



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NUMBER 165 OF 2019

FROM KISII APPEAL NO. 78 OF 2011

FROM ORIGINAL SRM'S COURT KILGORIS CR/ CASE NO 1014 OF 2010 OF SRM'S MAGISTRATE'S COURT AT
KILGORIS

BERNARD YEGON.....APPLICANT

VERSUS

STATE.....RESPONDENT

RULING

1. **BERNARD YEGON** hereinafter referred to as the applicant in an application dated 10th December 2019 seeks for a review of his sentence. The applicant was charged with the offence of defilement contrary to section 8 (3) of the Sexual Offence Act No. 3 of 2006. He was tried, convicted and sentenced to 20 years' imprisonment on the 25/3/2011. As per his affidavit in support of the application his appeal was dismissed by the High Court on the 25/9/2012.

2. The applicant avers that he was arrested in 2010 and that he has been in custody for 8 years from the time of his arrest. That he is a parent of 2 children and that his stay in custody will affect the children. That he has reformed and learnt from his past mistakes and begs for leniency. That whilst in custody he has undergone various vocational and spiritual courses, he has been issued with a certificate in upholstery grade 111 and grade 11 and a voice of prophecy. That his application for reduction of sentence is so that he may engage in positive development in the nation.

3. Mr. Otieno for the state did not oppose the application. He observed that the magistrate whilst sentencing the applicant indicated that his hands were tied that 20 years' imprisonment was the sentence provided by the law then. That in line with the Court of Appeal decisions the Court has jurisdiction to review the sentence.

4. I have considered the applicant's plea. The trial court's record shows that the applicant was charged in court on the 3/12/2010 and sentenced to 20 years' imprisonment on the 25/3/2011. He was in custody for a period of about 3 months before sentence. He has served 8 years' imprisonment. The trial court noted that he was a first offender and that the law provided a mandatory sentence of 20 years.

5. The court of appeal in the case **Kennedy Odhiambo Ouru v Republic [2020] eKLR** stated as follows on mandatory sentences in the Sexual Offences Act.

*"Turning now to sentence, the trial court in imposing 20 years imprisonment stated that it was the minimum sentence under the **Sexual Offences Act**, and this was confirmed by the learned Judge. The appellant had stated in mitigation that he was the eldest of five children and the bread winner as the mother was 'sick and unable' and he was also a first offender. We are of the view that minimum sentences are patently unconstitutional in so far as they divest trial courts of the discretion in sentencing that achieves an individualized consideration of the particular facts and circumstances of each case. They treat all offenders as an undifferentiated whole which the Supreme Court loudly instigated in **FRANCIS KARIOKO MURUATETU & ANOR vs. REPUBLIC [2017] eKLR**. We thus hold that trial courts do have discretion to impose appropriate sentences which may well be for terms shorter than the minimum sentences set out in the **Sexual Offences Act**.*

*We think upon a consideration of the case as a whole that the appellant's conduct amply deserved a severe sentence but the imposition of the minimum sentence is no longer tenable. In the result, we allow the appeal on sentence but to the slight extent of setting aside the **20 years** imprisonment and substituting it with a term of **18 years** imprisonment from the date the appellant was first sentenced."*

6. Considering the circumstances of this case, the age of the child, who was 12 years then, the fact that the applicant defiled her most of the night, considering his mitigation and period in remand and the Court of Appeal decision on mandatory sentence, I allow the application on

sentence by setting aside the **20 years'** imprisonment and substituting it with a term of **18 years'** imprisonment from the date the appellant was first sentenced."

Dated signed and delivered at KISII this 15th day of December 2020.

R.E. OUGO

JUDGE

In the presence of:

Applicant Present in person

Mr. Otieno Senior State Counsel Office of the DPP

Ms. Rael Court Assistant