Case Number:	Miscellaneous Criminal Application 6 of 2019
Date Delivered:	08 Jul 2021
Case Class:	Criminal
Court:	High Court at Lodwar
Case Action:	Ruling
Judge:	James wakiaga
Citation:	Suleiman Edung v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Turkana
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appellant re sentenced to twenty (20) years with effect from 4/3/2010 when he was convicted with the last three (3) years
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

MISC. CRIMINAL APPLICATION NO. 6 OF 2019

SULEIMAN EDUNG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 in Lodwar SRMC Criminal Case No. 56 of 2009 and upon trial was convicted and sentenced to serve twenty (20) years imprisonment.

2. Being dissatisfied by the conviction and sentence, the applicant file an appeal to the High Court of Kenya at Kitale which appeal was dismissed, leading to the applicant filing an Appeal to the court of appeal at Eldoret being Criminal Appeal No.67 of 2011 which appeal was also dismissed.

3. Being undeterred by the dismissal of this appeals, the same approached this court by way of a Constitutional Petition in High court of Kenya at Lodwar Constitutional Petition No. 5 of 2017 in which he sought for a declaration that the proceedings of the Lodwar Senior Resident Magistrate in Criminal Case No.56 of 2009 contravened the petitioner's right to a fair trial under Article 50(1) of the Constitution and further sought an order of retrial.

4. By a ruling dated 6/12/2018, this court dismissed the said petition on the ground that there was no violation of his constitutional rights noting the issues raised in the said petition should have been or were raised at the two appellate courts.

APPLICATION

5. Not deterred by the turn of events, by Notice of Motion filed on 28 March, 2019, the applicant filed this application at the High Court of Kenya at Kitale being Misc Criminal Application No.54/2021 in which he sought the following orders:-

"That he had served more than one third of the sentence, therefore this honourable court should grant him non-custodial sentence."

6. The application was based upon his annexed affidavit, where it was deposed that he was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement contrary to Sections 8(1) and 8(3) of the Sexual Offences Act No. 3 of 2006.

7. It was deposed further that he had served more than one third of his sentence and should therefore be granted non-custodial sentence, on account that his children, to whom he was the sole bread winner, had dropped out of school and that during that period he had been in custody he had reformed and rehabilitated and trained in dress making and tailoring which will help him become a self-reliant person.

8. By an order dated 29th April, 2019, the said application was transferred from Kitale to this court registry for trial and determination.

DIRECTIONS

9. Directions were given that the application be heard by way of written submissions and at the time of hearing, it is only the Respondent which had filed written submissions. The Applicant therefore made oral submissions and stated that he wished to be placed on CSO (Community Service Order) on the ground that he had only two (2) years to complete his sentence and that his case was based on a similar decision by the High Court at Kitale, the particulars of which he did not supply to court.

10. On behalf of the Respondent, it was submitted that the applicant's appeals were dismissed and the sentence confirmed. It was contended that the same had not demonstrated to the court the reasons why the sentence should be reviewed, noting that the trial court and the two appellate courts had considered the applicant's mitigation before sentence. It was further contended that the Sexual Offences Act under which he was charged did not anticipate non-custodial sentence, hence the application was misplaced.

DETERMINATION

11. Community service is provided for under Section 3 of the Community Service Order Act No. 10 of 1998 which provides as follows: -

1) Where any person is convicted of an offence punishable with:-

a) Imprisonment for a term not exceeding three years with or without an option of a fine or

b) Imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without a fine to be appropriate, the court may subject to this Act make a community service order requiring the offender to perform community service.

12. The Applicant was charged with sexual offence and was sentenced to serve imprisonment term of twenty (20) years which is over and above the three (3) years sentence within which the court may order for community service order. It therefore follows that his application is misplaced and lacks merit.

13. The applicant should have approached this court for re-sentencing hearing, within the meaning of the Supreme Court decision in **Francis K. Muruatetu case** as he was given the minimum mandatory sentence provided for under the law, but not to approach the court for an order of community service order.

14. I have noted that the Court of Appeal in the case of **DISMAS WAFULA KILWAKE v REPUBLIC C.A No. 129/2014 [2018] eKLR** extended the reasoning of **FRANCIS KARIOKO MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** to apply to the mandatory sentences provided under the Sexual Offences Act under Section 8 of the Act and stated as follows:-

"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 circumstance of earlier case should not apply to the sexual offence Act which is exactly the same thing.

Being persuaded we hold that the provision of Section 8 of the Sexual Offences Act must be interpreted 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 imposes unreasonable or lenient sentence 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."

15. Whereas the application herein is misplaced and should have been dismissed, so that the applicant as was stated in **Eldoret High Court Criminal Appeal No. 104/2012** be referred back to file an application for re-sentencing, so as to capture correct facts such as the period spent, whether there has been any change within the time he has been in rehabilitation, reports from the prison and any

other life changing skills acquired, I am of the considered opinion that in exercising the jurisdiction of this court conferred by Article 159 (1)(d) of administrating justice without due regard to procedural technicalities, the application herein can be converted to resentencing hearing which I hereby do.

16. I have taken into account the circumstances of the offence herein and noted that the Applicant was the Area Assistant Chief, who was expected to be a symbol of Authority in his area of jurisdiction. I have further taken note of the fact that the complaint was at the time of the commission of the offence, aged 15 years, a pupil in Class six, who according to the proceedings had this to say: -

"I told my father PW1 that Suleiman is my husband. On that day the 4th January, 2009, the accused person locked me inside his house and we had sex. It was about 9.00 p.m. I left the home of the accused person after we had sex with the accused person without any protection."

17. In cross examination PW1 stated as follows: -

"It is true I had sex with the accused person or I was pregnant before I had sex with the accused person on the 4th January, 2009. I do not have any reason why I did not tell my parents that I was pregnant on the 4th January, 2009. I was not forced to say that the accused person made me to be pregnant. I started having sex with the accused person in August 2008. I do not know why it was only discovered that I had an affair with the accused person on 4th January, 2009."

18. In sentencing the Applicant, the trial court stated as follows: -

"I have considered the accused person's mitigation. The accused is a local administrator and admits being conversant with the law. In the circumstances of the case I sentence the accused person to serve twenty (20) years imprisonment."

19. The Applicant at the trial attempted to introduce the evidence to the extent that the complainant was aged 18 years at the time of the commission of the offense and it is not clear from record whether his alleged defence under Section 8(5) and (6) was taken into account and dismissed.

20. It is clear to my mind that the trial court took into account the mitigation of the Applicant and the fact that he was a local administrator who ought to have known better. I have however noted that the affair between the Applicant had been ongoing for a period of over six (6) months and that at the time when it was detected the complainant was already pregnant. I have also taken into account the fact that the Applicant, who was a local Administrator lost his job, having served as an Assistant Chief for twenty-eight (28) years which should have been taken into account while passing the sentence.

21. I have further taken into account that though not supported by any documentary evidence from the prison, as the Applicant did not apply for re-sentence hearing, the same has undergone training in dress making and tailoring while in prison. I have further considered the Applicant's age and whereas I find the sentence meted out justifiable, I will nonetheless extend mercy to the applicant and exercise judicial discretion in his favour and maintain the sentence passed against him save that the remaining three years thereof shall be served on probation so as to rehabilitate him further and to resettle him into society.

22. I therefore resentence the appellant to twenty (20) years with effect from 4/3/2010 when he was convicted with the last three (3) years thereof being served on probation.

ORDER

23. The Applicant to serve twenty years sentence as follows: -

i) The first seventeen (17) years thereof with effect from 4/3/2010 imprisonment.

ii) The last three (3) years thereof on probation.

iii) The Applicant is entitled to remission if any on the first 17 years.

24. And it is ordered.

DATED, SIGNED AND DELIVERED AT LODWAR ON THIS 8TH DAY OF JULY, 2021

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J. WAKIAGA

JUDGE