Ali v Republic (Miscellaneous Criminal Application 71 of 2019) [2024] KEHC 10202 (KLR) (15 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS CRIMINAL APPLICATION 71 OF 2019

JN ONYIEGO, J

AUGUST 15, 2024

BETWEEN

MOHAMUD ADAN ALI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. Mahamud Adan Ali, the applicant herein, was charged with defilement contrary to section 8(1)(2) of the *Sexual Offences Act*. He was in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the *same Act*. Particulars of the main charge were that, on 2nd February 2012, in Wajir East District, within Wajir County, he intentionally caused his penis to penetrate the vagina of I.M a child aged six years. In the alternative, it was alleged that on the same date and place, he intentionally rubbed his penis on the vagina of I.M a child aged six years.

2. The applicant was subsequently tried and convicted on the main charge. He was consequently sentenced to life imprisonment. He appealed against the said conviction and sentence. By a judgment delivered on 05.06.2014, this court upheld his conviction and sentence.

3. On 14.02.2019, the applicant further made an application before the Court of Appeal at Nairobi challenging the finding of this court. The same was supported by a letter dated 14.02.2019 from the Deputy Registrar Garissa to the Deputy Registrar Court of Appeal Nairobi.

4. In the same breadth, he filed the application herein urging this court to consider the constitutionality of the mandatory nature of sentence imposed upon him by the trial court. It was his case that the nature of the mandatory sentence imposed deprived courts of their legitimate jurisdiction to exercise discretion on sentencing and that the sentence failed to conform to the tenets of a fair trial as enshrined under article 25 of the *Constitution*. He urged that the application be allowed as prayed.

5. Directions were taken that the application be canvassed by way of written submissions.

6. The applicant in his written submissions argued that after conviction, he was not given an opportunity to mitigate. That even if he were to mitigate, the nature of punishment of the offence he was charged with is mandatory in nature. He contended that in the case of *William Okungu Kittiny v Republic* [2018], the court held that jurisdiction to hear mitigation lay with the trial court and further, that the decision of Muruatetu also applied to sexual offences in reference to the mandatory sentences.

7. He further contended that he has been in lawful custody for a period running to nine years and therefore urged that the court considers the same bearing in mind that he has since been rehabilitated. That he was remorseful for his actions and therefore deserves another opportunity as he was a family man. It was his prayer therefore that this application be allowed as prayed.

8. The respondent via submissions dated 11.05.2021 urged this court to dismiss the application herein on grounds that the same was bereft of merit. This court was implored to be guided by the finding in the case of *John Kamau Gachua vs R* [2019] eKLR where the court stated that, in the case of *Dismas Wafula Kilwake vs R* [2018] unlike in the *Muruatetu case*, the Court of Appeal held that it lacked jurisdiction to resentence the applicant urging that only persons sentenced to death pursuant to mandatory provisions of the law are entitled to new sentence hearings. As a consequence, this court was urged to dismiss the application for the same was devoid of merit.

9. I have considered the application herein together with the submissions by both parties. The only issue for determination is whether the applicant's review application for resentencing is merited.

10. The applicant has invoked the resentencing jurisdiction of this court stating that he did not get a chance to mitigate during sentencing and that the nature of the mandatory sentence deprived the trial court its legitimate jurisdiction to exercise discretion on sentencing.

11. It is not lost to this court that sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate court.

12. Noting that the applicant previously had invoked the appellate powers of this Court and currently, has appealed the finding of this court to the Court of Appeal, it follows that this court is bereft of jurisdiction. I say so for the reason that the prayer sought herein is akin to asking this court to clothe itself with the jurisdiction of an appellate court which powers it doesn't possess. [See *Republic vs Ongaro & another* (Criminal Case 62 of 2013) [2023] KEHC 2309 (KLR)].

13. For the reason that the Court of Appeal is now properly possessed of the requisite jurisdiction to handle this matter, good order requires that this court down its tools. In any event, in the recent supreme court decision in petition No. E018 OF 2023 between *Republic vs Joshua Gichuki Mwangi*, the issue of minimum mandatory sentences and the exercise of discretion by courts in sentencing was addressed in detail to the extent that courts have no business deviating from lawful sentences statutorily provided in legislation unless amended by parliament or declared unconstitutional through special constitutional proceedings. Therefore, the legality or unconstitutionality of life imprisonment does not arise as a ground to call for resentencing before this court. That question should be addressed before the appellate court in this case the court of appeal.

14. From the foregoing, I find that this court lacks requisite jurisdiction to entertain the application herein and therefore, the same is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15TH DAY OF AUGUST 2024

J. N. ONYIEGO

JUDGE