REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION CASE NO. 54 OF 2018

LUKE SHINDIKA...APPLICANT

VERSUS

REPUBLIC...DIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The applicant herein was convicted, on 24th November 2015, in Butali PMCCRC No. of 479 of 2014, of defilement, contrary to section 8(1), as read with section 8(2)(3) of the Sexual Offences Act, No. 3 of 2006, and sentenced to imprisonment for twenty years. The victim of the sexual assault was aged twelve (12) at the time of the offence. The applicant filed an appeal at the High Court, being Kakamega HCCRA No. 140 of 2015, where the conviction was affirmed and the sentence upheld.

2. The application before me is in the nature of a Motion, dated 25th June 2018, seeking a retrial of the matter on the basis of alleged discovery of new compelling evidence. No such evidence has been attached, nor disclosed, and the issues disposed in the affidavit sworn in support of the application ought to have been raised at the appeal, in Kakamega HCCRA No. 140 of 2015. Considering those issues at this stage would amount to the applicant having a second bite at the cherry. If he was not satisfied with the outcome of the appeal at the high court he should have proffered an appeal at the Court of Appeal.

3. However, I do note that when the applicant appeared before me on 30th October 2019, he stated that he was seeking resentencing.

4. There have recent developments in the Kenyan jurisprudence with respect to mandatory sentences. The Court of Appeal and the Supreme Court has led the way. It is from that background that the applicant appears to have now moved the court in the instant cause. I believe he seeks re-sentencing in view of the developments that I have referred to here above.

5. Upon conviction, and before sentencing, the applicant pleaded for leniency, asking that he be forgiven. He said that he was a first offender, and he would not repeat the offence. The trial court considered his mitigation, but its hands were, of course, tied, and it imposed the minimum mandatory sentence prescribed under section 8(3) of the Sexual Offences Act, of imprisonment for twenty years.

6. When this matter was placed before me for the purpose of re-sentencing, on 10th February 2020, I called for a re-sentencing report. The probation office did not file one, and I have had make a determination without it.

7. I note that the victim of the crime was a child of twelve years, just at the threshold of teenage. The applicant, no doubt, took advantage of her young age to lure her into illicit sex. I note though that he did not appear to have used any force or intimidation. Of course, that is no excuse for having sexual liaisons with underage girls, but the same is a factor to consider in sentencing. I note that the applicant himself, was in his twenties at the material time, but still old enough to know what was morally and legally right and wrong in the circumstances. He took advantage of a school girl on her was to school. I believe she must have been in school uniform. He must have known that what he was doing was wrong, but nevertheless went ahead.

8. I believe that the applicant got what he deserved by way of punishment. However, in the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, and considering his age, and the fact that he was a first offender, I shall exercise discretion to reduce the sentence imposed by the trial court from twenty (20) years imprisonment to ten (10) years imprisonment, to run from the date of conviction on 24th November 2015. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2nd DAY OF Octobe, 2020

W MUSYOKA

JUDGE