Kibet v Republic (Criminal Application E014 of 2022)
[2023] KEHC 4153 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 4153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPLICATION E014 OF 2022

RL KORIR, J

APRIL 28, 2023

BETWEEN

SAMUEL ROTICH KIBET ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant filed a miscellaneous application for the revision of the sentence on March 2, 2023 asking the court to give consideration to mitigating circumstances being: the age of the offender, remorsefulness, rehabilitation, possibility of reform or reintegration and any other factors that the court may deem fit.

2. The applicant, Samuel Rotich Kibet was charged with the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. In the judgment dated December 29, 2016, the trial court found the accused guilty of the offence of defilement and convicted him. The trial court thereafter sentenced the accused to 15 years in prison.

4. The application was canvassed through oral and written submissions on March 6, 2023.

5. The applicant filed his submissions on March 2, 2023. He submitted that he was 54 years old, an age he considered to be a prime for nation building and that he wanted to be given a second chance in life by the sentence being reduced or reviewed. He further submitted that he was remorseful, had reformed and was now a born-again christian with good moral values. That he attended guidance and counselling sessions during his incarceration and that he could use the skills he had acquired in prison for nation building.

6. It was the applicant's written submission that he was the sole breadwinner of his family and that his five children needed school fees as they risked dropping out of school. He also submitted that he was sickly, that his health was deteriorating and that he had never had any issues of indiscipline in prison.

7. It was the applicant's further submission that the resentencing guidelines issued by Chief Justice Emeritus Willy Mutunga gave the judicial officers discretion in issuing sentences and that sentences ought to promote restorative justice and value rehabilitation. The applicant relied on *Philip Mueke Maingi and 5 others v Republic* (2021) eKLR on the issue of mandatory minimum sentences in sexual offences.

8. At the hearing of the application, the applicant further made oral submissions that the victim was the daughter of someone with whom he had a dispute and that he wanted to assist his children who were suffering.

9. Mr Njeru, learned prosecution counsel opposed the application for revision stating that the defilement was aggravated as the applicant defiled the victim four times and threatened to kill her and that he also made the victim pregnant. He further submitted that there was a huge age difference between the victim and the applicant. It was their submission that the court ought to rein in such behaviour as the offence was now rampant.

10. In a rejoinder, the applicant stated that he did not contest the decision of the courts in convicting him but merely sought a reduction in the sentence.

11. Having considered the application, the record from the trial court, and the opposing arguments of the parties, it is upon this court to determine whether the application is merited and whether the sentence ought to be revised.

12. Article 50 of the *Constitution* of Kenya provides for the rights of an accused person and the right to a fair hearing as follows: -

    (2) 2) Every accused person has the right to a fair trial which includes the right to :-

        (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

13. For this revision, the powers of this court are provided for under section 364 (1) (a) of the *Criminal Procedure Code* which provides: -

> 364. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence.

14. It is clear from the above that the court should not arbitrarily interfere with the sentence meted out by other courts of law unless it is satisfied that such a decision fell short of any of the following parameters being correctness, legality and propriety. The issue in this application is therefore whether the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or if the sentence was inordinately excessive or lenient as to be an error of principle.

15. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, (1954) EACA 270, stated as follows: -

> " The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors."

16. Section 8 (4) of the *Sexual Offences Act* with which the applicant was charged and convicted provides that: -

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

17. It is evident from the above provisions that the *Sexual Offences Act* provides for a mandatory minimum sentence for a person who is found guilty of the offence of defilement.

18. There has been a robust discourse on the issue of the legality or the illegality of mandatory minimum sentences. The same was clarified by the Supreme Court in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) (2021) KESC 31 (KLR) (6 July 2021) (Directions) by stating that:-

> " [10] It has been argued in justifying this state of affairs, that, by paragraph 48 of the judgment in this matter, or indeed the spirit of the judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;
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> .....
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> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".
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> .....
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> We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute." (emphasis added).

19. Guided by the above precedent, the sentence as prescribed by law was legal. It is however salient to note that the minimum nature of the sentence did not prevent the trial or appellate court from considering the mitigation and the circumstances of the case to inform a harsher or lenient sentence if the circumstances of the offence warranted. I associate myself with the sentiments of Odunga J (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) when he stated thus: -

> " 90. It is clear that minimum mandatory sentences, *prima facie*, do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances."

20. The objectives of sentencing as set out in the Judiciary Sentencing Guidelines 2016 are retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. In *Thomas Mwambu Wenyi v Republic* (2017) eKLR, the Court of Appeal held that:-

> "As for the sentence, the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraphs 70-71 had this to say on sentencing: -
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> 70. Sentencing is an important task in the matters 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 strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.
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> 71. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence
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> 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."

21. I have considered the trial court record and noted the mitigation offered by the applicant. It appears from the proceedings that there was an on-going sexual relationship between the appellant and the complainant and which had gone for approximately two years before any action was taken either by the complainant herself or her parents. What makes the relationship unpalatable however was the huge age difference between the appellant and the complainant and this fact was taken into account by the trial court.

22. I have considered the unique circumstances of the case. I have also considered that the appellant has served a substantial part of his sentence and has on this application demonstrated that he has since reformed.

23. In the final analysis, I reduce his sentence to 10 years imprisonment from the date of his first sentence.

24. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL, 2022.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant, (Virtually) present at Kericho Prison Mr. Njeru for the State and Siele (Court Assistant).