Kurgat v Republic (Miscellaneous Criminal Application E021 of 2022) [2023] KEHC 20612 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20612 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2022

RL KORIR, J

JUNE 29, 2023

BETWEEN

HILLARY KIPROTICH KURGAT ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on June 9, 2013 within Bomet County, he intentionally caused his penis to penetrate the vagina of SC, a child aged 12 years.

2. He was convicted and sentenced to serve 20 years in prison.

3. The Applicant applied for re-sentencing and relied on the following paraphrased grounds:-

   I. That his mitigation, evidence and circumstances of the case were not considered when the trial court arrived at the sentence of 20 years thereby causing him prejudice.

   II. That the mandatory minimum sentence prescribed in Section 8(3) of the *Sexual Offences Act* was unconstitutional and breached Articles 2(1), (3), (4), 25 and 28 of the *Constitution of Kenya*.

   III. That his constitutional right was violated as he was denied access to justice and a right to a fair trial contrary to Articles 48, 50 (2) (P) and 25 of the *Constitution of Kenya*.

   IV. That he relied on the case of *Francis Karioko Muruatetu and another v Republic* (Supreme Court Petition No 15 of 2015) that declared the mandatory minimum sentence unconstitutional.

4. The Applicant filed written submissions and stated that he was remorseful and repentant. He further submitted that his age was advancing and asked the court for a second chance to be reintegrated back to the society. That he had learnt that life was full of challenges and promised never to reoffend again.

5. It was his submission that he was a first offender and had used his time in prison constructively and that he was fully rehabilitated. It was his further submission that he had made peace with the complainant and her family

6. In mitigation, the Applicant stated that he had personally asked for forgiveness and that he was the sole bread winner for his needy family and elderly parents. It was his further mitigation that he was now a law abiding citizen and a crusader for good morals in the society.

7. In his oral submissions before court, the Applicant asked the court to forgive him. That he had no parents and his children were suffering as his first born had dropped out of school and his last born was on the verge of dropping out.

8. The Prosecution were not opposed to the court reconsidering the Applicant's sentence.

9. The Applicant contended that the Sentence as prescribed by Section 8(3) of the *Sexual Offences Act* was unconstitutional and relied on *Francis Karioko Muruatetu and another v Republic* (Supreme Court Petition No 15 of 2015). It was on that basis that his Application for resentencing was premised.

10. In a clarification regarding the validity and constitutionality of mandatory minimum sentences, 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) stated 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;
>
> > "[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right".
>
> 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".
>
> [11] The *ratio decidendi* in the decision was summarized as follows;
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> > "69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

> 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)

11. I note that the Appellant appealed against the trial court Judgment where he was convicted of the offence of defilement and sentenced to 20 years in prison. He subsequently appealed to this court. In the Judgment dated July 27, 2016, this (Muya J.) court upheld the conviction and sentence of the trial court.

12. This court has no further jurisdiction to review the Sentence as a court of equal jurisdiction had already pronounced itself and upheld the sentence. If the Appellant was dissatisfied with the Judgment of this court, his next step would be to appeal to the Court of Appeal and not this court. The Supreme Court in the case of *R v Karisa Chengo* [2017] eKLR, held that:-

> " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

13. Further, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held that:-

> " A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

14. In the final analysis, it is my finding that this court has no further jurisdiction in this matter. The Applicants' recourse lies in the Court of Appeal.

15. The Application has no merit and is dismissed.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 29TH DAY OF JUNE, 2023.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Appellant acting in person, Mr. Waweru holding brief for Mr. Njeru for the Respondent and Siele (Court Assistant)