REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. 17 OF 2019

NJAGI NDWIGA JOHN ALIAS NGAI MAGATI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is for the undated application filed on the 9/08/2019 for revision of sentence. On the 31/10/2011, the applicant was charged, convicted and sentenced to life imprisonment for the crime of defilement contrary to section 8 (1) of the Sexual Offences Act. The applicant exhausted all his avenues of appeal.

2. It is the applicant's case that he is satisfied with his conviction but as a result of his advanced age and his unfavourable health condition, the applicant seeks this court's discretion to revise his sentence or commit him to a non-custodial sentence.

3. The applicant further states that he has been in custody since his arrest on the 23/02/2011 to date and compounded by the fact that he is a first time offender and deeply regrets his actions, this court should grant him his revision. He further states that he is aged ninety (90) years and is sickly and requires constant medication and medical care.

4. The applicant also relies on the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** that declared the mandatory nature of the death penalty meted out on capital offenders unconstitutional.

5. The prosecution in response state that this court's hands are tied as the applicant is serving life imprisonment and as such the principles in the **Muruatetu** (supra) case are inapplicable. The prosecution however notes that the advanced age of the applicant is an exceptional circumstance which may be used to review the instant case.

B. Analysis of the Law

6. I have carefully considered the convict's plea for revision of sentence.

7. Section 362 of the Criminal Procedure Code Cap 75 of Kenya stipulate that: -

> *"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."*

8. Under its revision Jurisdiction, the High Court is empowered to do any of the following as stipulated in **Section 364 of the Criminal Procedure Code: -**

> *"(a) In the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by Section 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 Orders.*
>
> ***2)*** *No Order under this Section shall be made to the prejudice of the Accused person unless he has had an opportunity to be*

heard wither personally or through an advocate in his own defence, provided that this Section shall not apply to an Order made where a subordinate Court has failed to pass a sentence which it was required to pass under the written Law creating the offence concerned.

3) Where the sentence dealt with Under this Section has been passed by a subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the Accused has committed than have inflicted by the Court which imposed the sentence.

4) Nothing in this Section shall be deemed to authorize the High Court to correct a finding of acquittal into one of conviction.

5) When an appeal arises from a finding sentence or Order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

9. It would appear that the Applicant has grounded his Application on the Muruatetu doctrine. This was the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR.* In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

10. The reasoning in *Muruatetu Case* respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in *William Okungu Kittiny v R [2018] eKLR.*

11. The reasoning in *Muruatetu Case* was also extended to sentences imposed by the Sexual Offences Act and possibly all other statutes prescribing minimum sentences by the Court of appeal 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: -

"*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.*

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 Policy 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."

12. This decision now requires courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

13. In the present case, the applicant offered mitigation before the trial to the effect that he had numerous health problems. The report by Dr. J. Kinuthia of Embu Level 5 Hospital dated 30/09/2019 states that the accused suffers from acute diabetes milletus and hypertension both of which require continuous monitoring and medication to prevent complications. I have considered the advanced age of the applicant and his deteriorating health that calls for constant medical attention.

14. It is also imperative that the decision of **Francis Muruatetu Petition** and the principles thereto are applicable to offences under the Sexual Offences Act as was held by the Court of Appeal in the **Dismas Wafula** case. The hands of court are no longer tied in application of minimum or maximum sentences under the Act. The courts have discretion in sentencing that cannot be taken away by statute in disregard of the Constitution.

15. I have also taken into consideration that the offence in question is serious in nature as it involves preying on a young girl and the possibility that the trauma will be with her for the rest of her life. A sexual assault at a tender age tends to affect one's life for a long time. However, I note that the defilement here was achieved by means of subterfuge rather than violence.

16. All factors considered, I am of the view that a life imprisonment sentence in the circumstances of this case is excessive. The sentence is hereby reviewed by setting aside the sentence of imprisonment imposed by the trial court. Due to the advanced age of the applicant, I hereby find that a non-custodial sentence would be appropriate in the circumstances subject to suitability.

17. The applicant is hereby referred for a home inquiry report to be submitted to this court within seven (7) days.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for State/Respondent

Applicant present