Korir v Republic (Criminal Miscellaneous Application E004 of 2021)
[2023] KEHC 24391 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E004 OF 2021

JN KAMAU, J

OCTOBER 30, 2023

BETWEEN

JULIUS KIPKEMBOI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. The Applicant herein was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* No 3 of 2006. He was tried and subsequently convicted by the Learned Trial Magistrate, Hon T.N. Bosibori, Resident Magistrate under Section 8(3) of the *Sexual Offences Act* No 3 of 2006 and sentenced to twenty (20) years' imprisonment.

2. Being dissatisfied with the said Judgement, he lodged Kakamega HCCRA No 157 of 2011. Jaden Thuranira J dismissed the said Appeal and upheld both the conviction and sentence. It was not clear if he appealed against the proceedings said decision at the Court of Appeal as there was no information and/or to that effect.

3. He filed the application for review of his sentence herein for the reduction to the least possible sentence on 14th October 2022. He averred that he was sixty (60) years of age and was a first offender. He expressed remorse and prayed for a second chance in life.

4. He pointed out that he had trained in Emmaus Diploma International School of Ministry (ISOM) and done, Prisoner's Journey Certificate AFCM-Diploma as his rehabilitation while in custody.

5. He asserted that this court had jurisdiction to re-sentence him under Article 22, 23, 27, 50(2)(p)(q), 163, 165 as read with Section 216 and 328 of the Criminal Procedure Code. Although he referred this court to the case of Siaya HCCRA No 74 of 2019 Geoffrey Odhiambo Odhiambo vs Republic

(eKLR citation not given), he did not indicate what holding he was relying upon to support his case. His Written Submissions were dated and filed on 18th October 2021.

6. On 24th June 2022, Musyoka J who was seized of the matter herein at the time directed that the Deputy Registrar Vihiga call for the trial records in PMCCRC No 1912 of 2003 and Kakamega HCCRA No 157 of 2011 to enable him exercise his discretion in the matter as was directed by Odunga J (as he then was) in Machakos HC Petition No E017 of 2021 Philip Mueke Maingi & Others vs Director of Public Prosecutions & Another (eKLR citation not given). As the matter had emanated from Vihiga Principal Magistrate's Court, he transferred the file herein for hearing and determination by the High Court Vihiga.

7. When this matter was mentioned before this court on 19th September 2023, it noted that efforts to trace Kakamega HCCRA No 157 of 2011 and all lower court records had been futile. The outcome of the aforesaid Appeal was obtained from the Appeals' Register.

8. In view of the fact that the said files could not be traced, this court determined that it was in the best interests of justice to proceed on the basis of the certified copies of the proceedings and judgment of the lower court that the Appellant had supplied and to ascertain if there were other Rulings in respect of the Applicant herein that had been posted in the Kenya Law Reports website.

9. This court therefore directed the Respondent herein to file its Written Submissions. The same were dated and filed on 6th September 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

10. A perusal of the Kenya Law Report website indicated that the Applicant herein had also filed Kakamega HCCR Misc 116 of 2012 Julius Kipkemboi Korir vs Republic [2013] eKLR in which he had sought a re-trial of the criminal case against him on the grounds that the Charge Sheet was defective, that the Investigation Officer failed to attend the Trial Court to prove the Charge and that on appeal, the High Court failed to appreciate that material facts warranted an acquittal. Dulu J found that the said application not to have had merit and dismissed the same on 18th April 2013.

11. After extensive search on the Kenya Law Reports Website, this court did not find any other Rulings in respect of the Applicant herein. It therefore deemed that it would be safe to proceed on the documentation that it had with a view to doing substantive justice to the Applicant whose case had stalled as the previous records could not be traced.

12. The Applicant averred that he would be a crusader of good morals and reiterated that he was remorseful. It was his submission that most of the people who had been sentenced to death or were serving life sentence had had their sentences reduced to as low as ten (10) years. He contended that Sections 216, 329 and 333(2) of the Criminal Procedure Code were progressive in nature.

13. On his part, the Respondent herein submitted that he was sentenced to the statutory sentence as provided by the *Sexual Offences Act*. It argued that the sentence was both fair and legal and prayed that this court upholds the same.

14. Notably, EA (hereinafter referred to as "PW 1") was aged fifteen (15) years at the material time of the incident on 3rd December 2003. At the time, the Penal Code Cap 63 (Laws of Kenya) was the applicable law in matters of sexual offences. The *Sexual Offences Act* came into force in 2006. The Applicant herein had therefore been charged with the offence of rape contrary to Section 140 of the Penal Code.

15. In her decision, the Learned Trial Magistrate invoked Section 3(2) of the *Sexual Offences Act* which empowered the court to charge (sic) the accused person under the *Sexual Offences Act*. She accordingly convicted and sentenced him under Section 8(3) of the *Sexual Offences Act*.

16. Paragraph 3(2) of the Second Schedule of the *Sexual Offences Act* stipulates as follows:-

> Section 184 of the of the Criminal Procedure Code is repealed and replaced with the following new section-
>
> Where a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections of the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it."

17. As PW 1 was aged fifteen (15) years, the Learned Trial Magistrate did not therefore err when she convicted the Applicant herein for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.

18. Notably, Section 8(3) of the *Sexual Offences Act* states that:-

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

19. Having convicted the Applicant herein, the Learned Trial Magistrate did not therefore err when she sentenced him to twenty (20) years imprisonment as that was what was provided by the law.

20. The above notwithstanding, this court took cognisance of the fact that there is emerging jurisprudence that mandatory minimum sentences in defilement cases were unconstitutional and courts had a discretion to depart from such minimum mandatory sentences.

21. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

22. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

23. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

24. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK vs Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

25. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010.

He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

26. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

27. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

28. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to sentence the Applicant herein to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

29. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish him for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

30. Turning to Section 333(2) of the Criminal Procedure Code cap 75 (Laws of Kenya). The said section provides that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

31. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

32. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

33. As the lower court and High Court Appeal files could not be traced, it was not possible to ascertain exactly when the Applicant herein was arrested as there was no Charge Sheet. In his sworn evidence, he merely alluded to his arrest but did not state the date when he was arrested.

34. Be that as it may, a perusal of the proceedings of the lower court showed that he was arraigned in court on 10th December 2003 and was granted bail on 14th April 2004. As at 31st May 2004, he was still in

custody. However, on 16th June 2004, he was out on bond as the same was extended by the Trial Court. He was subsequently convicted on 21st July 2011.

35. It was not clear exactly when he was released on bond. However, from the proceedings in court, it was somewhere between 31st May 2004 and 15th June 2004. In the absence of any other evidence to the contrary, this court determined that the best date to work with for purposes of considering the merit or otherwise of applicability of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) herein was 31st May 2004. This court therefore found and held that the was in custody for five (5) months and twenty one (21) days.

Disposition

36. For the foregoing reasons, the upshot of this court's decision was that although the Applicant's conviction was safe and the same be and is hereby upheld, his Notice of Motion application that was dated and filed on 18th October 2021 was merited and the same be and is hereby allowed. His sentence of twenty (20) years imprisonment that was imposed on him be and is hereby vacated and/or varied and/or set aside and reduced to fifteen (15) years imprisonment and the same to run from 21st July 2021.

37. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 10th December 2003 and 31st May 2004 when he was first arraigned in court and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

38. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE