



REPUBLIC OF KENYA



KENYA LAW
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Oding v Republic (Petition E004 of 2023) [2024] KEHC 10022 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E004 OF 2023

RN NYAKUNDI, J

AUGUST 12, 2024

**IN THE MATTER OF ARTICLE 22(1), 23(1), 25(C), 27, 28, 50(2)(P)
(Q), 159(2), 160(1) AND 165 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF EDWIN WACHIRA & 9 OTHERS VS REPUBLIC
PETITION NO 97 OF 2021 CONSOLIDATED WITH PETITION NO 88
OF 2021 AND PETITION NO 57 OF 2021 AT MOMBASA HIGH COURT**

AND

**IN THE MATTER OF PHILIP MUEKE MAINGI & 5 OTHERS VS
DIRECTOR OF PUBLIC PROSECUTIONS & ATTORNEY GENERAL,
PETITION NO E017 OF 2021 AT MACHAKOS HIGH COURT**

AND

**IN THE MATTER OF SECTIONS 216, 329, AND 333(2) OF THE
CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA**

BETWEEN

FRANCIS ODING APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Petitioner herein was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No 3 of 2006 in Criminal Case No 130 of 2013 at Eldoret CM's Court and sentenced to thirty-five (35) years imprisonment.



2. The Petitioner lodged an appeal to the High Court at Eldoret in HCCRA No. 126 of 2013 whereby the same was dismissed in its entirety; conviction and sentence affirmed hence the Petitioner has no pending appeal.
3. The Petitioner stated that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others v Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition to the High Court for resentencing.
4. The Petitioner sought the following prayers:
 1. That, the Honourable Court Be Pleased to review my sentence and grant me a definite lenient sentence as per the mitigation that I shall tender during the hearing of this application and pursuant to Article 50(2)(p)(q) of the Constitution of Kenya 2010.
 2. That, the period spent in remand and custody be computed into the eventual sentence to be awarded pursuant to the provisions of section 333(2) of the Criminal Procedure Code and also pursuant to Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457(KLR).
 3. That, the Honourable Court Be Pleased to grant me probation orders if my circumstances so fit.
 4. Any Other order that the Honourable Court deems fit to give in the interest of justice.
5. The Petitioner filed an application vide undated Chamber Summons supported by the annexed Affidavit sworn by Francis Oding stating that:
 - a. That, the Honourable Court be pleased to certify this application as urgent and be heard on priority basis.
 - b. That, I am the applicant herein seeking re-hearing of sentence pursuant to the decision in Edwin Wachira & 9 Others v Republic Petition No 97 of 2021 at Mombasa High Court.
 - c. That, the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others v Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared that the impugned provisions of the Sexual Offences Act No 3 of 2006 prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused person's individual circumstances and mitigation, such sentences fall foul out of the right to a fair trial guaranteed under Article 50 of the Constitution of Kenya because mitigation and sentencing are part of a fair trial process.
6. The Application is supported by the grounds on face of it and by the annexed supporting Affidavit of Francis Oding. The Applicant states that the directions issued by the Supreme Court on 6th July 2021, in Francis Karioko Muruatetu & Another v Republic (2017) eKLR left it open to the High Court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination and that the Supreme Court did not hold that the High Court ought not to apply the reasoning in Francis Muruatetu & Another v Republic (2017).
7. The Applicant states that he was charged and convicted for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No 3 of 2006 in Criminal Case No 130 of 2013 at Eldoret CM's Court and sentenced to thirty-five (35) years imprisonment.



8. The Applicant lodged an appeal to the High Court at Eldoret in HCCRA No. 126 of 2013 whereby the same was dismissed in its entirety; conviction and sentence affirmed hence the Petitioner has no pending appeal.
9. The Applicant states that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others v Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition to the High Court for resentencing and hence the reason for his application.
10. The Applicant also states that the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others v Republic as consolidated with petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared that the impugned provisions of the Sexual Offences Act No 3 of 2006 prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused person's individual circumstances and mitigation, such sentences fall foul out of the right to a fair trial guaranteed under Article 50 of the Constitution of Kenya because mitigation and sentencing are part of a fair trial process.
11. Further, the Applicant states that the Court of Appeal's decision in Mwangi v Republic (Criminal Appeal 84 of 2015) is relevant to the application herein and that the courts should as far as possible, have the unfettered discretion in relation to sentencing. He also states that sentencing discretion permits balanced and fair sentencing which is a hallmark of enlightened Criminal justice and the absence of this crucial discretion is potentially prejudicial to the accused person.
12. The Applicant further states that the impugned mandatory minimum sentences are discriminatory in nature because they give differential treatment to a convict under the impugned provisions distinct from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences, so, mandatory minimum sentences violate an accused person's rights under Article 27 of the Constitution of Kenya 2010. Further, he contended that the High Court issued an order that persons convicted and imprisoned under the Sexual Offences Act No 3 of 2006 are at liberty to petition to the High Court for mitigation and resentencing.
13. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicant as well as the submissions filed by the Director of Public Prosecutions.
14. I note that the Director of Public Prosecutions has relied on the Supreme Court case of Muruatetu & Another v Republic (2017) eKLR in opposing this application. Indeed, the Muruatetu case reasoning does not apply herein, as it applied only to mandatory death sentences for those convicted of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63).
15. In deciding this application, I have perused and considered the judgment in Eldoret High Court Criminal Appeal No. 136 of 2013 which relate to the same case which started in the Magistrates Court.

Analysis of Law

Nature and scope of resentencing

16. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty



law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

17. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution* .A further leapfrog development; under article 50(2)(p) of *the Constitution*:

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- (2) Every accused person has the right to a fair trial, which includes the right—(p)to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

18. The applicant has approached the court on the basis of the decisional law in *Philip Mueke Maingi & Others v Rep*, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. It stated;

There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court’s discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence’s where appropriate.

19. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga v Republic* [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.
20. In *Michael Kathewa Laichena & Another v Republic* [2018] eKLR Majanja J. stated: “by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.
21. Further, the Court of Appeal sitting in Malindi in *Manyeso v Republic* Criminal Appeal No. 12 of 2021 [2023] kECA 827 (KLR) held that mandatory life sentences are unconstitutional and are “an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the constitution*. The said decision is supported by the case of *Vinter and others v UK*, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.

Sentencing

22. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it’s entirely so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence



and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

23. Also in the case of *Francis Karioko Muruatetu & Another v Republic* (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.
24. I note that the Petitioner/Applicant did not appeal to the Court of Appeal. He appealed to the High Court at Eldoret in HCCRA No. 126 of 2013 whereby the same was dismissed in its entirety; conviction and sentence affirmed.
25. I am in full agreement with the decision of Mativo, J (as then was) in *Edwin Wachira & Others v Republic*; Mombasa High Court Petition No. 97 of 2021 that “To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of *the Constitution* of Kenya, 2010.”
26. The Applicant has stated that his mitigation and the circumstances of the case were not considered by the trial court. I note that the Magistrate noted in sentencing him said that, “I have considered the nature of the offence with which the accused is convicted the fact that he is a first offender and the fact that he had no mitigation, I have taken note of the provisions of section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No 3 of 2006. I have considered the age of the Complainant and have noted that the accused is not remorseful for the offence he has committed.”
27. The Magistrate then stated that, “I find that a person with the character of the accused does not deserve the ere lased to the society until he reforms as he is likely to pay on other innocent children just like the Complainant. The Accused deserves a deterrent sentence and it is for this reason that I do hereby sentence the accused to serve 35 years’ imprisonment.”
28. The High Court, on its part, on appeal noted that a higher sentence was in fact warranted due to the facts and circumstances of the case, but maintained the sentence imposed by the trial court merely because the State did not ask for review (enhancement) of sentence.
29. From the foregoing, I am satisfied that the Applicant was given a chance to mitigate. As was held by the Supreme Court in *Francis Karioko Muruatetu & Another versus Republic* [2017] eKLR mitigation is an integral part of fair trial. That said all the trial court is required to do is to consider the mitigation. It is not under any obligation to believe what is stated in mitigation. As an exercise of discretion the court must act judiciously and not whimsically.
30. In my view therefore, my hands are tied by the decisions of the trial court and the High Court herein, as both courts considered the mitigation of the Applicant and the circumstances of the case in sentencing.
31. The application herein is thus unmerited, and the only option that could be available to the applicant is to appeal to the Court of Appeal, and not to come to this court for review, as this court cannot sit on



appeal on its own merit decision in the sentencing herein. Consequently, and for the above reasons, I dismiss the application.

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

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R. NYAKUNDI

JUDGE

