REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO.57 OF 2016

STEPHEN NGUU MULI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Stephen Nguu Muli was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 25th December 2009 at [particulars withheld] Trading Centre in Machakos County, the Applicant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of JWM, a girl aged thirteen (13) years. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged. He was sentenced to serve ten (10) years imprisonment. His appeal to the High Court on both conviction and sentence was dismissed. The custodial sentence that was imposed on him was however enhanced to twenty (20) years imprisonment. His appeal to the Court of Appeal was dismissed.

That would have been the end of the matter but for the window opened by the Supreme Court in the decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. Although initially the decision dealt with mandatory death sentence, it has been extended to sexual offences by the Court of Appeal. In **Philip Ochieng Mweresa –vs- Republic [2019] eKLR**, the Court of Appeal held thus:

> ***"[32] We take note of the Supreme Court's decision in Francis Karioko Muruatetu & Another v Republic SC. Petition No.15 as consolidated with Petition No.16 of 2015 in which the Supreme Court stated that the mandatory nature of the death penalty as provided under Section 204 of the Penal Code denies the Court its legitimate jurisdiction to exercise its discretion in sentencing. This Court recently in Dismas Wafula Kilwake v Republic Criminal Appeal No.129 of 2014 extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory sentences provided under the Sexual Offences Act and held that Section 8 of the Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. In the appellant's case the minor complainant was established to be 3 years old. The appellant's action of sexually assaulting such an innocent child was reprehensible. He behaved like an animal and the sentence of life imprisonment would be appropriate to keep him away from society in order to protect such innocent children."***

In **Robert Nyambani Mariara v Republic [2019] eKLR** Ngugi J held thus:

> ***"27. This is what the law provides and it is what the Learned Magistrate used to impose the sentence she did. However, in a recent decision, in Dismas Wafula Kilwake v R [2018] eKLR, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:***
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> > ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No.16 of 2015], 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.***
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> ***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. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***

The Sentencing Police Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

In his application through counsel, Mr. Murunga, the Applicant stated that since his incarceration, he has spent a total of ten (10) years in lawful custody. In the period, he had acquired vocational skills. He had undergone various trainings which have built him personally and spiritually. He was of the view that if the court were to favourably consider his mitigation, he would be ready to return back to the larger society. He stated that there has been reconciliation between his family and the family of the victim. In that regard, the Affidavit that he refers to is by the victim of the offence one JWM who in paragraph 5 of her affidavit alleges that she implicated the Applicant after she returned home late and her father forced her to admit the boy that she had been out with. The Applicant states that taking all these circumstances into consideration, it is only just and fair that the court favourably considers his application for resentencing. He submitted that, presently in prison he was a trustee, having been so recognized because of his exemplary behaviour while in prison.

Ms. Nyauncho for the State opposed the application. She submitted that the aggravating circumstances were such that this court cannot favourably consider the Applicant's application for resentencing. She reiterated that the Applicant took advantage of a girl of thirteen (13) years of age, who was her neighbour, and sexually assaulted her. She stated that this was an immoral and serious offence. A deterrent sentence should be meted on the Applicant. She urged the court not to interfere with the sentence that was imposed by the trial court.

The Supreme Court in the **Francis Karioko Muruatetu** decision gave the following guidelines when this court will be considering the Applicant's application on re-sentencing:

"[71]. As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

"25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.""

In the present application, this court must clarify that in an application for resentencing, the Applicant cannot be allowed to challenge the facts that led to his conviction. The trial court, the High Court and the Court of Appeal, all reached concurrent finding that indeed the prosecution had established to the required standard of proof beyond any reasonable doubt that the Applicant had defiled the complainant. The Supreme Court's decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR** does not give an applicant an opportunity to have a second or third bite of the cherry by seeking to re-argue his appeal. What the above decision gives, is the opportunity for an applicant to mitigate his sentence in view of the fact that the courts that decided his case applied the law that existed at the time where sentences in sexual offences were fixed and mandatory and were essentially determined by the age of the victim at the time of the commission of the offence. This court therefore is not persuaded by the thrust of the Applicant's application when he seeks to rehash the grounds of appeal which courts of competent jurisdiction have already rendered their opinion.

As regards the Applicant's mitigation, this court agrees with the Applicant that the courts that heard his appeal proceeded to enhance his sentence without taking into consideration his mitigating circumstances. The trial court had exercised its discretion and sentenced the Applicant to serve ten (10) years imprisonment. This sentence was however enhanced by the High Court so that the Applicant was sentenced

to serve twenty (20) years imprisonment. It was clear from the judgment of the Learned Judge that she varied and enhanced the sentence on the basis that the trial court had no discretion in sentencing the Applicant once it reached the determination that the Applicant was guilty as charged. The Court of Appeal confirmed the enhanced sentence on the same basis.

The Applicant has told the court that he has been in lawful custody since 9th December 2011 when he was convicted by the trial court. In the period of his incarceration, he has applied himself usefully by undertaking both vocational and spiritual courses which has developed him as a person. He has become a model prisoner to the extent that he has been granted the trustee position in prison. Although the offence that the Applicant committed is serious, this court is persuaded that taking into consideration the unique circumstance of this case, whereby the Applicant was initially sentenced to serve ten (10) years imprisonment, this court is of the view that the sentence of twenty (20) years imprisonment that was imposed by the Superior Court was not justified in the circumstances.

In the premises therefore, that sentence of twenty (20) years imprisonment is set aside and substituted by a sentence of this court sentencing the Applicant to serve five (5) years imprisonment with effect from the date of this Ruling. This court has taken into consideration the period of nearly eight (8) years that the Applicant has been in prison. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE