



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL REVISION NO.6 OF 2019

FORMERLY KISUMU HC CRIMINAL REVISION NO.39 OF 2019

FROM ORIGINAL CRIMINAL CASE NO.1917 OF 2010

AT

PM'S COURT HOMA BAY

BETWEEN

CHARLES ENOS MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

[1] The Notice of Motion, dated 21st January 2019 was presented herein by the applicant, **Charles Enos Makokha**, who was convicted and sentenced to fifteen (15) years imprisonment for the offence of defilement contrary to **Section 8 (1) (4)** of the **Sexual Offences Act in Homa Bay PMCC No.1917 of 2010**. His appeal on both conviction and sentence was firstly, dismissed by the High Court and secondly, by the Court of Appeal. By this application, he now seeks to have the three (3) years remaining for him to complete the sentence be served under a non-custodial probation sentence.

[2] **Sections 354 and 364** of the **Criminal Procedure Code** and **Articles 23 (3) (F) and 50 (2)** of the **Constitution** are the enabling provisions invoked by the applicant in this application. The supporting grounds are essentially that the applicant is a parent with school going children who risk dropping out of school due to lack of financial support and having served more than half of his sentence, he would be entitled to a review of the sentence by dint of **Article 50 (2) (q)** of the **Constitution**. He states that several rehabilitation programs undertaken by him in prison have enabled him to reform. All these, is fortified by the averments contained in his supporting affidavit dated 10th January 2019 in which he contends that he remains with three years to complete the full sentence given the privilege of prison remission. He also contends that he is very remorseful for the offence and therefore prays for the grant of the orders sought herein.

[3] Pursuant to an order of this court made on 3rd July 2020, the office of the Director of Public Prosecution (DPP) was served with the application which was then slated for inter parties hearing on 9th July 2020, on which date the applicant was not produced in court most probably due to the prevailing circumstances attributable to the Covid-19 pandemic.

MR. OLUOCH, the Learned Senior Assistant Deputy Public Prosecutor (S/ADPP) appeared for the respondent/state and opposed the application on the basis of grounds contained in his written submissions filed herein on the 9th July 2020. He urged this court to dismiss the application as the sentence of fifteen (15) years imprisonment imposed upon the applicant was the minimum sentence provided for under the Sexual Offences Act.

In his written submissions, the applicant anchored the application on the main ground that minimum mandatory sentences are unconstitutional as held by the Supreme Court in the case of **Francis Karioko Muruatetu & Another –vs- Republic (2017) e KLR** and the Court of Appeal in **Christopher Ochieng –vs- Republic (2018) e KLR** and **Jared Koita Injiiri –vs- Republic Criminal Appeal NO.93 of 2014**.

[4] Having given due consideration to the application on the basis of the supporting grounds set out in the supporting affidavit and submissions, this court observed that the offence facing the applicant was punishable under **Section 8 (4)** of the **Sexual Offences Act** which provides that **“a person who commits an offence of defilement with a child between two age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less that fifteen years”**.

So, the sentence imposed upon the applicant by the trial court was lawful leaving no room for the trial court to apply its discretion and impose a lesser sentence no matter the circumstances of the case. As at that time, the Muruatetu case had not been decided by the Supreme Court. Besides, after being decided, it did not outlaw the death sentence but only the mandatory nature of the sentence. It specifically dealt with capital punishment (i.e. death sentence) and not non capital punishment such as that which affected the applicant herein. It cannot therefore be used as an authority to confer discretion where non-exists and more so, in non-capital punishments.

The applicant cannot therefore be heard to say that the sentence imposed upon him by the trial court and affirmed by the two superior courts was unconstitutional due to its mandatory nature.

[5] In any event, the applicant is not requesting for the sentence to be quashed but rather that the remaining balance thereof be served outside prison walls preferably on probation. Such a request ought to have been made under the court's prison decongestion programme and not by way of this application which if granted would have the effect of interfering with a lawful sentence and indeed, the applicant's lawful detention in prison.

In sum, this application is dismissed.

J.R. KARANJAH

JUDGE

16.07.2020

[Delivered and dated this 16th day of July, 2020]