Ireri v Republic (Criminal Petition E002 of 2023)
[2024] KEHC 11952 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11952 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL PETITION E002 OF 2023

DKN MAGARE, J

SEPTEMBER 26, 2024

BETWEEN

NELSON NJURURI IRERI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over a petition filed by the Petitioner on 30/3/2023. The Petitioner prays that the application be admitted for rehearing of the sentence. It is supported by the affidavit of the Applicant and it was deponed in material as follows:

    a. The Petitioner was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* and was convicted and sentenced to life imprisonment on 4/12/2008.

    b. The Petitioner's appeal to the High Court and Court of Appeal was dismissed.

    c. The Petitioner seeks to review the sentence per the *constitution* and mitigation.

    d. The Petitioner is now 73 years old and has been in prison for 16 years.

2. The Petitioner filed submissions dated 29/3/2023 and further submissions dated 24/5/2024. It is submitted that this court has unlimited jurisdiction including to deal with the matters under this petition. He cited Article 165(3) of the *constitution* and *Protus Shikuku v Republic* (2012) eKLR.

3. The Petitioner further submitted that the minimum mandatory sentence as meted was unconstitutional.

4. Further, that he had rehabilitated and even obtained the Kenya Certificate of Primary Education while in prison. He sought to rely on *Julius Kitsao Munyesyo v Republic* (2023) eKLR.

5. The Respondent also filed submissions dated 21/2/2024. It was submitted that the sentence of life imprisonment was proper and based on mitigation.

6. Further, it was submitted that the Petitioner had already appealed against conviction and sentence and the appeals were dismissed and this application was an abuse of the court process.

Analysis

7. The Applicant was charged of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

8. The particulars of the offence were that on 8/7/2007 at [Particulars withheld] Village in Nyeri District of Central Province did an act of defilement to TWN, a girl under the age of 11 years.

9. The trial court considered the case and having convicted the Petitioner also sentenced him to serve life imprisonment. The Petitioner appealed to the High Court and the appeal was dismissed. His subsequent appeal to the Court of Appeal was also dismissed. This is thus his residual attempt to redeem himself at least on the aspect of the life sentence which in his submissions was not proper under the new constitutional dispensation.

10. The provisions of Section 8(1)(2) of the *Sexual Offences Act* are couched in mandatory terms in respect of the minimum sentence. In *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), it was stated by the court:

> "In arriving at its decision the Court was similarly guided by the decision of the Constitutional Court of Uganda in Susan Kigula & 417 Others v. Attorney General, Const. App. No. 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function and concluded that: "The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *constitution* ."

11. In the case of *Taifa v Republic* (Criminal Appeal E018 of 2022) [2022] KEHC 14230 (KLR) (24 October 2022) (Judgment) Aburuli J held:

> "In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *constitution* , the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional."

12. The Supreme Court has propounded in the *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR giving the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence:

    (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

13. In *WOR v Republic* (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) (26 April 2022) (Judgment) F.A Ochieng J (as he then was) held that mandatory sentences under the Sexual Offences was unconstitutional, when he stated inter alia that:

> " 50. Having received the mitigation from the Appellant, and the pre-sentencing report from the Probation Officer, the Court effectively decided that they counted for nothing.51.Prior to the Supreme Court's decision in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the courts construed mandatory sentences in a literal sense; just like the trial court herein.
>
> 52. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of Murder, was unconstitutional because it took away the Court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.
>
> 53. ...
>
> 54. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act*.
>
> 55. I am unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
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> 56. Accordingly, I do hereby set aside the sentences.

14. The mitigation factors by no way replace judicial discretion as observed by the Supreme Court in the *Muruatetu Case* (*supra*). I note that the Petitioner did his KCPE while in prison in 2011. There is also a report from the officer in charge of the Nyeri Maximum Prison where the Petitioner is held. The report inter alia states that the Petitioner has reformed and engaged in farming while in prison.

15. In *Muruatetu I* (*supra*), the Supreme Court referred to the case of Vinter and others v. the United Kingdom (Applications Nos. 66069/09, 130/10 and 3896/10) in which the Court held that:

> " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for

> detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
>
> Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.

16. Similarly in *State v. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts."

17. The court also cited *Mithu Singh v. State of Punjab*, 1983 AIR 473, in which the Supreme Court of India considered the constitutionality of a provision of law prescribing a mandatory sentence of death that was challenged. In holding that the provision was unconstitutional, the Court stated as follows:

> "...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having

regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

18. In arriving at its decision the court was similarly guided by the decision of the Constitutional Court of Uganda in *Susan Kigula & 417 Others v. Attorney General*, Const. App. No. 3 of 2006 that:

> " The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *constitution* ."

19. Therefore, I have no doubt that the purpose and objectives of sentencing as stated in the Judiciary Sentencing Policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.

20. The Court of Appeal of South Africa in *S v Nkosi & others* 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. The Court stated at para 9 as follows:

> " Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e., a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the *constitution of the Republic of South Africa* Act 108 of 1996.The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

21. Back home, the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) stated as follows:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

22. The Petitioner submitted that he was arrested and taken to custody on 8/7/2007 and has remained in prison since then following his conviction, for about 17 years. He also submitted that he is 74 years old. Whether I take into consideration his mitigation, it is irrelevant as the Court of Appeal has pronounced itself on the sentence. Mitigation is thus irrelevant for a matter handled by the court above. The applicants must learn to live with the consequences of the decisions that land them in prison.

23. The only difficulties we are facing are pronouncements by superior courts which not only clarify the law but also leave gray areas. The life sentence was deserving and has been confirmed by the Court of Appeal. However, there has been some decisions of the Court of Appeal which interpreted what life imprisonment is. In *Evans Nyamari Ayako v Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported) translated life imprisonment to 30 years.

24. In the case of *Barasa v Republic* (Criminal Appeal 219 of 2019) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the Court of Appeal stated as follows: -

> " Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code.

25. In *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi (Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment is unconstitutional and substituted the same with 40 years. They stated as follows: -

> " We recognize that although the Judiciary released elaborate and comprehensive *Sentencing Policy Guidelines* in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...
>
> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances,

uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

26. It is therefore my understanding that in each case we shall translate what life imprisonment means. In this case a sentence of 30 years translates to life imprisonment.

27. I therefore translate the life sentence to 30 years. The period shall run as per Section 333(2) of the *Criminal Procedure Code* from date of arrest, that is on 8/7/2007.

28. The application is thus largely dismissed for being res judicata of the decision of the Court of Appeal. However, as per the dictates of the same Court of Appeal, we are entitled to translate the sentence. It is my sincere hope that superior courts in giving guidance on re-sentencing shall address the question of res judicata, otherwise we shall remain with revolving doors.

29. The matter having been dealt with by a higher court, I decline to consider mitigation. The life sentence remains save that it is translated to a term sentence.

Determination

30. I therefore make the following orders: -

    a. The life imprisonment imposed upon the Petitioner is translated to a sentence of 30 years imprisonment running from the date of arrest on 8/7/2007.

    b. The application is largely dismissed except the translation of life sentence.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF SEPTEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Kaniu for the State

Petitioner – present

Court Assistant – Jedidah