Kangale v Republic (Miscellaneous Criminal Application E080 of 2022) [2022] KEHC 14709 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14709 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION E080 OF 2022

A. ONG'INJO, J

OCTOBER 21, 2022

BETWEEN

GEOFREY KIMEU KANGALE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Hon. Kimanga RM in Criminal Case No. 3904 of 2010 at Mombasa Law Courts)

RULING

1. The Applicant Geofrey Kimeu Kangale was charged in Mombasa Chief Magistrate's Court Criminal Case No. 3904 of 2010 with two counts where he was charged with the offence of abduction with intent to confine contrary to Section 259 of the Penal Code in count I, and the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 in count II. He was convicted and sentenced to serve seven (7) years for the first count and life imprisonment for the second count in accordance with the law, and the sentences were to run concurrently. Being aggrieved by the conviction and sentence, he appealed in Mombasa High Court Criminal Appeal No. 106 of 2013 but Hon. Justice M. Muya upheld the conviction and sentence.

2. The Applicant now seeks that the mandatory life sentence imposed upon him be reviewed in pursuit of the ruling in Narok High Court Misc. Criminal Application No. E014 of 2021 in *Baragoi Rotiken v Republic* where Gikonyo, J. reviewed life imprisonment to 25-year imprisonment where the Accused had been convicted for the offence of defilement under Section 8 (1) as read with Sections 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The Application was premised on the following grounds:-

    1. That touching on Misc. Criminal Application No. E014 of 2021 High Court Narok, Baragoi Rotiken v Rep. the applicant was charged and convicted under similar provisions of Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, was given a chance for resentencing

and the life sentence was substituted to 25 - year imprisonment, an opportunity which the applicant was denied.

2. That Section 216 and 329 of the *Criminal Procedure Code* limits second appeal to convictions only, if not set aside by the first appellate court, the mandatory life imprisonment therefore violates the right to a fair hearing under Article 50(2)(q) of the *Constitution* 2010 which cannot be limited by Article 25 of the said Constitution.

3. That Section 354 of the *Criminal Procedure Code* entitles any person who has undergone a criminal trial to appeal to or seek a judicial review from a High Court.

4. That the Applicant was heard for purposes of sentencing upon conviction but such mitigation circumstance was not considered because the wording of Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*.

5. That the judicial officer who heard the case and sentenced him was only limited to his freedom to consider mitigation circumstances.

6. That at the point when he was being sentenced, he did not have any criminal records, a considerable mitigation factor in his case.

7. That he was relatively young and showed remorse a head of his sentencing by the trial court.

8. That the Applicant has been in the prison facility under confinement for a period of ten years with considerably good reputation.

9. That the Applicant is substantially remorseful for the action that led to serve the term of life imprisonment.

10. That the offence worded in Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* restricted the judicial officers to listening to his case to only punish him to serve 25 years sentence despite the diverse situation at the point of committing the offence.

11. That Section 8 (1) as read with 8 (2) of the *Sexual Offences Act* violate the provision of Article 25 (c) and 50 (2)(q) of the *Constitution* of Kenya by limiting the Applicant's right even though the *Constitution* is clear that the same may not be limited.

12. That mitigation in criminal trial process as provided for under Section 216 and 329 of the *Criminal Procedure Code* forms part of fair trial under Article 25 (c) of the *Constitution*.

13. That the current trial process discriminates against him contrary to Article 27 (1) of the *Constitution* because touching on Misc. Criminal Application No. E014 of 2021 High Court Narok, *Baragoi Rotiken v Republic,* the Applicant was charged and convicted under similar circumstances and was given a chance for re-sentencing where the life sentence was substituted to 25 – year imprisonment, an opportunity which the Applicant was denied and will continue to suffer if the application herein is not heard and dispensed with in the first instance.

14. That the High Court had powers under Section 354 of the *Criminal Procedure Code* to review the lower court findings and if possible set aside the sentence imposed upon the applicant.

15. That Certiorari to move this court to review the decision of the learned magistrate made by Hon. Kimanga RM in Criminal Case No. 3904 of 2010 at Mombasa Law Courts.

Analysis and Determination

3. The Applicant contends his mitigation was not considered when he was being sentenced. The Applicant urged the court to consider that he has been in custody for 10 years with considerable good reputation and is remorseful for the action that led him to be sentenced to life imprisonment.

4. The Applicant has not filed an appeal to the Court of Appeal and he contends that Section 216 and 329 of the *Criminal Procedure Code* limits second appeal to convictions only and that if the life imprisonment is not set aside, his right to fair hearing under Article 50 (2) (q) of the *Constitution* 2010 will have been violated. He also relied on Section 345 of the Criminal Procedure Code to bring this application for review of his sentence.

5. Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 provides: -

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

6. Justice Odunga in Petition No. E017 of 2021, *Phillip Mueke Maingi & 5 Others v DPP & AG* while following the principles set in Francis Karioko Muruatetu & Another v DPP & AG had this to say in regard to minimum and maximum sentences in sexual offence: -

> " It may be argued that these decisions of the Court of Appeal ought not to be followed on the ground that they are per incurium in light of the clarification in Muruatetu 2. However, it is my view that the Supreme Court in Muruatetu 2 did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that Muruatetu 1 only dealt with murder. I agree with that clarification. However, the Supreme Court left it open to the High Court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination one way or another. The Supreme Court did not hold that the High Court ought not to apply the reasoning in Muruatetu 1."
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> "In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of the *Constitution*."
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> ...
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> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional."

> "At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed. I gather support from the opinion held by the Court of Appeal in Dismas Wafula Kilwake v Republic [2019] eKLR ..."

7. In consideration of the above authority and the holding by Gikonyo, J. in Miscellaneous Criminal Application No. E014 of 2021 Narok High Court in *Baragoi Rotiken v Republic*, this court finds that the mandatory life sentence deprives the trial court of the discretion in sentencing.

8. The Applicant was given an opportunity to mitigate and the trial court considered the mitigation and imposed life imprisonment for the offence of defilement. The High Court upheld the conviction and sentence. Sentence was not passed because it was a mandatory sentence but because of the circumstances of the case. However, in consideration that a life sentence is infinite, the current trend is that determinate sentence is imposed. The court has discretion to consider mitigating circumstances that may lessen the culpability of the Accused and the prisons are also certain how long they are going to hold an Accused Person. Determinate sentences meet the objectives of Sentencing Policy Guidelines because of their certainty.

9. In *Baragoi Rotiken v Republic* [2022] eKLR it was held that severe sentence such as life imprisonment is applied in appropriate circumstances and in accordance with the *Constitution* or other laws on sentencing. Further, the position on determinate sentence was held by Hon. Lady Justice Njoki Mwangi in *Musinda Mahupa v Republic* [2020] eKLR where life imprisonment sentence was substituted with a determinate sentence

10. In consideration of the above, this court finds that the application has merit and is allowed. The Applicant's life sentence is reviewed to 25 years imprisonment.

11. On when the sentence should start running, Section 333 (2) of the *Criminal Procedure Code* provides as follows: -

> " Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

12. Further to the above section, the court in *Bethwel Wilson Kibor v Republic* [2009] eKLR held 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."

13. The Judiciary Sentencing Policy Guidelines also state as follows: -

> " 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 trail. 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."

14. The Applicant was arraigned in court on 22.12.2010, he was convicted on 4.6.2013 and sentenced on 11.6.2013. This shows that the Applicant has already served 11 years, 11 months and 28 days in custody

15. In conclusion, this court finds that in consideration of the application for review and in consideration of Section 333 (2) of the *CPC*, 25-year imprisonment is to run from 22.10.2010. The time already served in custody is to be deducted from the said sentence. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 21ST DAY OF OCTOBER 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Applicant present in person