**Dzombo v Republic (Criminal Revision E002 of 2023)**
**[2024] KEHC 9041 (KLR) (25 July 2024) (Revision)**

Neutral citation: [2024] KEHC 9041 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KWALE**

**CRIMINAL REVISION E002 OF 2023**

**OA SEWE, J**

**JULY 25, 2024**

**BETWEEN**

**JULIUS MAUMBA DZOMBO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the sentence passed in Sexual Offences Case No. 95 of 2016 in the Chief Magistrate's Court at Kwale by Hon. Wambugu, SRM on 6th August 2018)***

**REVISION**

1. The applicant, Julius Maumba Dzombo, filed his Notice of Motion on 6th November 2023 seeking sentence review. He deposed that he was charged with the offences of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* *vide* Criminal Case No. 95 of 2016 in the Senior Resident Magistrate's Court at Kwale. Upon conviction, he was sentenced to 40 years' imprisonment, which sentence was reduced on appeal to 20 years' imprisonment. He consequently filed the instant application seeking that his sentence of 20 years' imprisonment be reviewed; and that an order be made for him to serve the remainder of his sentence on probation.

2. The application is expressed to be filed under Sections 354(1) and (3) and 364(1) of the *Criminal Procedure Code*. It was premised on the grounds that during his long stay in custody, he has undergone several rehabilitation programs and has therefore reformed. He further averred that he has a family consisting of a housewife and three children; and that his mother who was looking after his family has since died.

3. The applicant urged his application by way of written submissions which he filed alongside his application. He was explicit that the review is confined to the sentence imposed on him, and that it is premised on the mitigating factors set out in his application. The applicant also relied on the Judiciary Sentencing Policy Guidelines as to the objectives of sentencing. He stressed the assertion that

his children are now destitute following the death of his mother and prayed that he be allowed to serve the remainder of his sentence on a non-custodial basis.

4. Learned counsel for the respondent, Ms. Mwaura, opposed the application. In her oral submissions on 30th May 2024, she confirmed that 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; that upon conviction he was sentenced to 40 years' imprisonment; that he appealed against conviction and sentence, and that the sentence was thereupon reduced to 20 years' imprisonment. In her submission, no new circumstances have been demonstrated to warrant review.

5. I have given careful consideration to the application and the response thereto by the respondent. Indeed, Article 50(2)(q) of the *Constitution* gives the Court the general power to review the decisions of the subordinate courts. It states:

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

6. In the same vein, Section 362 of the *Criminal Procedure Code*, recognizes that:

> " The High court may call for and examine the records 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."

7. In that regard, Section and 364(1)(b) of the *Criminal Procedure Code* stipulates that:

> " In the case of a proceeding in subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may ... in the case of any other order other than an order of acquittal alter or reverse the order."

8. Accordingly, the Court called for the record of the lower court, namely, Kwale Chief Magistrate's Court Sexual Offence No. 95 of 2016: *Republic v Julius Maumba Dzombo*. The record of the lower court confirms that the applicant was indeed charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The offence was alleged to have been committed on 20th July 2016 at Mwamsefu Village in Mwereni Location within Kwale County and the victim was said to be a girl then aged 15 years. In the alternative, the applicant was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act.*

9. The record further shows that the applicant denied those allegations and was consequently taken through the trial process. Ultimately the lower court was satisfied that the main count of defilement had been proved beyond reasonable doubt. He was convicted accordingly. The applicant was then given an opportunity to express himself in mitigation before the sentence was pronounced.

10. The record further confirms that the applicant filed Mombasa Criminal Appeal No. 117 of 2018: Julius Maumbo Dzombo and that the said appeal was heard and determined on 30th December 2020. The judgment of the appellate court confirms that, while the appeal against conviction was dismissed, the sentence of 40 years was reduced to 20 years. The Court held:

> " In consideration of the decision of Supreme Court in the Muruatetu's case and in consideration of the minimum sentence set by the Sexual Offence Act and in consideration

of the appellant's mitigation before the trial court, the sentence of 40 years is excessive and is set aside and substituted with one of 20 years imprisonment."

11. It is trite law that sentence review, even on appeal, ought not to be easily done; and that certain factors must be present to warrant such intervention. Some of these factors were discussed in the case of *Ogalo s/o Owuora v Republic* [1954] 21 EACA 270, as follows:

> "...The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic* [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."

12. Similarly, in B*ernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal restated that:

> It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

13. In this instance, it is common ground that the sentence imposed by the subordinate court has already been reconsidered on appeal and reduced to 20 years' imprisonment by a court of concurrent jurisdiction. Accordingly, the only avenue open for the applicant was to appeal the decision. The question of further consideration by this Court cannot arise. In this connection, I agree entirely with the expressions of Hon. Aburili, J. in Constitutional Petition No. 5 of 2018 *Daniel Otieno Oracha v Republic* [2019] eKLR, that:

> 14. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.
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> 15. .....
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> 16. The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
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> 17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court

14. Therefore, the applicant's prayer for his sentence to be reviewed further and be substituted with probation placement is indeed misconceived and I so find. In the result, the application for sentence review is hereby dismissed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2024**

**OLGA SEWE**

**JUDGE**