



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO.365 OF 2018

(From Original Conviction and sentence in Criminal Case No. S.O'A' 18 of 2018 of the Principal Magistrate's Court at Wanguru)

REPUBLICAPPLICANT

VERSUS

DMNRESPONDENT

RULING

1. The respondent DMN was convicted of the offence of incest contrary to **Section 20(1) of the Sexual Offences Act** and sentenced to serve 15 years in jail by the Senior Resident Magistrate Wang'uru.
2. The State through Mr. Geoffrey Obiri Assistant Director of Public Prosecution filed an application for revision under **Section 364 of the Criminal Procedure Code**. It is based on the ground that the accused was charged with the offence of incest contrary to **Section 20(1) of the Sexual Offences Act**. Initially when he took plea on 2/7/18 the age of the minor was indicated to be 13 years old.
3. Subsequently the minor was taken for age assessment and the Doctor's report was produced as **exhibit 5** indicated that the minor was aged Eleven years. She was the complainant. That the provision of **Section 20(1) of the Sexual Offences Act** provides that if it is alleged in the charge sheet and proved that the female is under the age of 18 years the accused person **shall be liable** to imprisonment for life.
4. He urges the court to correct the anomaly in sentencing and met an appropriate sentence as provided under **Section 20(1) of the Sexual offences Act**.
5. The respondent prayed that the sentence be allowed to stand and he serves Fifteen years.
6. I have considered the application.

Section 364 1a & b of the Criminal Procedure Code provides:-

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

The jurisdiction of this court to make orders on revision is under **Section 362 of the Criminal Procedure Code** which provides:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

7. The court is supposed to satisfy itself on the correctness, legality or propriety of any finding, sentence or order.
8. The court while exercising that jurisdiction, is not supposed to deal with matters which should otherwise be dealt with on appeal. **Section 364(5) of the Criminal Procedure Code** provides:-

“(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

9. An appeal lies against sentence. The applicant was therefore supposed to prove that the sentence was not correct. The applicant is stating that the **Sexual Offences Act** provides for a mandatory sentence of life imprisonment. **Section 20(1) of the Sexual Offences Act** provides:-

“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years: Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

10. There has been a move from mandatory sentences which has been stated to tie Judges and Magistrate from the unfettered exercise of discretion in sentencing. The law now favours a departure from mandatory sentence to a sentence which leaves room for the court to exercise discretion while sentencing depending on the circumstances of the case. The Supreme Court in the case of **Francis Kioko Muruatetu & Another –v- R and others Pet. No. 15/15** stated in a unanimous decision:-

“The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional.”

11. This must apply to other mandatory sentences. The court of Appeal in the case of **Jared Koita Injiri –v- R CR. APP. NO. 93/2014** dealt with the issue of the application of the Supreme Court in other mandatory sentences. In the case, the court dealt with the issue of the sentence under **Section 8(1) as read with Section 8(2) of the Sexual Offences Act** where the trial Magistrate had sentenced the appellant to life imprisonment and the High Court upheld the sentence.

The court held –

“Arising from the decision in Francis Kioko Muruatetu and Another –v- Republic, here the Supreme Court held that the mandatory death sentence prescribed for 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 the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating 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 person under the Article 25 of the Constitution.”

The Court of Appeal then stated:-

“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.”

12. The mandatory nature of the sentence under **Section 20(1) of the Sexual Offences Act** is unconstitutional. The sentence was passed on 20/11/2018. This was after the decision in **Muruatetu** case. The trial Magistrate must have been informed of the decision in **Muruatetu** case when she passed the sentence. The sentence cannot be stated to be incorrect or irregular. The trial Magistrate had discretion to pass the sentence which she did and the grounds for revision under **Section 362 & 363(1) of the Criminal Procedure Code**, High court has no discretion to impose a greater punishment for the offence that accused has committed than might have been inflicted by the court which imposed the sentence.

13. For these reasons I find that the application lacks merits in view of the decisions which I have quoted above. I dismiss the application. The ruling will apply in Revision 364/2018 with the necessary modifications to names and the charge, and the sentence.

Dated at Kerugoya this 18th day of July 2019.

L. W. GITARI

JUDGE