Setek v Director of Public Prosecution (Criminal Petition E002 of 2022) [2023] KEHC 3471 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3471 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL PETITION E002 OF 2022

F GIKONYO, J

APRIL 26, 2023

BETWEEN

PATU SETEK ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

Sentence Review

1. The relief sought in the undated application received in court on 3RD January 2022 is review of sentence.

2. The application is is expressed to be brought pursuant to Articles 2(1)(4),10(a)(b),19(3)(a),20(3)(b)(4)(a)(b),22(1),23(1),25(c),27(1)(2)(4)(5) (7), 28,29(a) (d) (f), 47(1), 50, 159, 160,165,25991) (a)(b)(c), (3) and the sixth schedule (article 262 of the *Constitution*, section 20(1) of *SOA*, *Wilson Kipchirchir Koskei v Republic* [2019]eKLR and *Samson Tobiko v Republic*.

Brief background

3. The applicant was charged with an offence of incest contrary to section 20(1) of the *Sexual Offences Act* 2006. The particulars were that on 19th January 2013 at Eleengatia area in Narok north district within rift valley province being a male person caused his penis to penetrate the vagina of LS a female juvenile aged 15 years who was to his knowledge his daughter.

4. In the alternative charge, he was charged with the offence of indecent act contrary to section 11(1) of the *Sexual Offences Act* no. 3 of 2006. The particulars were that on 19th January 2013 at Eneengatia area in Narok North District within Rift Valley Province committed an indecent act with L.S. by rubbing his genital organ(penis) against the said L.S. female genital organ(vagina).

5. The applicant was convicted of the offence and sentenced to serve life imprisonment.

6. The applicant dissatisfied with the decision of the trial court filed an application seeking to appeal out of time. His application was dismissed.

Background

7. The appellant delayed in filing his appeal for a period of three years and five months. He therefore filed a criminal miscellaneous application no. 1 of 2017 dated 16th January 2017 at Narok high court. In the said application he sought leave to appeal out of time under section 349 of the *Criminal Procedure ode*. Bwonwong'a J dismissed the application vide the ruling delivered on 8th February 2017.

8. The applicant herein then filed a myriad of applications before the high court as follows;

   i. Miscelaneous Criminal Petition No. 6 of 2018- received in court on 29th may 2018. the application sought resentencing under muruatetu case.

   ii. Miscellaneous criminal application no. 35 of 2018 seeking to be released on bond pending appeal. The applicant vide letter dated 30th january 2020 notified the court that he was withdrawing the miscellaneous application no. 35 of 2018 and appeal no. 32 of 2019.

   iii. Petition of appeal no. 32 of 2019 filed on 17th july 2019.

   iv. Miscellaneous criminal application no. 6 of 2020 filed on 30th january 2020. the applicant was seeking a close hearing date for his appeal

   v. Criminal revision no. 51 of 2020 filed in court on 26th march 2020. in this application the applicant sought the court to invoke its criminal revisionary jurisdiction.

   vi. Miscellaneous criminal application no. 7 of 2020 dated 17th february 2020 seeeking leave to file his appeal out of time. The advocates on record, wambua kigamwa and company advocates vide letter dated 19th march 2020 notified the court that the appelllant had withdrawn his application seeking leave to extendtime to lodge an appeal agains the conviction and sentence dated 19th july 2013 in Narok chief magistrate criminal case no. 76 of 2013 entirely.

9. On 7th october 2020 when miscellaneous application no. 7 of 2020 came for mention the court directed that the matter be mentioned on 14th october 2020 to enable the prosecution prepare for a hearing date.

10. The advocate for the appellant on 17th novemebr 2020 prayed that all applications filed in the suit be marked as closed which prayer was granted.

11. This court vide its judgement delivered on 9th december 2021struck out the appeal for being incompetent and filed without leave of the court.

Directions of the court.

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

Applicant's Submission

13. The applicant submitted that the life sentence he is serving is harsh as he is 52 years and the said sentence did not take into account transitional and consequential provisions, sixth schedule (art.262) of the *Constitution*.

14. The applicant submitted that while passing the sentence the judicial officer did not take into account art.10(a)(b) (2)(b) of the *Constitution* to give effect to the promotion of human dignity

15. The applicant submitted that the sentence under section 20(1) *SOA* is couched in mandatory nature hence taking away judicial discretion

16. The applicant submitted that this court has jurisdiction to review the sentence of the petitioner in accordance with article 50(2)(a) of the *Constitution*. Further that this court is not functus officio as this matter is based on the bill of rights.

17. The applicant submitted that he has reformed and is ready to be integrated back into society.

18. The applicant has relied on the case *Thomas Mwambe Wengi v Republic* [2017] eKLR cited the decision of the supreme court of India in *Alister Anthony Pereira v State of Magistrate*

Respondent's Submission

19. The respondent opposed the application.

20. The respondent submitted that the trial court took into account all circumstances before sentencing the petitioner. Of great concern was the age of the victim who was below 8 years at the time of the offence, she was 15 years. Another fact is that the petitioner was his father. Therefore the petitioner took advantage of the vulnerability of the victim because of her age and also took advantage of the trust that the victim had on his father whom she did not imagine would do such a beastly act on her. Taking all that into consideration, the trial court sentenced the petitioner according to law after taking into consideration all the prevailing circumstances.

21. The respondent urged this court to dismiss this petition for it lacks merit and also an abuse of the court process by wasting the court's judicial time.

Analysis And Determination

22. The application and the rival parties' written submissions portend two issues for determination, namely:

    i. Whether this court has jurisdiction to adjudicate upon this application; and

    ii. Whether the applicant's sentence should be reviewed.

Nature and scope of Re-sentencing

23. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's revisionary power to review sentences. The court does not consider conviction. In re-sentencing, the court will only be checking on the legality of the sentence or whether it violates the rights of the applicant. The court will therefore be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.

Purpose of re-sentencing

24. The purport of re-sentencing is to provide an effective remedy to such injustice arising from a violation of right or fundamental freedom as was aptly explained by Majanja J in *Michael Kathewa Laichena & Another -v- Republic* (2018) eKLR that:

> " ...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".

Redress for violation of right

25. The application is made on the basis of alleged violation of the *Constitution* and more specifically, the Bill of Rights.

26. The High Court under Article 165 (3) and 23 of the *Constitution* has the jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

27. Accordingly, this court has jurisdiction to hear this application.

Court's authority to uphold rights

28. The authority of the court in article 165(3) and 23 of the *Constitution* is inter alia, to uphold and enforce the Bill of rights. The authority also formally and actually gives the court power of consistently structuring, developing and deploying progressive jurisprudence on rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of the *Constitution*, that: -

> In applying a provision of the Bill of Rights, a court shall— develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Of alleged violation of right

29. The applicant made two pertinent arguments.

30. One, that the life sentence he is serving is harsh given that he is 52 years and the said sentence did not take into account transitional and consequential provisions of sixth schedule (art.262) of the *Constitution*.

31. He added that, in passing the sentence, the judicial officer did not take into account art.10(a)(b) (2)(b) of the *Constitution* to give effect to the promotion of human dignity.

32. Two, that, the sentence under section 20(1) *SOA* is couched in mandatory nature hence taking away judicial discretion

Life Sentence: indeterminate and harsh?

33. The applicant seems to argue that life sentence is indeterminate and harsh; it is contra the objects of punishment, sentencing policy and does not give him an opportunity to be re-integrated back into society. For these reasons, he termed it as an affront to his rights to less severe sentence and to benefit from re-habilitation.

34. Needless to say, that, life sentence is, of itself, a lawful sentence. It may, however, appear, and is considered by many to be harsh due to its indeterminate nature. Nevertheless, it is now settled that it is not immutable or irreducible. While I agree that there may be a need for certainty as to what amounts to a life sentence, the certainty should be furnished through legislative enactment. See the *Muruatetu Case*, where the Supreme Court made this clear thus:

> (87) In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.

(88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya *Judiciary Sentencing Guidelines*, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

(89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the *Constitution*, which reads:

> 51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
>
> (3) Parliament shall enact legislation that—
>
> (a) provides for the humane treatment of persons detained, held in custody or imprisoned; and
>
> (b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of *Jackson Maina Wangui & Another v. Republic* Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

> "As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.
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> 76. .... As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

35. In the light of the foregoing, it cannot be argued that life imprisonment per se amounts to a violation of the applicant's constitutional rights as was herein urged by him. It is therefore my finding that the sentence imposed on the applicant is not inimical to the constitutional provisions that the applicant relied on herein.

Of mandatory sentence and lack of discretion

36. The more potent argument by the applicant is that, a provision of law which prescribes mandatory sentence takes away the discretion of the court in sentencing, making it unconstitutional. Many commentators seem to suggest that the mandatory nature of the sentence is what is unconstitutional. But, others focus on the fact that the sentence is mandatory leaving no room for discretion of the court is really what makes it unconstitutional.

37. Be that as it may, discretion ensures that courts impose appropriate sentence upon the accused. Appropriate sentence varies from case to case depending on the circumstances of the case. Therefore, discretion in sentencing pertains to fair trial.

38. Mandatory sentence deprives the courts of the discretion to impose appropriate sentence. Thus, persons who suffer this kind of deprivation may claim violation of the right to appropriate or less severe sentence- a principle embodied in the *Constitution* including article 50(2)(p) of the *Constitution*.

39. The applicant stated that Section 20(1) of the *SOA* provides for a mandatory sentence thereby taking away the discretion of the court in sentencing. Does it? And, has he suffered any deprivation of discretion in sentencing which violated the right to appropriate or less severe sentence.

Of unconstitutionality of s.20(1) of SOA

40. Section 20(1) of the *Sexual Offences Act* Provides that: -

> 20. (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.

41. The terms used in the section is; 'is liable to imprisonment' and 'shall be liable to imprisonment'. In my considered view, there is no dearth of jurisprudence that, where the term liable is used in a penalty clause, it does not connote mandatory but directory command.

42. I am content to cite a work of Odunga J (as he then was) in the case of *Patrick Muli Mukutha v Republic* [2019] eKLR: -

> 14. It is true that section 8(3) and (4) of the *Sexual Offences Act* applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":
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> "The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."
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> 15. The predecessor of the court went further in Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation inter alia thus:
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> "It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

16. A similar position was adopted in D W M v. Republic (supra) where the Court held that:

> "As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was Page 3/6 Patrick Muli Mukutha v Republic [2019] eKLR within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

17. In this case, however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in Elizabeth Waithiegeni Gatimu v. Republic [2015] eKLR:

> "The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

43. Therefore, I take the view, that the court has discretion to impose appropriate sentence under the section.

44. It bears repeating that, except section 8(2) of the *Sexual Offences Act*, all other penalty clauses use the term liable which to me does not prescribe mandatory sentence, and the court may impose appropriate sentence thereto. I so hold.

45. In consequence thereof, the applicant has not shown that section 20(1) of the *Sexual Offences Act* prescribes a mandatory sentence.

46. Even if one was to find that the sections prescribe mandatory sentences, being existing law, they should be construed with such modifications, exceptions, adaptations and alterations necessary to bring them into conformity with the *Constitution*. These are new tools- read-in, read-out or read-down techniques- provided by the *Constitution* in the construction of existing law. Therefore, unless a provision of existing law is totally irreconcilable, there is no necessity or strict requirement in law to strike down such provision.

47. These techniques were specially designed to avoid paralysis and confusion in the application of law which may ensue upon down-right striking out of provisions of law, but also giving the legislature time to remove the offending elements aligning it to the *Constitution*.

A misconception?

48. I am, however, aware that many courts as well as legal practitioners have held the view that these sections in *SOA* prescribe mandatory or mandatory minimum sentence- this will be revisited in the exact circumstances of this case.

49. But, given my orientation and being guided by the jurisprudence on the subject matter, I am persuaded this could be an honest misconception of the true meaning and purport of the term liable in a penalty clause which has been complicated by the incongruous use of the term liable and not less than in the same sentence.

50. In this case the learned magistrate in her judgement stated as follows;

> I have considered the mitigation by the accused. He planned to commit this offence well in advance and executed it in the pretense that they were instructions from witch doctor. The offence is very serious and carries only one prescribed sentence provided by law as per the age of the victim which is life imprisonment.

51. The learned magistrate seemed to believe there was only one sentence provided in the proviso to section 20(1) of the *Sexual Offences Act*. This was erroneous or a misconception of the law.

52. Nevertheless, is the sentence appropriate sentence in the circumstances of the case?

53. Despite stating that the offence carries only one sentence prescribed in law, the trial magistrate considered the mitigation by the accused, and also aggravating factors to wit; that he planned to commit this offence well in advance and executed it in the pretense that they were instructions from witch doctor; the offence is very serious, the age of the victim- minor; and was his daughter. These aggravating factors justify imposition of life sentence.

54. Accordingly, I do not find any violation of his right to less severe sentence. I therefore, do not find any reason to interfere with the sentence of life imprisonment imposed on the applicant. His application for re-sentencing/review is completely devoid of merit and is hereby dismissed.

55. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF APRIL 2023.

F. GIKONYO M

JUDGE

In the presence of:

The Appellant

M/s Mwaniki for DPP

Kasaso C/A