Ngige v Republic (Miscellaneous Criminal Application 16 of 2020)
[2023] KEHC 24278 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION 16 OF 2020

HM NYAGA, J

OCTOBER 26, 2023

BETWEEN

GABRIEL KARANJA NGIGE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant Gabriel Karanja Ngigi was charged with the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code*. The particulars being that on 12th April, 2010 along Mitimingi-Elementaita Road in Naivasha District within the Rift Valley Province jointly with another not before court and while armed with offensive weapons namely rungus robbed Simon Mwangi Macharia four mobile phones (1 Nokia 1208 valued at Ksh. 3,000/=, 1 Kabambe E-top up valued at Ksh. 1,899/= and 2 Nokia 1202 valued at Ksh. 4,398/=), Safaricom scratch cards valued at Ksh. 20,000/= and cash Ksh. 103,000/= all valued at Ksh. 132,297/= and at or immediately before or immediately after the time of such robbery used actual violence against the said Simon Mwangi Macharia.

2. After a full trial, the Applicant was found guilty. He was duly convicted and sentenced to serve 20 years' imprisonment on 7th February,2013.

3. Being dissatisfied with the trial court's decision, he lodged an appeal against both conviction and sentence before this court vide Criminal Appeal No.16 of 2013. However, this court upheld the trial's court judgement both on conviction and sentence on 24th January,2019.

4. On 5th February,2023 he filed an undated Application seeking for sentence rehearing. He averred that he was not accorded a fair trial on sentencing in contravention to article 50(2)(q) of *the constitution*. Citing the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (Muruatetu 1) & William Okungu Kittiny v Republic [2018] eKLR, he averred that mandatory sentences are excessive and too harsh.

5. He urged this court to review his sentence, relying on the case of *Martin Bahati Makoha & Another v Republic* [2018] eKLR & *Robert Mutashi Auda vs Republic*, Nairobi Criminal Appeal No. 247 of 2014.

6. Honourable Justice J. Ngugi (as he then was) considered the Application and in his ruling he stated as follows: -

> "I have noted that the Applicant was convicted of the offence of Robbery With Violence Contrary to Section 296(2) of the Penal Code and was sentenced to death as the law then mandatorily required. Consequently, the Applicant is eligible for sentence re-hearing under the Muruatetu doctrine. In keeping with the Supreme Court's remarks that where possible sentencing is best done by the trial court, I will transfer this matter to the Chief Magistrate's court, Nakuru Law Courts for sentence re-hearing. Consequently, the honourable Deputy Registrar to facilitate the transfer of the file to the Chief Magistrate's court for further processing, listing and hearing according to the directions to be given by the Honourable Chief Magistrate and Head of station."

7. The file was duly referred to the Chief Magistrate's Court for re-sentencing, but was then sent back to this court. No reasons were given for that action, but I would want to believe that this was as result of the decision in Francis Karioko Muruatetu & Another vs Republic [2021] eKLR (Muruatetu 2). In clarifying the import case of its earlier decision, in Muruatetu 2, the Supreme Court gave the following guidelines:

   i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;

   ii. .....

   iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

   iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

   v. .....

   vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

   vii. .....

   viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

8. It is thus the duty of this court to deal with the application.

Applicant's Submissions

9. The Applicant submitted that he is 58 years old and married with 6 children who totally depend on him. He contended that he is remorseful and has acquired a certificate in theology while in prison. He urged this court to consider the period he has spent in custody pursuant to section 333(2) of the *Criminal Procedure Code* and to be allowed to serve the remainder of his term under non- custodial sentence.

Respondent's Submissions

10. The Respondent is opposed to the Application for reasons that the offence is aggravated; that during the commission of the same, the Applicant inflicted grievous injury to the victim and left him for dead lying in a ditch; that the victim co-operated with the robbers but they still went ahead to assault him; and that the Applicant was not remorseful.

Analysis & Determination

11. The only issue that arise for determination is Whether the petitioner's plea for re-sentencing is merited.

12. There is settled law that mandatory sentences are unconstitutional. The constitutional test was provided by the Supreme Court in the case of Francis Karioko Muruatetu & Another vs Republic (supra). The court declared that the mandatory sentence for murder under section 204 of the *Penal Code* was unconstitutional on grounds that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case.

13. Subsequently, the Court of Appeal in William Okungu Kittiny vs Republic (2018) eKLR applied the Muruatetu case mutandis mutatis to the mandatory sentence for robbery with violence under the provisions of section 296 (2) of the *Penal Code* and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the Muruatetu case. As follows:

> "...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ..."

14. In the premises, a court can in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence.

15. The Supreme Court in the Francis Karioko Muruatetu case (supra) set out the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

    a. age of the offender;

    b. being a first offender;

    c. whether the offender pleaded guilty;

    d. character and record of the offender;

    e. commission of the offence in response to gender-based violence;

    f. remorsefulness of the offender;

    g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

> Guideline Judgments
>
> Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

16. In *Nicholas Mukila Ndetei vs Republic* (2019) eKLR, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that: -

> " In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report."

17. I have considered the above stated principles of sentencing. The Applicant was charged with robbery with violence contrary to section 296(2) of the *Penal Code*. Said Section is prescribed as follows:

> " 296(2.) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

18. The Applicant herein was not sentenced to mandatory sentence of death as provided in the above section but to 20 years' imprisonment. On his appeal, on both conviction and sentence, the issue was extensively addressed and the appeal was dismissed by this court, albeit differently constituted.

19. The application by the applicant is premised upon the decisions in Muruatetu 1 and Muruatetu 2 (supra). It must be remembered that the Muruatetu cases were not the first to deal with the question of mandatory sentences.

20. In *Godfrey Ngotho Mutiso vs Republic* Criminal Appeal No. 17 of 2008, the Court of Appeal was called to give its opinion on the death sentence. The Court of Appeal was previously the highest court in our Republic, prior to the establishment of the Supreme Court of Kenya.

21. In Mutiso's case, the sentence was in relation to the offence of murder, contrary to section 203 of the *Penal Code*. As with the present case, the "mandatory" sentence is death.

22. It is important to also note that the decision in Mutiso's case was made prior to the promulgation of the present Constitution of Kenya. Nevertheless, the Court of Appeal found that the mandatory death

sentence prescribed for certain offences was antithetical to the constitutional provisions on protection against inhuman and degrading punishment or treatment and fair trial.

23. In short, the Learned Judges of Appeal arrived at the conclusion that in so far as section 204 *Penal Code* provided for the Death sentence as the only punishment in respect of murder, the said section was inconsistent with the letter and spirit of *the constitution*.

24. The court was also quick to point out that the same arguments applied to offences of treason under section 40(3) *Penal Code*, robbery with violence under section 296(2) Penal code and attempted robbery with violence, under section 297(2) Penal Code.

25. After the decision in Mutiso's case many courts applied it to depart from the long held view that the death sentence should automatically be decreed where the law stipulated so.

26. Though it is not clear why the trial court imposed the 20 year imprisonment sentence instead of the death sentence, it has to be presumed that it was relying on Mutiso's case. Otherwise that sentence would have been unlawful.

27. It is thus clear that the applicant was not subjected to the mandatory death sentence. It follows that his application is based on a wrong interpretation of the sentence of the lower court. In short, he has already benefitted from the principles that later came to be laid down in the Muruatetu cases.

28. I therefore opine that that the applicant is precluded from having a second bite of the cherry. This application is an abuse of the court process.

29. Even assuming that I am wrong on the above findings, and proceed to re-sentence the applicant, I would have to consider the circumstances surrounding the offence. The evidence on record shows that the Applicant and his accomplice were armed with a dangerous weapons, namely rungus (clubs). In the process of robbery, they injured the complainant. The doctor who examined the complainant assessed the degree of injury as harm. I also note that the total value of the victim's stolen property was Ksh. 132,297/=. The items were not recovered.

30. In my view, and as held by the court on appeal, trial court duly considered the circumstances of the case and noted the applicant's mitigation, where he pleaded for a non-custodial sentence. The sentence imposed was in line with other sentences in cases where the courts have applied Muruatetu cases. I will cite a few examples.

31. In *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J(as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

32. In Nairobi Misc. Cr. Application No. 430 of 2015; *Simon Kimani Maina –vs- Republic* [2019] eKLR, the Applicant was convicted for the offence of attempted robbery with violence and sentenced to life imprisonment. The court considered that he was 18 years at the time of his arrest and the victims were not injured during the failed robbery attempt. It also considered the fact that he was a first offender, that he was not the one with the AK-47 rifle and that he appeared remorseful. He was resentenced to the time served of 14 years.

33. In Nairobi Misc. Cr. Application No. 393 of 2018; *Joseph Kaberia Kainga vs Republic* [2019] eKLR the Applicant was convicted for the offence of attempted robbery with violence and sentenced to death. He was 27 years old at the time of his arrest and had been in custody for 16 years. In resentencing him to the time served, the court noted that the victims were not injured during the failed robbery attempt, that the probation officer's report was positive, that the Appellant appeared to have been rehabilitated during his period of incarceration and that he was remorseful.

34. In Nrb Misc Criminal Appeal Nos 81 & 82 of 2009; *Martin Bahati Makoha &Another vs Republic* [2018] eKLR, the Appellants were convicted for the offence of robbery with violence and sentenced to death. The victim sustained a cut wound on the left thumb and throat and his injuries were classified as harm. The court was of the view that the circumstances under which the offence was committed were not so grave to warrant a death penalty. The Appellants were resentenced to the time served of 10 years and 2 days

35. The Applicant herein stated that he has acquired a certificate in theology while in prison. There is no pre-sentence report in this matter to ascertain this position.

36. Be that as it may, I have taken into account his mitigation herein and the aggravating factors, guided by the above precedents. I am of the considered view that the sentence of 20 years' imprisonment imposed by the trial court was lawfully meted out. It cannot be said to be harsh or excessive. Again, this point was exhaustively handled by the court on appeal.

37. The other point raised in this application is that the trial court did not consider the provisions of section 333(2) of the *Criminal Procedure Code*(CPC). The section requires a sentencing court to take into account the period spent in custody awaiting trial.

38. Section 333(2) of the *Criminal Procedure Code*, states as follows:

> "(2) 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".

39. It has been stated that in invoking section 333(2) of the Criminal Procedure Code, the court is not required to embark on an arithmetic journey to calculate time to be spent in custody. In the case of *Bukenya vs Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) it was stated that;

> "Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement."

40. It is my understanding of the above decision that the court is only required to take account of the time spent in remand custody. This is to be done by considering and noting in the sentencing decision.

41. The Court of Appeal in *Bethwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows:-

> " By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

42. The above decisions can be contrasted with the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where the Court of Appeal held that:-

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

43. As can be seen, there is no consensus on how the taking into account is to be applied. In *Ahmad Abolfathi's* case (supra), the court seem to suggest that the time in custody ought to be deducted while in Bethwel Wilson Kibor's case(supra) the court seems to agree with Bukenya vs. Uganda(supra) and held that what the sentencing court ought to do is to specifically state that it had taken account of the period spent in remand custody .

44. I have perused the trial court record and I note that the court stated as follows;

> " I have considered the mitigation stated by the accused person. I do take into consideration the period of time the accused has been in custody. i.e. from 13/4/2010"

45. In my view, the trial court duly considered the remand period and expressed itself very clearly. It did not need to commence a mathematical journey and make deductions of the time spent in remand custody. It is enough that it took account of the time spent in custody. It is thus not true that the provisions of section 333(2) *Criminal Procedure Code* were not adhered to.

46. In the circumstances, I find that this application lacks merit and it is dismissed.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 26TH DAY OF OCTOBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Murunga for state

Applicant present