waweru Wambui vs. Republic [2019] eKLR

[g] Geoffrey Makokha vs. Republic [2020] eKLR

[h] Samuel Nyongesa vs. Republic, and

[i] Thomas Patrick Gilbert Cholmondely [2009] eKLR

[7] The Application was opposed by **Mr. Mugun,** learned counsel for the State. In his view, the sentence provided for by **Section 8(2)** of the **Sexual Offences Act** is one of life imprisonment; and therefore the sentence imposed on the applicant was, by all standards, lenient. He cited **Christopher Ochieng vs. Republic** [2018] eKLR in which the appellant was sentenced to 30 years' imprisonment for defilement under **Section 8(1) and (3)** of the **Sexual Offences Act.**

[8] Mr. Mugun further pointed out that the applicant had the option of appealing the sentence; an option which he took up by filing **Eldoret High Court Criminal Appeal No. 63 of 2007**, but after being cautioned that the sentence might be enhanced, he made a hasty retreat by abandoning his appeal. For that reason, it was the submission of **Mr. Mugun** that the applicant should not be allowed to challenge the sentence, over a decade later.

[9] A perusal of the record shows that the applicant was arraigned before the subordinate court on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act.** Although the applicant denied the charges levelled against him, he was found guilty after trial and was duly convicted and sentenced to 30 years' imprisonment. Being aggrieved by his conviction and sentence, the applicant filed **Eldoret High Court Criminal Appeal No. 162 of 2007: Julius Kiplimo vs Republic**, which he later withdrew from the court before it was heard.

[10] In the light of the directions of the Supreme Court dated **6 July 2021 on the applicability of the Muruatetu Case** to offences under the **Sexual Offences Act**, this application is untenable. At paragraphs 11, 12 and 14 the Supreme Court clarified 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.**
>
> **…**
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> **[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."**

[11] In the premises, the instant application is devoid of merit and is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER 2021.

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OLGA SEWE

JUDGE