REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 29 OF 2019

LOUIS KAUGI NYAGA.....APPLICANT

VERSUS

DIRECTOR OFPUBLIC PROSECUTIONS……..…….…....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the application for revision under Article 50 (2) (q) of the Constitution.

2. The applicant herein was charged with the offence of defilement contrary to Section 8(1) as read together with Section (8)(4) of the Sexual Offences Act No. 3 of 2006 and subsequently convicted and sentenced to 15 years imprisonment. It is this sentencing which precipitated the instant revision. The said application was premised on the grounds that the applicant having been charged with the said offence before Siakago court, was subsequently sentenced to fifteen (15) years imprisonment. He then appealed to this court vide Embu High Court in HCCR. No. 5 of 2018 which he withdrew before this petition was heard.

3. This application seeks for review of the sentence under article 50(2)(q) of the Constitution in substitution of the sentence by the lower court for he states that he is a reformed person engaged in rehabilitation programmes and assisting the Prison school as a professional teacher. He then proceeded to rely wholly on his written submissions in support of the application.

4. However, in opposition to the application, Ms. Mati for the respondent urged the court to consider the seriousness of the offence and the circumstances under which it was committed.

5. The applicant in rebuttal and in praying for leniency submitted that the victim's mother was 24 years old who looked for the minor as the accused served the sentence. He further stated that he lost his job after being arrested and his investments collapsed.

B. **Analysis of the law**

6. The issue for determination is whether the applicant has satisfied the court on his application for review of sentence. Article 50(2)(q) of the Constitution deals with review of a decision of a lower court by a higher court. This constitutional provision was expanded under sections 362 and 364 of the Criminal Procedure Code.

7. **Article 50(2) of the Constitution** provides: -

> ***(2) Every accused person has a right to a fair trial which includes the right to –***
>
> ***(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.***

8. This provision is replicated in the Criminal Procedure Code Sections 362 and 364. **Section 362** provides: -

> ***"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 provides interalia that the High Court in its revision jurisdiction cannot make an order that is likely to cause prejudice to the accused person without according him an opportunity to be heard either personally or by an advocate, inflict a greater punishment for the offence which in its opinion the accused has committed than might have been inflicted by the court which imposed the sentence nor can it

reverse or alter an order of acquittal. Further, when an appeal arises from such sentence finding or order of the magistrate's court and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

10. The applicant herein was convicted with the offence of defilement contrary to Section 8(1) as read together with section 8(4) of the of the Sexual Offences Act of 2006. The said section 8(4) provides that *a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of* ***not less than fifteen years*** and pursuant to this section, the applicant was sentenced to fifteen (15) years imprisonment (which was the minimum term under the provision of Section 8(4) of the Act). The legality such sentences is minimum mandatory sentences under the Sexual Offences Act has been considered by the courts in a number of instances.

11. In **BW –vs- Republic (2019) eKLR** the Court of Appeal **while adopting the** Supreme Court's decision in **Francis Karioko Muruatetu & another –v- Republic [2017] eKLR held that the** minimum mandatory sentences under the Sexual Offences Act were unconstitutional. The court then proceeded to revise the sentence on that basis. In the case of ***Dismas Wafula Kilwake v*** **Republic [2018] eKLR** *the Court of Appeal* extended the reasoning of the Supreme Court in the **Muruatetu** decision to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that it does not take away the discretion of the Court in sentencing.

12. The purpose of revision under Section 362 of the Criminal Procedure Code is for the court to satisfy 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.* As such, the question which needs to be answered is whether the trial court was correct, legal or proper when passing the sentence.

13. The court records shows that at the time of sentencing the applicant, the trial court considered the mitigation of the applicant that he was a first offender. It proceeded to sentence the applicant based on the fact that Section 8(1) as read with Section 8(4) of the Sexual Offences Act provides for the minimum sentence of 15 years. From the record, the trial magistrate did not take into account the principles laid out in the Supreme Court decision of **Francis Muruatetu** which held in principle that the court's discretion in sentencing must be exercised without any hindrance by the law.

14. The court held in **Dismas Wafula Kilwake vs Republic (supra), the provisions under section 8 of the Sexual Offences Act are indicative of the seriousness with which the legislature and the society take the offence of defilement and thus in appropriate cases, 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. On the other hand, the court cannot be constrained by statute to impose the prescribed sentence if the circumstances of the case at hand do not demand it.**

15. **The court further ought to bear in mind that o***ne of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances. (See* **Charles Ndirangu Kibue v Republic [2016] eKLR)**

16. I note that the applicant had mitigated before the trial court and where he stated that he was a father of four children (3 in High school) and that he was the sole breadwinner and took care his aged and widowed father and that he was a first offender. However, it should not be lost that the applicant indeed committed a heinous crime which occasioned severe trauma and suffering to a young girl and which young girl ought to have justice.

17. It is my considered view that the provisions of Section 362 are applicable herein in that the sentence imposed despite the mitigation of the applicant was based on wrong principles and was therefore incorrect in view of the Supreme Court decision in the **Muruatetu** case. The trial court ought to have exercised its discretion in sentencing as well as bearing in mind that the offence of defilement is serious and merits a deterrent sentence. I reach a conclusion that the trial court made a mistake in disregarding its discretion in sentencing the applicant.

18. Having considered all the above and the circumstances under which the offence was committed, it is my considered opinion that this application is merited and is hereby allowed.

19. The fifteen (15) years imprisonment sentence is hereby set aside and substituted with one of ten (10) years imprisonment.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through video link