



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 63 OF 2018

DUNCAN WAWERU NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The petitioner Duncan Waweru Nyaga was charged, convicted and sentenced to serve ten(10) years imprisonment on the 9th November 2018 for the offence of defilement **Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**, and six months imprisonment for the offence of actual bodily harm to the victim.

2. He appealed against both the conviction and sentence to the High Court vide HCRA No. 63 of 2018 which appeal he withdrew on the 15/6/2020, opting for a re-sentencing application for review and/or reduction of the sentence, basing the application on the principles stated in the commonly known as “**Muruatetu**” Supreme Court decision **Francis Karioko Muruatetu & Another –v- Republic (2017)eKLR**, a matter under **Section 296(2) of the Penal Code** (robbery with violence) that attracted a death sentence, and applied in numerous post **Muruatetu** decisions by both the Court of Appeal and the High Court.

3. The reasoning in the **Muruatetu** decision in outlawing the mandatory minimum death sentence and life sentences has now been extended to not only crimes of murder and robbery with violence sentences but also to sentences imposed by the Sexual Offences Act.

4. In particular, the Court of Appeal in **Dismas Wafula Kilwake –v- Republic (2018) eKLR**, the court sitting at Kisumu rendered itself, in regard to mandatory minimum sentences prescribed under the Sexual Offences Act thus:

“----- we hold that the provisions of Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. --- In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the cases so demand. On the other hand, the court cannot be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it ----- the sentencing policy guidelines require the court in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and previous convictions of the offence.

Among the mitigating factors are provocation, offer of restitution, age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

5. The Learned Judges of Appeal, in the **Dismus Wafula Kilwake**, however held that, unlike in the **Muruatetu** decision, and in other cases where a death sentence was imposed, the decision does not operate retroactively, but in future cases.

6. Ngugi J in **John Kangunda Kariuki –v- Republic (2019) eKLR, Nakuru Misc. Criminal application No. 88/2019** in respect of the decision, interpreted it to carry a meaning that, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the **Dismus Wafula** holding.

7. The Court (Ngugi J) further rendered that, only prisoners who had been sentenced to death pursuant to the mandatory provision of the law are entitled to new re-sentence hearings; that for all others, they are entitled to urge the new decisional law in that appeals to lower the sentences, and therefore cannot bring new applications for re-sentencing. This holding is but persuasive, not binding on this court of equal status.

8. In this petition, the petitioner withdrew his appeal against conviction and sentence, and has urged for the review of the sentence. Taking cue from the learned decisions cited above, which I fully subscribe to, I now turn to the application before me.

9. The petitioner having withdrawn his appeal from the High Court, he seeks for a reduction of the sentence imposed under **Section 8 of the Sexual Offences Act**. The offences were committed to a Sixteen year old boy child **Contrary to Section 8(2) of the Sexual Offences Act**. Upon conviction, he was sentenced to ten (10) years imprisonment. Section 8(4) provides that upon conviction under Section 8(2), the offender is liable to imprisonment for a term of not less than Fifteen years. The trial court acted within its discretion and meted the sentence that is and was permissible under the law and circumstances presented before it.

10. I have considered the mitigating factors stated in the petitioner's written mitigation. He says he is very remorseful and prays for a second chance in life. He is a first offender with no previous criminal record. However, nothing new has been presented in this petition to persuade me to reduce the sentence to non –custodial.

The court notes that the applicant used violence that caused actual bodily harm to the victim while committing the defilement for which he was handed a sentence of six months. The victim was traumatized by the applicants unwarranted actions.

11. The petitioner has served close to two years in prison. He has urged for leniency, and has undertaken to keep peace if a non-custodial sentence is considered.

12. In **Jonah Isindu Limiti –v- Republic (2019) eKLR**, in similar circumstances, the offence of defilement having been committed to a Sixteen years old girl child, the court (Sitati J), reduced the trial court's sentence of 15 years imprisonment to 8 years imprisonment.

13. The Court in **Daniel Otieno Oracha –v- Republic (2019) eKLR** resented the applicant to 12 years from the initial 21 years imprisonment for a similar offence.

Other cases I have considered are **William Okungu Kittiny –v- Republic (2018) eKLR, Jared Koita Injiri –v-Republic (2019) eKLR, and Evans Wanjala Wanyonyi –v- Republic (2019)eKLR.**

14. I appreciate that offences under the Sexual Offences Act are inhuman and heinous. They traumatize the victim and have a life long impact on the victim.

15. For the foregoing and in exercise of my discretion, I resentence the petitioner to eight (8) years imprisonment, effective from the trial court's sentence on the 9/11/2018.

Orders accordingly.

Dated, Signed and Delivered at Kerugoya this 1st day of October 2020.

J. N. MULWA

JUDGE

In the Presence of:-

Applicant in person

Mr. Ashimosi – Ass. D.P.P for the State.