Shitemi v Republic (Miscellaneous Application E003 of 2021)
[2022] KEHC 10306 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS APPLICATION E003 OF 2021

WM MUSYOKA, J

JUNE 24, 2022

BETWEEN

HASSAN SHISIA SHITEMI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Motion herein, dated, 4th January 2021, and filed herein on even date, principally seeks review of sentence downwards, so that the applicant serves a non-custodial sentence of what remains of his fifteen year sentence. He alludes to having served one third of his sentence.

2. The applicant had been convicted of defilement contrary to section 8(1) (4) of the *Sexual Offences Act*, No. 3 of 2006, on facts that he had defiled a fifteen year old girl. He was sentenced to fifteen years. He appealed in Kakamega Hccra No. 45 of 2016, but that appeal was dismissed on 10th April 2019. He asserts that he is now comfortable with the conviction and sentence, and would like only for the sentence to be reviewed downwards.

3. The applicant essentially appears to be asking for consideration for remission, under the *Prisons Act*, Cap. Laws of Kenya, for it is that law which provides for remission of sentence upon a prisoner having served a third of their prison term. That is a right provided for under the law, and the applicant does not have to move the court for an order for the Kenya Prison Service to award him the remission time. Its application is administrative. It is something that is in the hands of the Executive, and the court ought not to intervene, on account of separation of powers, unless there is a violation of that right to remission. The applicant does not allege any such violation. He should, therefore, pursue administrative channels within the Kenya Prison Service to have that right actualized.

4. This matter was previously placed before me on 5th July 2021, and on the premise that it was founded on *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ

&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), I had given directions on certain things preparatory to review of the sentence imposed. I had called for the files in Mumias Spmccrc No. 709 of 2013 and Kakamega Hccra No. 45 of 2016 to be availed. I had also directed the Kenya Prisons Service and the Probation Service to file relevant reports. There has been only partial compliance. Of the two court files that I called for, only the file in Kakamega Hccra No. 45 of 2016 has been availed; and of the two reports that I directed to be filed, only the probation office filed a report dated 18th January 2022.

5. However, at about the time that I was giving those directions, the decision in F*rancis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ) came, decreeing that its decision in F*rancis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) was of limited application, to murder cases only, and not any other. That meant that *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) could not apply to a sexual offence case such as that now before me.

6. There has been development, however, with respect to mandatory minimum sentences for offences under the *Sexual Offences Act*. The High Court, in Philip Mueke Maingi & others vs. Director of Public Prosecutions & another Machakos HCPet. No. E017 of 2021 (Odunga J), has, on 17th May 2022, given directions, akin to those given in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ). That then would mean that I can still go ahead and consider the application herein, in the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), but based on *Philip Mueke Maingi & others vs. Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga J).

7. I believe that the material before me is adequate for me to reconsider the sentence imposed by the trial court. The charge the applicant faced was defilement under section 8(1) (4) of the *Sexual Offences Act*. Section 8(4) prescribes the sentence, where the defilement is committed on a child aged between sixteen and eighteen years. At the trial it emerged that the complainant was aged sixteen at the time the offence was committed on 28th August 2013, having been born on 16th jnauary1997. That no doubt brought the charge that the applicant faced within section 8(4) of the *Sexual Offences Act*.

8. I have perused the trial record, the applicant opted not to mitigate, when given the opportunity to do so. The trial court considered him to be a first offender, and exercised discretion with respect to that, by imposing upon him the minimum sentence of fifteen years. Under *Philip Mueke Maingi & others vs. Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga J) am required to reconsider the sentence on the premise that that minimum does not exist.

9. The offence is defilement, and the law around it is meant to protect minors against sexual predators. The minimums were introduced to guard against exercise of discretion in these offences in a manner that would leave the minors exposed, where the sentences given would amount to something of a slap on the wrist. Review of sentence, in the circumstances, should be seen in that context. I have considered the trial record. The two, the complainant and the applicant, were not in a relationship. The sexual act happened in circumstances that amounted to rape, were the issue of consent a factor. The complainant did not consent to it. In the circumstances of the offence is not mitigated, or the circumstances are not extenuating. The applicant took advantage of the situation that prevailed, the fact that the complainant was stranded, to defile her, instead of arranging for her to have a safe abode.

10. The report placed before me by the probation office speaks in his favour. In his written submissions, the appellant expresses remorse, and says he is now rehabilitated or reformed. It is unfortunate that

the prison service filed no report, yet it is the said service which has custody of the applicant, and the best qualified to advise on the reformation aspect. Anyhow, the review under *Philip Mueke Maingi & others vs. Director of Public Prosecutions & another* Machakos HCPet. No. E017 of 2021 (Odunga J) should not be so much on the what obtains now, but rather on what obtained in 2016, when the trial court was considering sentence.

11. Given that the complainant was a minor at the time of the offence, and that defilement law is designed for protection of minors, I am of the view that non-custodial sentence ought not to be a consideration, for imposing a sentence of that nature would be to send the wrong signal. Given the circumstances of the commission of the offence herein, I am persuaded that the sentence imposed by the trial court was adequate, the minimums imposed by the law notwithstanding. I shall, therefore, not interfere with the said sentence.

12. The Deputy Registrar shall cause copies of this ruling to be availed to the applicant, the Commandant of the GK Prison Kakamega and the Director of Public Prosecutions.

DELIVERED, DATED AND SIGNED AT KAKAMEGA ON THIS 24th DAY OF JUNE 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Hassan Shisia Eshitemi, the applicant, in person.

Mr. Mwangi, instructed by the Director of Public Prosecutions.