Mulatya v Republic (Criminal Petition 1A of 2023)
[2024] KEHC 17200 (KLR) (16 August 2024) (Judgment)

Neutral citation: [2024] KEHC 17200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL PETITION 1A OF 2023

TM MATHEKA, J

AUGUST 16, 2024

BETWEEN

MUTINDA MULATYA ..... PETITIONER

AND

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was convicted for the offence of defilement in Makueni CM's Court S.O Case No. 12 of 2018 and sentenced to 20 years' imprisonment. The victim was G.N, a child aged 9 years.

2. He has now approached this court for sentence re-hearing through an undated Petition and Notice of Motion application. He has supported his application with an undated affidavit and all of them were filed in court on 14/02/2023. The gist of his application is that he is entitled to re-sentencing pursuant to the High Court declaration and Order No. 2 in Petition No. E017 of 2021 (Philip Maingi Mueke & Others –vs- ODPP & Attorney General). He deponed that by failing to account for his mitigation, time spent in remand custody and sentencing him pursuant to mandatory minimum sentence, the trial court went against the spirit of *the Constitution* and *Criminal Procedure Code*.

3. The orders sought in the application are inter alia ; That this honorable court finds and declares that the petitioner's rights under Article 50 have been violated as pertains to a fair trial in regards to mitigation vis-à-vis the minimum mandatory sentences as provided for in the *Sexual Offences Act*; That this honorable court finds and orders that the petitioner is entitled to a sentence review; That this honorable court finds and orders that the petitioner has a right to the benefit of the least severe sentence.; That this honorable court finds and orders that the petitioner is entitled to the benefit of section 333(2) of the CPC.

4. Parties elected to canvass the Matter through submissions and appropriate directions were given. Petitioner's Submissions

5. The petitioner submitted that in the Philip Maingi case (supra), Justice Odunga declared that those who were convicted of sexual offences and whose sentences were on the basis that the trial courts had no discretion in imposing the mandatory sentences are at liberty to seek review from the High Court.

6. He submitted he was relying on the "finding of the High Court on the jurisdiction of the minimum mandatory sentences under the *sexual offences Act* as canvassed in Constitutional Petition no. 97 of 2021 Edwin Wachira & 9 others (consolidated) at Mombasa by Hon Mativo J dated 29th August 2022 which echoed the reasoning of hon G. Odunga J sitting at Machakos in Constitutional Petition no E 017 of 2021 Philip Mueke Maingi & Others vs R that the mandatory minimum sentence is unconstitutional as they fetters(sic) judge's discretion hence discrimination against sexual offenders under Article 27 and 28 "

7. He argued that the *Sexual Offences Act* came before *the Constitution* and hence it was necessary to apply it in accordance with *the Constitution* so as to uphold the dignity of the individuals and the circumstances of the case as mandated by s. 33 of the Same Act. See also Yawa Nyale vs Republic [2018] eKLR

8. He urged the court to consider the provisions of s. 4 of the *Probation of Offenders Act*

9. The rest of the submissions unfortunately are not with respect to the Petition as they appear to have been directed at some other appeal for someone who had been convicted of incest c/s 20(1) of the SOA in Kilungu MCCR (SO) no. 4 of 2020, and sentenced to 25 years' imprisonment; yet he was sentenced and convicted in Makueni MCCRC (SO) 12 of 2018 for defilement c/s 8(1) as read with 8(2) of the SOA. and was sentenced to 20 years' imprisonment.

Respondent's Submissions

10. The Respondent, through Prosecution Counsel, Lucas Tanui submitted that the petitioner's appeal to this court was dismissed. He opposed the application and petition on the following grounds;

    a. That the decisions in Machakos Petition No. 17/2021 and 15/2021 were made by a court of concurrent jurisdiction hence not binding on this court but only persuasive.

    b. That the petitioner has misapprehended the provisions of section 8(1)(2) of the *Sexual Offences Act*, in regard to mandatory maximum sentence. The provisions of the law in which the petitioner was charged provides for life imprisonment yet the trial court only sentenced him to 20 years and therefore the applicant cannot argue that he was sentenced based on maximum sentence.

    c. That the applicant/petitioner still has a right of second appeal to the Court of Appeal which can review the decision of the trial court and first appellate court.

    d. That the petitioner's submissions challenge his conviction and therefore this court lacks jurisdiction to hear the same.

    e. That the Petitioner has not provided the court with any material to support his application for review of the sentence.

    f. That the application and petition lack merit and the same should be dismissed.

11. The only issue for determination is whether the application/petition has merit.

Analysis and Determination

12. The petitioner was charged with defilement of a 9-year- old under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The latter section provides that;

> "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

13. The mandatory sentence imposed by statute is imprisonment for life. The petitioner was sentenced to 20 years imprisonment and that is a clear indication that the trial magistrate exercised discretion in sentencing. Consequently, the Philip Maingi case (supra) is not applicable as it only relates to convicts of sexual offences whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence.

14. The Prosecution Counsel alluded to an appeal filed by the petitioner to this court but did not provide the case number. A search at the Makueni High Court Criminal Appeals section yielded no evidence of any appeal. I have also checked KenyaLaw and no Judgment in the name of Mutinda Mulatya alleged has shown up. The inevitable conclusion is that the petitioner did not appeal against the decision of the trial court. Further, the trial court file does not have a copy of the record of appeal and that is another indication that no appeal was filed to this court. In any event the prosecution had the obligation to provide the court with the details of the alleged appeal.

15. Coming back to the merit of the Petition: The Petitioner's view is that the subordinate court imposed a mandatory sentence and supported by the authorities he has cited that sentence is up for review for being unconstitutional.

16. The trial court record shows that the petitioner's mitigation was; "I pray for leniency". The court proceeded to obtaining a pre-sentence report from Probation and After Care Services. In passing the sentence, the trial magistrate expressed herself as follows;

> "I have considered the accused person's plea for leniency in mitigation. I have further considered the pre-sentence report prepared by the probation officer. It is indeed clear that the accused person has lived a crime free life. The events of 12/05/2018 will forever change the cause of his life; this court is at a loss to understand how a middle aged young man would decide to commit such a serious crime against a young girl. Sexual offences against minors affects victims and impacts on them for a long time. The accused actions have changed the young girl's perception of people. Her trust in men may be affected for a while. In passing this sentence, I bear in mind the wishes of the victim to have justice prevail and the accused person's right to a well balanced sentence. I have been guided by the Judiciary's sentencing policy guidelines to that end. The accused is hereby sentenced to 20 years' imprisonment." (emphasis mine)

17. The Hon. Chief Justice Now retired, Willy Mutunga send out this message in the Judiciary Sentencing Guidelines 2016

> These Sentencing Guidelines are a response to the challenges of sentencing in the administration of justice. These include disproportionate and unjustified disparities in respect to sentences imposed to offenders who committed same offences in more or less similar circumstances and an undue preference of custodial sentences, in spite of the existence of numerous non-custodial options, which are more suitable in some cases. Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile

offenders. These guidelines recognise that sentencing is perhaps one of the most intricate aspects of the administration of trial justice.

It acknowledges that sentencing impacts not just the individual offender but also the community, and indeed the entire justice system. They also seek to enhance the participation of the victim, and generally infuse restorative justice values in the sentencing process. Significantly, they champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases. (emphasis mine)

18. From the foregoing it is evident that the learned trial magistrate in arriving at the sentence took into consideration not only the law, but also the wise counsel in the above message. In my view, the sentence was well considered and the fact that the petitioner was sentenced to 20 years shows that the trial magistrate did not consider herself bound by the mandatory minimum sentence.

19. This court is alive to the now settled position that sentencing is the discretion of the trial court. The words of the learned judge in Fatuma Hassan Salo vs Republic (2006), aptly capture the position

> " Sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors."

20. I am not persuaded that the learned trail magistrate did not act accordingly.

21. The petitioner complained that the time spent in custody was not taken into account while passing the sentence. Section 333(2) of the *Criminal Procedure Code* provides: - "Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under sub section

    (1) has prior, to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

22. The Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) provides as follows;

> " The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

23. In the petitioner's case, the charge sheet shows that he was arrested on 13th May 2018 and the committal warrant shows that he remained in custody till delivery of judgment on 18th July 2018. That is a total of 66 days.

24. In pronouncing the sentence, the record shows that the learned trial magistrate did not make any mention of the period spent by the petitioner in remand custody awaiting trial. The provisions of s. 333(2) of the *Criminal Procedure Code* are mandatory. The court ought to have taken into consideration the 66 days the Petitioner spent in custody.

25. In the circumstances, the Petition is allowed only to the extent that the Petitioner's 20 years' imprisonment sentence will run from May 13, 2018.

26. The other declarations sought are declined.

27. Orders accordingly

DATED SIGNED AND DELIVERED VIRTUALLY ON 16TH AUGUST 2024

MUMBUA T MATHEKA

JUDGE

CA-Ms. Mwanatumu

Petitioner- Present at Makueni Main For ODPP-N/A

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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