REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL REVISION NO. 4 OF 2018

PAUL MANG'OKA KIVELENGE.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Paul Mang'oka Kivelenge** the Applicant herein on the 7th March, 2018 filed an application seeking review of his sentence of twenty (20) years imprisonment for the offence of defilement.

2. He was convicted on 7th November, 2007 after a full hearing. His appeal to the High Court vide **Machakos HCRA No. 117 of 2008** was summarily rejected on 13th November, 2008 by Justice Lenaola *(as he was then).*

3. In his application through the supporting affidavit, the Applicant has deponed that he is very remorseful for his actions. He asks the court to consider the two (2) years spent in custody as part of his sentence. He claimed to be aged, 85 years as at 7th March, 2018.

4. When the application came for hearing on 4th July, 2019, the Applicant submitted that he was too old *(now aged 86 years)* and prayed to be released. He reckoned that he had learnt a lot while in prison and had several certificates to show for that. He says he intends to go and teach the young people about life and even life in prison, which they should avoid.

5. **Mr. Kihara** learned counsel for the DPP appreciated the Applicant's ability to remember many things and his willingness to go and share what he had so far learnt at the prison. He noted that at the time of conviction the Applicant was shown to be 74 years of age.

6. Counsel submitted that there was no evidence to confirm that the Applicant was or has been unwell as he alleges. To him the sentence meted out to the Applicant was appropriate. He did not however have any objection to the two years spent by the Applicant in custody being considered as part of the sentence served. This would make the period served to read 14 years instead of 12 years he submitted.

7. The Applicant is not in any way contesting the conviction in this matter. He was charged and convicted under Section 8(2) Sexual Offences Act which is a penalty section. Secondly Section 8(2) Sexual Offence Act provides for a sentence of life imprisonment upon conviction.

8. The Applicant was upon conviction sentenced to twenty (20) years imprisonment. He is not saying that this is an unlawful sentence. All he is pleading with the court to do is to consider his age and the period he has been in prison and the pre-sentence period and set him free. Though he claims that the period he was in custody was two (2) years, it is actually one (1) year. That is November 2006 – November 2007.The State is not opposed to that pre-sentence period being considered as part of the sentence served.

9. The issue is whether this court can review the sentence imposed and reduce it as applied for by the Applicant. It is true that what the Applicant did to a defenseless minor was inhuman. Even as the court punishes such an offender, all the aggravating circumstances must be considered.

10. The Applicant at the time of conviction said he was 74 years old. This is a special factor that ought to have been considered by the trial court. It is nowhere stated that it was considered. He is now 86 years old. I have seen his diminishing eye sight and physic when he appeared before this court.

11. The Appellant in the case of **Jared Koita Injiri –vs- Republic Criminal Appeal No. 93 of 2014 (2019) eKLR** had been convicted of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The Court of Appeal in the said case upheld the conviction but had the following to say of the sentence:

*"This then leaves the question of the sentence. Arising from the decision in **Francis Karioko Muruatetu & Another –vs- Republic, SC Pet. No. 16 of 2015** where the Supreme Court held that the mandatory death sentence prescribed or the offence of murder by Section 204 of the penal Code was unconstitutional. The Court took the view that;*

"Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the courts of their legitimate jurisdiction to exercise

discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigation circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; and absolute right".

In this case the Appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.

The Appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the Appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

*Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another –vs- Republic** (supra), we would set aside the sentence for life imposed and*

substitute it therefore with a sentence of 30 years from the date of sentence by the trial court".

12. The Applicant was sentenced on 7th November, 2007 and has served roughly 12 years. He was in remand custody for one year. This is not a short period of incarceration and I believe he has learnt his lesson or lessons. At his age of 86 years there is no service he is rendering at the prison. He is only sleeping and feeding at State expense. Inspite of his past actions, he is an old man whose dignity should be upheld as per the Constitution and as acknowledged in the **Muruatetu case.**

13. In the premises, I **set aside the Applicant's sentence of 20 years' imprisonment and substitute it with the period already served. He shall be forthwith released unless lawfully held under a separate warrant.**

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 5TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE