REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 55 OF 2020

IN THE MATTER OF ENFORCEMENT OF RIGHTS UNDER ARTICLE

22(1), 27, 28, 29, 48, 50(1),(2), AND 51(2) OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF SECTION 362, 364(1)(b) OF

THE CRIMINAL PROCEDURE CODE

RASHID WANYAMA OMAR.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] Before the Court is a Petition filed by **Rashid Wanyama Omar**, the petitioner, wherein he seeks revision of the sentence he is currently serving of 10 years' imprisonment. His prayer is that the same be substituted with a non-custodial sentence. He complained that his health has continued to deteriorate in prison due to the fact that he is unable to access specialist treatment and the medication needed to manage his condition. He relied on **Article 27 (1) (2) and (4)** of the **Constitution of Kenya; Sections 362, 364 (1) (b) and 365** of the **Criminal Procedure Code** and **Section 39 (2) of the Sexual Offences Act No. 3 of 2006,** among other provisions.

[2] The brief background of the matter is that the petitioner was arrested and arraigned before the Chief Magistrates Court at Eldoret in **Criminal Case No. 5884 of 2015** with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act, No. 3 of 2006.** In the alternative, he was charged with the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** He was also charged with the offence of sexual assault contrary to **Section 5(1)(a)(i) and (2)** of the **Sexual Offences Act.** The allegations against him involved two female minors aged 11 and 12 years respectively. Although he denied the charges, he was tried and found guilty of the two substantive counts and was accordingly sentenced to 20 years' imprisonment for Count I and 10 years' imprisonment in respect of Count II.

[3] Being dissatisfied with the decision of the subordinate court, the Petitioner filed an appeal against both conviction and sentence in **Eldoret Criminal Appeal No. 57 of 2018: Rashid Wanyama Omar vs. R.** The said appeal which appeal was determined on the **4 December, 2019;** whereupon his appeal against conviction was dismissed. His appeal against sentence was partially successful in that the term of 20 years' imprisonment imposed on him for Count I was reduced to 10 years' imprisonment.

[4] Undeterred, the petitioner filed the instant Petition on **22 September, 2020** seeking a further review of his sentence on medical grounds. The petitioner also pointed out that he has so far served one-third of his sentence; and that he is remorseful, reformed, and repentant. He explained that even before his conviction and sentence, he was suffering from a failed and blocked urethra; and that his condition has worsened on account of the suspension of personal visits in prisons and the restriction of movement in and out of prison due to the Covid-19 pandemic. He also complained that he has been denied access to his medical specialists causing a continued decline to his physical and mental health. He accordingly prayed that his sentence be reconsidered pursuant to **Section 39 (3)** of the **Sexual Offences Act**.

[5] The petitioner relied on his written submissions filed herein on **11 June 2020** in which he reiterated his assertion that he is remorseful and has learnt his lesson. He consequently invoked the provisions of **Articles 165(3)** and **258(1)** of the **Constitution** in urging his case. He likewise made reference to the **Judiciary Sentencing Policy Guidelines** and the following cases:

[a] Eldoret Criminal Appeal No. 311 of 2018: Rodgers Wafula Barasa vs. Republic;

[b] Clement Barassa vs. Republic [1957] EA 52;

[c] Bernard Lolimo Ekimat vs. Republic [2005] eKLR

[6] On the part of the State, **Mr. Mugun** the Learned Counsel for the Prosecution made oral submissions to the effect that the Supreme Court has since pronounced itself and made directions on the **6 July, 2021** in the case of **Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae**) [2021] eKLR, and therefore that the **Muruatetu** case is inapplicable to the instant case; which involves defilement. He further pointed that the petitioner's sentence has already been reduced to 10 years' imprisonment; and therefore that he has already benefited from the **Muruatetu** decision.

[7] I have given due consideration to the Petition as well as the petitioner's submissions. I have likewise taken into account the oral submissions made on behalf of the respondent. There is no gainsaying that the High Court has unlimited original jurisdiction for purposes of **Article 165 (3)** of the **Constitution,** which states that:

> ***"(3) Subject to clause (5), the High Court shall have—***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) …..***
>
> ***(d) …..***
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation."***

[8] *It is therefore significant that, having exhausted his rights under the appellate procedure, the petitioner decided to resort to* **Section 362** and **Section 364 (1)** of the Criminal Procedure Code; which essentially provide for revision. **Section 362** of the **Criminal Procedure Code** is explicit that:

> **The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

[9] Section 364, on the other hand, states that:

> **(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**
>
> **(a)….**
>
> **(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**
>
> **(c)…**

[10] Needless to say that the above provisions envisage proceedings of subordinate courts or tribunals in respect of which the High Court has the supervisory jurisdiction to call for, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed therein. I therefore agree entirely with the decision of the Court in **Abiud Muchiri Alex v Republic** [2020] eKLR wherein it was held that:

> **"…From the application, the Applicant cited Sections 362 and 364 of the Criminal Procedure Code as being some of the provisions under which the application was brought. However, under the said provisions, this court can only exercise revisionary jurisdiction over the sentence and/or proceedings of a subordinate courts for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the subordinate court in issue and which was not the case herein. Section 362 and 364 are not applicable to the facts of this application since the applicant seeks to review the decision of the High Court…"**

[11] The petitioner's appeal having been heard and determined on **4 December, 2019,** a revision under **Sections 362 and 364** of the **Criminal Procedure Code** is untenable. It is noteworthy too that the said appeal was heard and determined by this Court; and, as was pointed out by counsel for the respondent, the effect of **Muruatetu** was exhaustively considered and applied to the petitioner's benefit; whereupon his sentence was reduced accordingly. The Court noted thus:

> "…following the decision of the Supreme Court in **Francis Karioko Muruatetu vs. Republic [2017] eKLR,** the Court of Appeal reconsidered the constitutionality of the mandatory nature of the life sentence and by extension minimum offences under the Sexual

Offences Act, and held thus in **Jared Koita Injiri vs. Republic [2019] eKLR**:

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 sentences 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."**

[48] In the premises, the appellant is entitled to a review of the sentence based on the circumstances of the case and any mitigating circumstances evinced by the record. Accordingly, the sentence meted for Count I is hereby reduced to 10 years' imprisonment, to be reckoned from the date the Appellant was sentenced by the lower court. The sentence for Count II is however warranted and is upheld."

[12] In the premises, the instant Petition is as completely unwarranted as it is devoid of merit. The same is hereby dismissed accordingly.

It is so ordered.

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

.....

OLGA SEWE

JUDGE