Bakila v Republic (Criminal Revision 7 of 2021)
[2023] KEHC 2653 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2653 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL REVISION 7 OF 2021

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

CLINTON MULEMA BAKILA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Revision arising from conviction of the applicant on 17th May 2021, and the sentence imposed on 2nd June 2021, in Hamisi Criminal Case No. 31 of 2021, Republic vs. Clinton Mulema Bakila, by Hon. M. Ochieng, Principal Magistrate)

RULING

1. The proceedings herein were initiated by way of a motion dated 15th June 2021. The applicant seeks revision. He was arraigned in court on 17th May 2021, before the Principal Magistrate, on a charge of defilement, contrary to section 8(1), as read with section 8(3) of the *Sexual Offences Act*, No. 2 of 2006, Laws of Kenya, with an alternative count of an indecent act with a child, contrary to section 11(1) of the same Act. He denied the count on defilement, but pleaded guilty to the alterative count. When the facts were read over to him, he confirmed them to be true. He was convicted on the alternative count, and sentenced to 15 years imprisonment.

2. In the application for revision, he says that he was not in his proper frame of mind, as he was scared of his new environment, had been assaulted at the police cells, molested by fellow inmates and had been advised by the investigating officer to plead guilty to the alternative count so that he could be placed on probation. He denies involvement in the crime. He would now want to change his plea. He also says the sentence imposed was extreme and harsh.

3. Although I had given directions, on 19th July 2021, for service of the application, and filing of replies, none were filed. The matter was mentioned before Farah Amin J, on 20th September 2021, in the presence of Mr. Wekesa for the applicant and Ms. Koech for the respondent. My orders of 19th July

2021 were reiterated, that the respondent be re-served with the application, whereupon it would have 14 days to reply. The matter was fixed for mention on 19th October 2021. On 19th October 2021, the respondent was represented by Mr. Chigiti, but Mr. Wekesa was absent. I was not addressed on the matter of service, but by then no replies had been filed. The matter was stood over generally. Eventually, in the course of 2022, the file, with others, was given to me, for the purpose of giving directions. As the court does not have to hear parties on a revision, I decided to write this ruling without hearing either of them.

4. Revision, which is provided for under section 362 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, targets orders, decisions and sentences made or imposed by the trial court, with a view to address any incorrectness, irregularity, illegality or impropriety in them, or the manner that the proceedings leading up to them were conducted. The provision targets the act of or conduct by the trial court, with the intent to correct or straighten out or smoothen any mistakes or errors made by that court, which rendered its decision irregular, improper, incorrect or illegal.

5. The application before me does not make any claims that the trial court conducted the proceedings in a manner that was irregular, illegal, improper or incorrect, and thereby rendering its decision, based on those impugned proceedings, flawed. Similarly, the applicant does not allege that the orders of 17th May 2021, regarding the court finding him guilty on his own plea of guilty, and the sentence imposed, were improper, illegal, incorrect or irregular, save for the sentence, which he says was extremely harsh, which is not the same thing as saying it was either improper, illegal, irregular or incorrect, for sentences are at the discretion of the court, and anyone dissatisfied with the sentence has a right of appeal on the exercise of discretion. Consequently, there is no material before me which suggests that the trial court acted improperly, incorrectly, irregularly or unlawfully in the manner it conducted the proceedings of 17th May 2021, nor that the orders it made, including the sentence it imposed, were irregular, illegal, improper or incorrect.

6. What emerges is that the applicant has changed stance, or thought over the matter after the conclusion of the proceedings of 2nd June 2021. The issues he raises, as the basis for changing his mind, were not brought to the attention of the court, and, therefore, the court could not have reckoned them in its final determination. It cannot be said that the issues were flagged out to the court, but the court ignored or disregarded them. These were things in the mind or knowledge of the applicant, which he did not share with the trial court.

7. I have gone through the proceedings recorded by the trial court. They are straightforward. The charges were read to the accused person in Kiswahili, and he pleaded to them. When the facts were read out to him he confirmed them to be true. He does not say that he did not understand the charges on account of language, or that the proceedings were flawed in anyway. The issues that he raises have nothing to do with the way the trial court handled the matter. I, therefore, do not find basis for intervening in the matter, for the reasons advanced by the applicant. The revision application, therefore, has no merits. I accordingly dismiss the same.

8. I may, perhaps, only intervene to the limited extent of the sentence, not because it is irregular or illegal or improper or incorrect, for the trial court acted properly and within discretion in awarding sentence, but because of the current jurisprudence. The offence to which the applicant pleaded guilty, and in respect of which he as sentenced, is defined in section 11(1) of the *Sexual Offences Act*. It attracts a minimum sentence of 10 years in prison. It is, therefore, a mandatory minimum sentence. The trial court could only award a sentence of 10 years in prison and above, with no option for consideration of any other sentence.

9. The current jurisprudence is against statutory or mandatory minimum sentences. *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) decreed them unconstitutional. The High Court dealt with minimum sentences, on application, in *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga, J), where it followed *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), and pronounced them unconstitutional, and gave directions on how such sentences are to be addressed, with respect to cases where they have been imposed. I shall follow *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga, J), and deal with the sentence imposed, in view of the new jurisprudence.

10. I note that the applicant did not say much on mitigation. He was arraigned on 17th May 2021 and sentenced on 2nd June 2021. Given the circumstances of the offence, as stated in the information, and its gravity, and the age of the victim, I would consider a sentence of 6 years adequate penalty, and I accordingly reduce the said sentence to 6 years accordingly, the time spent in custody, from date of arraignment to date of sentence, to be reckoned. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24thDAY OF March 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr, Wekesa, the applicant, in person.