Mbago v Republic (Criminal Application E109 of 2024)
[2024] KEHC 10039 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPLICATION E109 OF 2024

RE ABURILI, J

AUGUST 12, 2024

BETWEEN

LEAKEY OTIENO MBAGO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Nyando SPM Sexual Offence Case NO. 1113 of 2014 by Hon B.M.Kimutai, SRM)

RULING

1. The applicant is a convict for the offence of ape contrary to section 3(2) of the *Sexual Offences Act*. He was sentenced to serve fifteen years imprisonment vide Nyando SPM SO Case No 1113 as per the warrant of commitment to prison dated 26th June, 2015 although he claims it was SO Case No 1099 of 2014.

2. H seeks for sentence review on the ground that the mandatory sentence was unconstitutional, and consideration of section 333(2) of the *Criminal Procedure* as he was in remand custody pending the trial. He has however not annexed any proceedings to confirm that position.

3. I have considered the application as presented and the supporting affidavit. The issue is whether this court can review or revise the sentence as imposed in sexual offences at this moment in time.

4. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and anotherv Republic* [2017] eKLR on 6th July 2021 that highlighted that the said case was only applicable to murder cases, courts re-sentenced petitioner/convicts for different offences, including sexual offences.

5. In the cases of defilement, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section

8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

6. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and another v Republic* (*supra*) was applicable to re-sentencing in murder cases only, courts have since stopped re-sentencing applicants in sexual offences.

7. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

8. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

9. In the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* (*supra*) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

10. However, the aforementioned decision was overturned by the Supreme Court on the 12th July 2024, exactly one month ago, in Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi* wherein the court faulted the Court of Appeal's decision to reduce the sentence meted out on the appellant from 20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act. The Supreme Court noted that:

> "The reasoning behind the court's decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter."

11. The Supreme Court in setting aside the Court of Appeal decision in Joshua Gichuki Mwangi supra went on to find and hold that the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid.

12. For the above reasons, I find no merit in the application for revision of sentence imposed on the applicant in a sexual offence, the sentence being lawful

13. The application dated 15th February, 2024 is hereby dismissed.

14. Signal to issue.

15. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE