REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION NUMBER 60 OF 2020

PAUL MWANGI MACHARIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Paul Mwangi Macharia has filed Notice of Motion dated 20/5/2020 seeking orders: -

1. Spent

2. **THAT** the lower court to make an order of Habeas Corpus in respect of the petitioner herein pursuant to Article 25(d) as read with 51(2) of the Constitution of Kenya 2010 for the interest of justice.

3. **THAT** court be pleased to grant a sentence rehearing in the CM's Court at NAKURU Criminal Case No 296 of 2013.

4. **THAT** Section 8(3) of the Sexual Offence Act curtails the discretionary powers of the lower court by providing mandatory sentence hence he be allowed to adduce/tender his mitigation afresh.

5. **THAT** this court do receive the applicant's mitigation in accordance with Section 216 as read with 329 of the CPC and consider an appropriate sentence devoid of the harsh sentence imposed by the trial court in line with: -

- **Francis Karioko Muruatetu & others vs R – [2017] eKLR (Supreme Court**)

- **Court of Appeal – Evans Wanjala Wanyonyi vs R [2019] eKLR.**

- **Christopher Ochieng vs R [2018] eKLR**

- **Jared Koita Injiri vs R Kisumu Court of Appeal 93/14**

6. **THAT** the sentence of 20 years' imprisonment imposed on him be set aside and replaced with an appropriate sentence including a probation sentence.

7. **THAT** in providing the appropriate sentence as above the court to apply section 333 (2) of the Criminal Procedure Code and take into consideration the period the applicant spent in remand custody before he was sentenced.

8. The application is supported by his affidavit sworn (date not indicated) but filed on 20/5/2020.

In the affidavit the appellant depones that he was charged with 2 counts in Nakuru CM CR case No 296/2013 – Robbery with Violence Under Section 296(2) of the Penal Code, convicted, sentenced to death, AND defilement under section 8(1) as read with 8(3) convicted, sentenced to 20 years' imprisonment. He filed HCCRA No 64 /2016.

9. This court reduced the death sentence to 20 years' imprisonment but sustained the 20 years sentence for defilement, on the basis that it was the minimum mandatory sentence.

10.**THAT** his mitigation though rendered before the trial court was not considered hence the rendering of the mandatory sentence.

11. **THAT** the trial court ought to have given him an opportunity to mitigate.

12. **THAT** the provisions of sections 8(1) as read with 8(2), 8(30 & 8(4) were unconstitutional. He invokes the jurisdiction of this court under Articles 22, 23, 165(3), and 258 of the Constitution.

13. The applicant filed written submissions which he relied on in toto. 14. The gist of his application is that there is a new jurisprudential paradigm in Kenya with regard to mandatory minimum sentences whereby the mandatory nature of those sentences has been declared unconstitutional.

15. THAT the mandatory nature of the minimum sentences set out under Section 8(2), 8(3), 8(4) of the Sexual Offences Act was brought under the ***Muruatetu*** Principle through various case;-In particular- **Dismas Wafula Kilwake vs R [2018] eKLR**

He went on to cite the sentencing policy guidelines on the circumstances to be put into consideration in determining a sentence. He also put down his mitigation relying on several cases where the High Court has re-sentenced applicants serving sentence for defilement, he urged this court to follow suit and re-sentence him accordingly.

15. The State through Ms. Wambui appeared to agree with him that the holding in **Dismas Wafula Kilwake** applied to his case and suggested 15 years' imprisonment for defilement.

16. I have carefully considered the application, the very detailed appellant submissions, and the authorities he has cited, where the court following *Muruatetu* has proceeded to re-sentence applicants.

I must state here that I am bound by Muruatetu, Dismas Kilwake and other Court of Appeal Authorities on the application of the *Muruatetu* principle on mandatory minimum sentences.

17. However, the interpretation on the application of the same by the High Court, to the Sexual Offences Act that is where I differ. And I am not alone there are 2 views;

- one, that once an appellant's sentence has been confirmed by the High Court, the next level for the appellant is the Court of Appeal where the appellant can raise those issues.

- However, while hearing an appeal on defilement this court is not bound by the so called mandatory minimum sentences but has the discretion courtesy of *Dismas Kilwake* & other cases to determine a sentence based on the circumstances of the offence and the mitigation by the appellant.

- similarly, the subordinate court in conducting its trial and upon finalizing the matter is not bound by the recommended minimum sentences but can and ought to sentence the accused person in accordance with the circumstances of the offence and the accused person's mitigation following the sentencing guidelines. In saying this, I reiterate the words of the Supreme Court in *Muruatetu*;

> ***"it is prudent for the same court that heard this matter to consider and evaluate the mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners".***

18. My understanding of this is that the court where the sentence was 1st meted, is the rightful court for sentence rehearing giving the petitioner/applicant a chance to appeal the said sentence should he/she not be satisfied with the same. Hence, I would not find it prudent to re-sentence the applicant.

19. As for *Dismas Wafula Kilwake* the court referring to the mandatory sentences under the Sexual Offences Act stated: -

> ***"We are persuaded there is no rational reason why the reasoning of the Supreme Court which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***
>
> ***Being so persuaded, 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".***

20. I do not hear sentence rehearing here. What I hear is that of I am going to sentence a person under Section 8 of the Sexual Offences Act. I must consider that I have discretion to give the appropriate sentence in the circumstances.

While I am alive to the unlimited jurisdiction of the High Court, I must still answer the question, when do I sitting a Judge of the High Court get to sentence a person; generally

1. When I hear the case (in Murder trials)

2. In contempt proceedings

3. On revision of subordinate court matters under supervisory jurisdiction given by Article 163 as read with 50(2) (q).

4. On appeal from the subordinate court

When it comes to Sexual Offences it will be either on appeal or on revision. I doubt that it can be after the I have heard the appeal and confirmed the sentence by the subordinate court. That in my view becomes subject of an appeal.

In my understanding sentence rehearing was not part of the deal for sexual offences, but appropriate sentencing is.

21. What can I do for the applicant under the law?

- 1st this court has already rendered itself on the sentence confirming his 20 years sentence as imposed by the subordinate court.

- The only thing that both the subordinate court and this did not consider was that the appellant had been in custody for 3 years and 2 months before he was sentenced. This was the applicants right under the Provision to Section 333(2) of the CPC. Which states: -

> ***"Provided that where the person sentenced …. has prior to such sentence been held in custody, the sentence shall take into consideration the period spent in custody"***.

- Neither the subordinate court nor this court mentioned having taken into consideration the said period of time. And even if the court was imposing a mandatory sentence it was imperative to take into account the period of time spent in remand custody.

22. Back to the prayers;

1. No basis was made for the order of Habeas Corpus.

2. **I do not find the basis for** a sentence rehearing Sexual offences. The appellant will get the relief he seeks in an appeal.

3. **While** Section 8(3) of the Sexual Offence Act provides a minimum sentence and curtails the discretionary powers of the lower court, the appellant did adduce his mitigation before the trial court. This court rendered itself on his sentence. Hence the right forum for him would be the unpursued appeal. This deals with prayer 4 as well,

4. The trial court did receive the applicant's mitigation in accordance with Section 216 which states ***The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made (***same words in 329) of the Criminal Procedure Code in meting out the sentence

5. **T**he challenge against the sentence of 20 years' imprisonment imposed on him lies in the Court of Appeal.

6. **THAT** the sentence of 20 years imprisonment to run from the first day he was held in custody in line with the proviso to section 333 (2) of the Criminal Procedure Code.

The rest of the application is declined.

Delivered and Signed at Nakuru this 9th October 2020

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant

For state Ms. Rita

Appellant Present