REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL PETITION NO. 52 OF 2020

MGO.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The Petitioner, **MGO**, has invoked the decision made by the Supreme Court in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, SUPREME COURT PETITION NO. 15 OF 2015**, seeking to be re-heard in respect to the sentences which the trial court has handed down to him.

1. For the offence of **Defilement** he was sentenced to 20 Years Imprisonment, whilst for the offence of **Incest** he was sentenced to Life Imprisonment.

2. After conviction, the Petitioner appealed to the High Court.

3. The High Court upheld the convictions, as well as the sentences, save to order that the said sentences should run concurrently, instead of consecutively as the trial court had ordered.

4. At the time the Petition herein was filed, the Petitioner said that he had never filed an appeal at the Court of Appeal.

5. He has submitted that the life sentence was excessive, arbitrary, demeaning, degrading and inhuman as it violates the Petitioner's right to a fair trial.

6. The Petitioner also submitted that the 2 sentences were illegal and bad in law as they amount to duplicity of charges. In his considered view, he ought to have only been charged with the offence of Incest, and not defilement as well.

7. In the circumstances, the Petitioner asked this Court to exercise its judicial discretion, and have him re-sentenced to a valid, fair and legal sentence.

8. It was the Petitioner's submission that the time limit for life sentence was ambiguous and uncertain, thus constituting a violation of his right to dignity.

9. He also considers the life sentence as one which defeats the purpose and rationale of the criminal justice system, in particular the correctional department whose mandate was to ensure that the offender undergoes rehabilitation and reformation, so that he can thereafter be re-integrated back to the society as a law abiding citizen.

10. He urged the court to exercise its power, and so to impose a lesser sentence.

11. Finally, the court was asked to consider **Section 333 (2)** of the **Criminal Procedure Code**, and therefore take into account the period which the Petitioner spent in custody whilst he was still on trial.

12. In answer to the Petition, the learned Prosecution Counsel, Ms M. Odumba begun by conceding that it is now well settled, that the mandatory sentence is unconstitutional.

13. Nonetheless, the Respondent submitted that when called upon to review a sentence the court ought to take note of indicative prescribed

sentence.

14. I do agree with the Respondent, that when a statute prescribes a sentence, as is its mandate to do, the court ought to always derive guidance from the relevant statutory provision.

15. Having set its eye on the statute, the court would then take into account the mitigation put forward by the offender. The court would apply its mind to both the mitigating factors as well as the aggravating factors, if any.

16. When the court finds good reasons for departing from the prescribed sentence, such reasons should be discernible from the notes made by the court when it was sentencing the offender.

17. In this case the Petitioner had carnal knowledge of his own daughter, who was less than 14 years old.

18. When the charges were read out to him, the Petitioner pleaded guilty.

19. He told the trial court that he had returned home when drunk, and that it is in that condition that he committed the offence.

20. In his Judgment, Mwera J. (as he then was) expressed himself thus;

> ***"First, that consumption of alcohol was self-induced and there was no evidence to the effect that by its volume or potency, it deprived the appellant of his senses to know what he was doing or that it was wrong to do such acts."***

21. The learned Judge quoted with approval the following words of the Lord Chancellor Ellwyn – Jones in **DPP Vs MAJEWSKI [1977] A.C. 443**;

> ***"If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition."***

22. I do concur, that such reckless conduct cannot provide a defence to the offender. If anything, such conduct would constitute an aggravating factor, in the circumstances of this case.

23. It is my considered opinion that if the Petitioner wished to canvass the following issues, he ought to have lodged an appeal to the Court of Appeal;

> ***(a) The alleged excessive, arbitrary,demeaning, degrading or inhuman nature of the life sentence and,***
>
> ***(b) The alleged illegality of the sentences.***

24. When Mwera J. determined the appeal before him, he upheld the 2 sentences. I cannot now purport to sit on an appeal over his Judgment, as I am a court whose jurisdiction is concurrent with his, as at the time he rendered the Judgment on appeal.

25. As regards the alleged duplicity of the sentences, I hold the view that the Petitioner has not demonstrated any such duplicity. Each of the 2 offences has been the subject of a sentence, in accordance with the law.

26. In my considered view, there is merit in the contention that there was duplicity in the charges.

27. In the case of **STEPHEN ODHIAMBO AGUTU Vs REPUBLIC, HIGH COURT CRIMINAL APPEAL NO. 128 OF 2016** Majanja J. expressed himself thus, in a case in which the Appellant had been convicted for both Defilement and Incest;

> ***"It is clear from the provisions I have outlined that both incest and defilement are co-extensive offences although incest is proved either by establishing penetration or an indecent act in addition to proving the relationship between the accused and the child.***
>
> ***It was therefore improper for the prosecution to charge the appellant with both offences.***
>
> ***Since the allegation of defilement involved the appellant's daughter, he ought to have been charged with incest."***

28. It would therefore follow that the charges were duplex.

29. If I was handling an appeal touching on the issue of the Petitioner's conviction, I could most probably have held that he ought not to have been convicted on the 2 charges.

30. But I am not sitting on an appeal against the conviction of the Petitioner. I cannot therefore purport to make a pronouncement that would be tantamount a Judgment to set aside the conviction.

31. On the question of the life sentence, I hold the considered view that it was neither ambiguous nor uncertain, as alleged by the Petitioner.

32. I am aware that in a number of countries, when a person is sentenced to serve a life sentence, it means he would be in jail for a specified duration. In those jurisdictions, the offender would know that he would be in prison for, say 30 years or 25 years, depending on what is stipulated by the applicable law.

33. But as no such specification exists in the country, a person who is sentenced to life imprisonment shall spend the rest of his lifetime behind bars.

34. Although the court and the offender would not know how long the offender would continue living, after he had been sentenced; and even though it is possible that any 2 or more persons who were jailed for life on the same day, may thereafter die at very different times, the constant fact would be that, provided the offender was still alive, he would stay in prison.

35. On the question about the role of the correctional department of the Prison Service, I find that the Petitioner has actually proved that that purpose (of rehabilitation and reform) is not defeated by a sentence of life imprisonment. He has told the court that he was;

> ***"……. remorseful, rehabilitated,reformed, and a first offender who is ready to associate with the society at large."***

36. Indeed, he emphasized that he was now ready to be intergrated back to the society. It therefore follows that the correctional department of the Prison Service was still able to undertake its mandate appropriately, even though the Petitioner was facing a life sentence.

37. In his Judgment, Mwera J. expressed himself thus;

> ***"As for the sentences, they are the minimum that the Act in question sets down. Neither the learned trial magistrate nor this court canalter them. They are the minimum terms under the law. Whatever the feeling of individual judicial officers about minimum sentences, it is only Parliament that can address that."***

38. Although the learned Judge believed that it was only Parliament that could prescribe the sentences to be handed down in respect to each criminal offence, so that if Parliament enacted laws which stipulated either minimum or mandatory sentences, the courts had to comply; the Supreme Court of Kenya has changed that perception.

39. In the landmark decision of **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, SUPREME COURT PETITION NO. 15 OF 2015**, it was held that the mandatory nature of the death sentence, which is prescribed for the offence of murder, was unconstitutional.

40. Taking a page from that Judgment, the Court of Appeal held as follows, in the case of **DISMAS WAFULA KILWAKE Vs REPUBLIC [2018]eKLR**;

> ***"(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."***

41. I therefore find that when the learned trial magistrate felt constrained to hand down not less than the prescribed minimum sentences, the court failed to take into account the specific circumstances of the Petitioner. For that reason, the Petitioner is entitled to re-sentencing.

42. I have taken into account the circumstances in which the offence was committed, as well as the period which he spent in custody during the time when he was still on trial; and I now re-sentence the Petitioner to 30 Years Imprisonment, for the offence of Defilement.

43. The said sentence will run from 3rd July 2008.

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **12th** day of **May** 2021

FRED A. OCHIENG

JUDGE