Mulongo v Republic (Criminal Appeal 92 of 2019)
[2023] KEHC 26702 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 92 OF 2019

DK KEMEI, J

DECEMBER 20, 2023

BETWEEN

ROBERT WANJALA MULONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Through an undated application lodged on 1st August 2020, the Applicant, Robert Wanjala Mulongo, moved this Court for sentence re-hearing. The facts as contained in the application are that the Applicant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Webuye SPM Court Criminal Case No 678 of 2010. Thereafter, he lodged an appeal at Bungoma High Court against both sentence and conviction through Criminal Appeal No 51 of 2010. His appeal was dismissed. Subsequently, the Applicant appealed to the Court of Appeal vide Criminal Appeal No 233 of 2011 against both sentence and conviction and that his appeal was also dismissed.

2. Through the instant application, the Applicant seeks a review of the life imprisonment sentence imposed by the lower Court. He argues that this Court has jurisdiction under Article 165(3)(b) of the *Constitution* to hear and determine his application. The Applicant relies on the decisions in Supreme Court case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR and *Bernard Mulwa Musyoka v Republic*, Criminal Case No 25 of 2016 in support of his argument that this Court is empowered to hear this application for sentence re-hearing.

3. The Applicant further submitted that courts are free to impose sentences that deviate from those provided under section 8 of the *Sexual Offences Act* and that during his time in prison he has embraced rehabilitative programs and that he has obtained several certificates confirming this fact. The Applicant also pointed out that he is now 34 years and that he was convicted while he was 19 years. Further, that

he is remorseful and that he was a first offender and therefore prays that this Court reduces his sentence to the term already served in prison.

4. On its part, the Respondent through submissions filed on 2nd October 2023, urged this Court to consider the gravity and nature of the offence committed by the Applicant. Reliance was placed in the case of *Alister Antony Parreira v State of Maharashtra* as cited in the case of *Margarete Lima Tuje v Republic* (2016) eKLR.

5. The clamour for sentence re-hearing has been precipitated by the decision of the Supreme Court in the Muruatetu Case wherein the Supreme Court declared unconstitutional the mandatory nature of the death sentence. That decision was made on 14th December 2017. Also, the Applicant's application is hinged on the provisions of the *Constitution*. I note too that the applicant also relied on Article 165(3) (b) of the *Constitution*, by which the Court is imbued with jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. To this end, he hinged his application on Articles 22 (1), 23(1) 25(c), 27(1) (4), 50 (2) (p) (q), 159(2) and 165(3) of the *Constitution*; and therefore, it has to be viewed from that prism; notwithstanding that it was not specifically crafted and styled as a constitutional petition.

6. Turning now to the merits of the application, there is no gainsaying that the Muruatetu Case targets, with equal force, the mandatory minimum sentences provided for under the *Sexual Offences Act*. The Supreme Court has, however, clarified the applicability of its decision to offences other than murder in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR 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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> > "[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".
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> (11) The ratio decidendi in the decision was summarized as follows;

> "69. Consequently, we find that Section 204 of the *Penal Code* is C 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 supplied]

7. A reading of the Supreme Court judgement therefore shows that the mandatory minimum sentences provided under section 8 of the *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of defilement.

8. It is noted that this court has already handled the applicant's appeal and thus became functus officio. Already, the applicant has approached the Court of Appeal which dismissed his appeal. Due to the hierarchy of courts, it would be disrespectful of this court to purport to descend into the arena to what amounts to a review of the decision of the Court of Appeal- that found the applicant's appeal as lacking in merit. Again, the Supreme Court in the *Muruatetu case* (*supra*) gave guidelines dated 6th July, 2021 wherein it held that the decisional law in that case did not extent to cases other than murder. Hence, the offence with which the applicant had been charged being one under the *Sexual Offences Act*, I find the same does not fall within the scope contemplated by the Supreme Court's decision aforesaid. Considering what has been stated in the aforesaid decision, I find no reason to interfere with the sentence of life imprisonment imposed on the Applicant.

9. In the result, it is my finding that the application dated 1st August, 2020 for re-sentencing is devoid of merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER, 2023

D. KEMEI

JUDGE

In the presence of:

Robert Wanjala Mulongo Petitioner

Mwaniki for Respondent

Kizito Court Assistant