Murara v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 10738 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E001 OF 2021

JN NJAGI, J

MAY 25, 2022

BETWEEN

STEPHEN MURIUKI MURARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment on re-sentencing in the Chief Magistrate Court at Nyeri by Honourable W. Kagendo, in Criminal Petition No. 252 of 2020 on 30th July 2020)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve 20 years imprisonment. He appealed against the conviction and the sentence at Kerugoya High Court in Criminal Appeal No. 91 of 2013. On 23rd June 2017, the court dismissed the appeal and upheld the sentence on the basis that it was appropriate as the prosecution presented overwhelming evidence against the appellant.

2. The appellant then filed Criminal Petition No. 252 of 2020 before the Chief Magistrates Court in Nyeri seeking, inter alia, that the court considers re-sentencing him in line with the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic*, SCK Petition No. 15 & 16 of 2015 (2017) eKLR. On 30th July 2020, the court dismissed the petition but enhanced his sentence of 20 years to 30 years imprisonment.

3. Being aggrieved by the decision of the lower court, the appellant has lodged the instant appeal citing 2 grounds of appeal which are that:-

    a) The learned trial magistrate erred in fact and in law by re-sentencing the appellant to serve 30 years jail term which is manifestly excessive, uncalled for and outright illegal.

b) The learned trial magistrate erred in law and in fact by enhancing a sentence which act was ultra vires and or in excess of her jurisdictional mandate.

4. The appeal was disposed of by way of written submissions. The firm of Gori, Ombongi & Co. Advocates appeared for the petitioner while M/s Pauline Mwaniki made presentations for the state.

Submissions -

5. The appellant submits that the trial court gave no valid reason in enhancing the sentence from 20 years to 30 years. That in her judgment, the learned magistrate simply repeated the finding of the trial magistrate at Gichugu without making any dissenting or complimenting view on the findings of the trial magistrate. The appellant adds that the decision to enhance the sentence appears to have been based on the learned magistrate's invocation of her emotions as to the age of the victim and to the purported violence that was allegedly meted against the victim. The appellant submits that it was uncalled for and out rightly illegal for the learned magistrate to re-evaluate what she deemed to be the circumstances surrounding the alleged offence at the hearing of a re-sentencing petition. That this occasioned a severe miscarriage of justice to the petitioner.

6. The appellant further submits that the learned magistrate did not clearly state why the petition lacked merit in her opinion. That it appears on the face of it that the learned magistrate was punishing him for not settling down to serve his sentence instead of filing further pleadings in court.

7. The appellant contends that by enhancing the sentence from 20 years to 30 years, the learned magistrate acted ultra vires and in excess of her mandate. Moreover, the Supreme Court in the Muruatetu Case provided guidelines that ought to be applicable in re-sentencing hearings. The appellant submits that the learned magistrate seems to have misapprehended the said guidelines by asserting that she was granted the discretion to mete out alternative sentences to convicts of capital offences. Further, the appellant submits that none of the guidelines in the Muruatetu Case donates power to a judicial officer to enhance the sentence of a petitioner as did the learned magistrate. The appellant contends that the learned magistrate did not evaluate any of the provided guidelines in assessing her findings.

8. The appellant further submits that the learned magistrate misapprehended the guidelines as provided by the Supreme Court by presiding over a re-sentencing hearing in a case emanating from a sexual offence. The appellant submits that the learned magistrate did not have jurisdiction to hear the resentencing petition and ought to have struck out the petition. The appellant states that by proceeding to directly make an enhancement of the sentence against him, a serious violation of his rights was occasioned. The appellant relies on the guidelines by the Supreme Court in the decision in Petition No. 15 & 16 (Consolidated) of 2015, Francis Karioko Muruatetu & Another vs Republic & 7 Others as to the application of the guidelines to be applied in re-sentencing in line with the Muruatetu case where the learned judges stated that-

   The decision of Muruatetu and the guidelines thereof apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code.

9. Based on the above reasons, the appellant states that the appeal has merit and prays that the same be allowed.

10. The respondent on the other hand submitted that the decision in Muruatetu Case only applies to sentences of murder under Section 203 and 204 of the Penal Code. At the time when judgment in Nyeri CM's Criminal Petition No. 252 of 2020 was delivered, there were conflicting decisions on the court's jurisdiction in hearing and determination of applications for re-sentencing for various offences. The court were forced to make their own interpretations into the applicability of the Muruatetu Case

in cases relating to Section 296(2) of the *Penal Code* and others under the *Sexual Offences Act*. As such, the Supreme Court on 6th July 2021, issued guidelines on the applicability of the Muruatetu case as regards re-sentencing.

11. The respondent submits that the appellant was charged and convicted with the offence of defilement and is therefore not entitled to the benefit of re-sentencing pursuant to the guidelines of the Muruatetu Case. Additionally, the appellant is not entitled to benefit from the instant appeal as he has an appeal currently in the Court of Appeal which he has not withdrawn. The respondent submits that the law does not apply retrospectively and therefore this appeal ought to be determined while considering the current provisions of the law and the recent decision in the Muruatetu Case.

12. The respondent submits that while enhancing the appellant's sentence, the trial magistrate noted that the appellant was charged with two serious offences and that the appellant had not only defiled the victim but caused her grievous harm. The learned magistrate proceeded to show her reasoning in finding that the offence was aggravated in nature which had a very negative impact on the victim. The court also noted that although the appellant was not charged with the offence of robbery with violence there was evidence to show that he committed the offence. As such, the respondent submits that the learned magistrate was ably guided by the aggravating circumstances of the offence and the fact that this was a violent act against a 16 year-old.

13. The respondent relies on Section 8(4) of the *Sexual Offences Act* and submits that the court was well within the said provisions when re-sentencing the appellant. That the appellant is serving a legal sentence. Further, the respondent submits that the appellant contends that the court ought to have reduced his sentence and not enhanced the same. The respondent states that the trial court was not bound by the appellant's expectations to have his sentence reduced. It is clear that the decision by the trial court was well reasoned and guided by the circumstances of the case. As such, the court cannot be held to be at fault for exercising its jurisdiction when the law and jurisprudence provided for it. The respondent submits that the appeal lacks merit and prays that the court dismisses it.

Analysis and Determination –

17. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu vs Republic* [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

18. Similarly in the case of *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (S*hantilal M. Ruwala vs R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there

> was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958]EA 424." This was also set out in the case of *Kiilu & Another vs Republic* [2005] KLR 174.

19. The question before this court is whether the lower court had jurisdiction to determine the application for re-sentencing. The petitioner herein sought re-sentencing in Nyeri CMC Criminal Petition No.252 of 2020 and pegged his application on the Muruatetu doctrine. The trail magistrate enhanced his sentence to 30 years from 20 years, and the appellant being aggrieved with the decision of the trial court instituted an appeal on 11th January 2021. Evidently, at the time he instituted his appeal the decision of Muruatetu in respect of Section 204 of the penal Code had been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences -See *William Okungu vs Republic* [2018] eKLR. The reasoning in Muruatetu Case was also extended to sentences imposed by the *Sexual Offences Act*. The Court of Appeal in *Dismas Wafula Kilwake vs Republic* [2018] eKLR had the following to say about mandatory minimum sentences prescribed in the *Sexual Offences Act*:-

> In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic* SC Pet. No. 16 of 2015, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.

20. Being persuaded, we hold that the provisions of Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

21. The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to fight or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

22. In the case of *John Kagunda Kariuki vs Republic* [2019] eKLR the court stated that the decision in Dismas Wafula Kilwake, unlike the decision in Muruatetu does not apply retroactively. The court held:-

> However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a

decision given the ordinary common law mode which does not entitle all other people who could have benefited from the new development in decisional law to approach the High Court afresh for a review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.

23. The Supreme Court of Kenya has severally pronounced itself on the matter and extent of jurisdiction that a court of law cannot exercise jurisdiction in a matter in which it does not have jurisdiction to determine it. In that regard, the Court in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others*, Petition No.2 of 2012 held as follows;

> " A Court's jurisdiction flows from ... *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. We agree with counsel for the first and second respondents ... that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of he matter, for without jurisdiction, the Court cannot entertain any proceedings ... Where *the Constitution* exhaustively provides for the jurisdiction, of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*."

24. *In Re The Matter of Interim Independent Electoral and Boundaries Commission*, [2011]eKLR the Court emphasis on jurisdiction and stated;

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours..."

23. And in *Daniel Shumari Njiroine v Naliaka Maroro* [2014] eKLR the same court stated that:

(31) Jurisdiction has been regarded as the proverbial Chinese first step, in a Court's litigation journey. The words of Nyarangi J (as he then was) in *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR1 at 14 continue to illuminate the special dimensions of jurisdiction:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Article 50(2) of *the Constitution* provides that:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.

24. Article 165(6) of *the Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. In that respect the High Court can call for any record of a subordinate court so as to satisfy itself as to the correctness or legality of any order or sentence issued by the subordinate court. However, the subordinate court has no power to call for the record of the High Court with a view to reviewing it. It is clear from the provision stated above that a person can only apply for review of an order or sentence in a criminal case to a higher court. Therefore, the magistrate`s court in this case had no jurisdiction to review the sentence of the High Court, which is a court of higher jurisdiction than itself. Neither did it have the power to enhance the sentence. The review was in the premises ultra vires and the trial court abrogated the hallowed hierarchy of courts. It is incomprehensible that the magistrate`s court had the temerity and audacity to review a sentence that had been confirmed by the High Court. Nowhere in the Muruatetu case did the Supreme Court give power to the magistrates` courts to review orders made by the High Court.

25. In the premises, I find that the appeal is merited. The sentence of 30 years imprisonment is set aside and the original sentence of 20 years imprisonment reinstated. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY 2022.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mururu for Appellant

Applicant: present

Court Assistant: Kinyua

14 days R/A.