REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 2 OF 2019

BETWEEN:

ALEX MWAZIGHE MWAFUSI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENCING

1. The Appellant herein Alex Mwazighe Mwafusi was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act and an Alternative Charge of committing an indecent Act with a child contrary to Section 2(1) as read together with Section 11 of the Sexual Offences Act.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the alternative count and for that the trial court sentenced him to serve ten (10) years imprisonment, which was the minimum mandatory sentence.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against both the conviction and sentence. The Appeal was duly heard and judgment delivered on 10/12/2019. The judgment dismissed the Appeal and upheld both the conviction and sentence by the trial Court. However, after dismissing the Appeal, the Judge made the following orders:

a. For view of age of the Appellant, he is entitled to ask for the review of his sentence.

b. The probation officer to file a report on sentence within 28 days.

c. Review Hearing on 29/1/2019.

Analysis & Determination.

4. Once a court becomes functus officio, the only orders it can grant are review orders, which are an exception to the functus officio doctrine. The Supreme Court in **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** stated that:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties.

Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

5. Looking at the re-sentencing report file in Court on 28/1/2020, it is noteworthy that the Appellant is a 23-year-old orphan who is already a father to a two-year-old child. The community is looking forward to the re-sentencing, hoping that justice will be served during the resentencing. The recommendation by the probation department is that this Court should take into account the circumstances of the offence, extenuating factors, the youthful age of the Appellant and his attitude towards the victim, the views of both the families of the victim and Appellant, the views of the community that does not regard him as a sexual predator.

6. The victim in her victim impact statement report filed in Court on 28/1/2020, states that the Appellant was not her boyfriend, and that she does not view the Appellant as a threat to her well-being because nothing sexual happened on the material day, and that her efforts to clarify to the public fell on deaf years. The victim blames uncles who had initially had some differences with the Appellant for instigating the Appellant's arrest. The victim further states that it was due to the charged atmosphere and threats from her uncle that she blamed the Appellant for things that never happened.

7. Section 11(1) of the Sexual Offences Act provides that:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

8. Section 11 provides for a mandatory minimum sentence. However, such a sentence does not meet the constitutional test in in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.

9. This Court has the discretion to impose any sentence over and above the minimum sentence, the section do not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. These provisions therefore fail the constitutional test.

10. The trial court in this matter did not consider the mitigating submissions of the Appellant since there was a minimum mandatory sentence of 10 years in prison for the offence he had been convicted of. There was nothing the court could do because its hands were tied by statute. The Supreme Court in the **Francis Karioko Murwatetu** case (supra) set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows:

"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.

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 thatparagraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound 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."

11. I have considered the Re-sentencing report and the Victim Impact Report and the mitigation by the Appellant especially in the light of the aforesaid **Muruatetu case.** It is noteworthy that the Appellant has served 2 years since arrest, conviction, and sentence. I find that the Appellant's mitigation at the trial court of being a first offender, an orphan, and that he fended for his siblings were true. Therefore, I am satisfied that in the circumstances of the case, the Appellant deserves to be re-sentenced in regard to the unconstitutional mandatory minimum sentence under Sections 11 of the Sexual Offences Act.

11. Accordingly, I hereby set aside the mandatory minimum sentence of 10 years and in place thereof, I jail the Appellant for the period already served in prison, with the effect that the Appellant is forthwith set free and released unless lawfully held.

Right of appeal in 14 days.

Dated, Signed and Delivered at Mombasa this 10th day of December , 2020.

E. K. OGOLA

JUDGE

Ruling delivered in chambers via MS Teams in the presence of:

Mr. Fedha holding brief for M/S Mukango for DPP

Applicant in person

Court Assistant – Peris

NOTE: This ruling was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver rulings in response to the COVID-19 Pandemic.