REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL MISC. APPLICATION NO. 34 OF 2018

FORMERLY MACHAKOS HCCRA.NO.183 OF 2012

NICODEMUS MUSYOKI KILONZO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act vide Makingu P.M Criminal case no. 939 of 2011. The complainant was a child aged 13 years. He was upon conviction sentenced to twenty (20) years imprisonment on 3rd December, 2012.

2. He appealed against the conviction and sentence vide Machakos HCCRA no. 183 of 2012. The said appeal was dismissed on 18th March, 2015.

3. He has filed this application for a retrial under Article 50(6) (a) and (b) of the constitution. In his submissions, he appears to be seeking a review of his sentence in view of the mitigation offered.

4. The mandatory and minimum sentence provided for under Section 8(3) Sexual Offence Act is 20 years, which is the sentence that was meted out to the Applicant herein.

5. He is asking the court to consider the period he was in custody and reduce the sentence for him. He says he was sentenced when he was only 18 years of age and he has learnt a lot of skills while in prison.

6. This application was opposed by learned counsel Mrs. Owenga for the Respondent. She submitted that the sentence meted out was lawful and not harsh and should not be interfered with.

7. I have considered the evidence on record and the submissions by both parties. The lower court record shows that the Applicant conducted his case while on bond and not in remand custody. Section 333(2) Criminal Procedure Code provides: -

> ***"(2) Subject to the provisions of section 38 of the penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise, provided in this code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."***

This provision is therefore not applicable to him.

8. The record also shows that he never gave any mitigation before the trial court. The Applicant submitted that he was only 18 years of age at the time of conviction.

9. This offence was committed on 31st August, 2011. The Applicant was sentenced on 3rd December, 2012. If his submission is correct then it means he was a minor at the time of commission of the offence. That issue was never raised before the trial court or during his appeal in the High Court. It cannot therefore be an issue here.

10. The sentence meted out to him is a mandatory minimum sentence which has been found to be unconstitutional where the trial court is denied discretion in sentencing. This follows the decision in **Francis Muruatetu & Anor –vs- R, Supreme Court Petition No. 15/2015**.

Other decisions on the same issue are from the Court of Appeal in the cases of: **Christopher Ochieng –vs- R, Kisumu Criminal Appeal No. 202 of 2011(2018) eKLR; Evans Wanjala Wanyonyi –vs-R (2019) eKLR.**

11. I have considered all the circumstances of the case and the age of the minor. The Applicant and the complainant are first cousins. Taking into account all this and the manner the mission was executed, I find no substantive ground raised to make me interfere with the sentence.

12. The best the Applicant can do is to move to the Court of Appeal to challenge the decision of the High Court dismissing his appeal.

13. The upshot is that the application lacks merit and is dismissed.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 18TH DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE