Njura v Republic (Criminal Revision E125 of 2024)
[2024] KEHC 16175 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL REVISION E125 OF 2024

LM NJUGUNA, J

DECEMBER 19, 2024

BETWEEN

DOMINIC NDUIGA NJURA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. For determination is a notice of motion dated 03rd July 2024 through which the applicant seeks the following orders:

    a. Spent;

    b. That a declaration be made that the applicant has since reformed and rehabilitated and is ready to be re-integrated back to the society; and

    c. That a declaration be made that the time served in prion be deemed as enough sentence, or otherwise as the court with deem fit.

2. The applicant moved the court for the said orders on the strength of Articles 165(3)(b), 23, 22 and 50(6)(a) of the *Constitution*. The applicant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. He pleaded guilty and he was convicted on his own guilty plea. He was sentenced to life imprisonment. The sentence was upheld on appeal in Embu HCCRA No. 93 of 2012 and now, through this revision application, he seeks sentence review.

3. The respondent opposed the application stating that the high court does not have jurisdiction to review its own order regarding the sentence. It also stated that the application does not meet the requirements for revision under section 364 of the Criminal Procedure code. It stated that the application is an abuse of the court process.

4. The application was canvassed by way of written submissions.

5. The appellant stated that he ought to have been sentenced while keeping in mind the discretion of the court at the point of mitigation. He relied on section 4(1&2) of the *Probation of Offenders Act* and stated that the court should consider releasing him on probation since he has already been incarcerated for 17 years so far. That it is unfair for the discretionary power of the court to be handed over to the legislature as the result of this is unfair and unlawful sentences. He termed the situation as a judicial coup and argued that all levels of court cannot purport to have the same opinion of a sentence to be imposed after conviction.

6. He urged that the courts should be at liberty to depart from mandatory prescribed sentences in line with Article 28 of the *Constitution* and the case of *S v. Malgas* 2001 (1) SACR 469 (SCA). He stated that the sentences imposed by the *Sexual Offences Act* came before the *Constitution* of Kenya 2010 and that all the Act needs to be aligned to the *Constitution*. He further relied on the cases of Okello v Republic [2022] KECA 1034 (KLR) and Joshua Gichuki Mwangi v Republic [2015] KEHC 1424 (KLR) and Article 50(2)(p&q) of the *Constitution*. The appellant submitted that during his time in prison, he has learned skills that would enable him to reintegrate smoothly into the society, for instance, soap making, first aid and bible courses.

7. On its part, the respondent submitted that in exercising its revisionary powers, the court should limit its findings to the correctness, legality or propriety of the sentence. That in this case, the High Court does not have supervisory jurisdiction in light of Article 165(6) of the *Constitution*. It relied on the cases of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR) (Muruatetu 1) and *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), where the Supreme Court clarified that the decision in Muruatetu only applied to Murder cases. That resentencing should not be entertained by this court given the findings of the supreme court on the matter. It urged that this court dismisses the application.

8. The issue for determination is whether the court has jurisdiction to entertain the application and whether the sentence should be reviewed.

9. The revisionary power of the High Court is drawn from Article 167(6)&(7) of the *Constitution* which provides:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

10. Section 362 of the *Criminal Procedure Code* provided as follows on the High Court's supervisory jurisdiction:

> "The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

11. The applicant was sentenced to life imprisonment by the trial court in Embu MCCR 96 of 2007. This sentence was upheld on appeal before the high court. The respondent has submitted that the High Court does not have supervisory jurisdiction according to Article 165(6) of the *Constitution*.

12. An application for resentencing may take the form of a revision application such as the one herein. Since the sentence was last upheld on a first appeal, this court can still revisit the order. Paragraph 4.8.18 of the *Judiciary Sentencing Policy Guidelines 2023* provides:

> "Resentencing cases shall be handled by the 'Sentencing Court' – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts."

13. The applicant was sentenced after being convicted on his own guilty plea. Section 21(1) of the *Sexual Offences Act* provides for the sentences thus:

> "(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

14. The sentence of life imprisonment was imposed upon the applicant because the victim in his case was 11 years old at the time of the incident. The trial court was bound to apply the sentence as provided since the provision is couched in mandatory terms using the word 'shall'. Recently, the Supreme Court has guided on the issue of sentencing and held that if a sentence prescribed in statute is to be struck down, it must be based on evidence and sound legal principles. Here, the applicant pleaded guilty thus there is no evidence to reconsider the circumstances under which the offence occurred and the mitigation provided.

15. In the Supreme Court decision in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR), it was held:

> "We must also reafrm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial

arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

16. The court's hands in this matter are tied in that the Supreme Court has given guidance on consideration of sentence rehearing. There is rapid growth of jurisprudence in the area of resentencing. Maybe, some day in the future, the court will find a reason to consider resentencing the applicant. However, at this point in time, it is not possible.

17. Therefore, the application lacks merit and the same is hereby struck out.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF DECEMBER, 2024.

L. NJUGUNA

JUDGE