Tumboseno v Republic (Criminal Petition E022 of 2021)
[2022] KEHC 14380 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL PETITION E022 OF 2021

RE ABURILI, J

OCTOBER 21, 2022

BETWEEN

DOUGLAS TUMBOSENO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

(Being an Application for Resentencing in Kilgoris SRM's Court Sexual Offence case No. 141/2011 by Hon. B.O. Ochieng and in Kisii HCRA 184/2011 by Hon. Justice Sitati, J on 27/9/2013)

JUDGMENT

1. This petitioner herein is Douglas Tumboseno. He was convicted and sentenced to serve twenty years imprisonment on August 29, 2011 on his own plea of guilty *vide* Kilgoris SRM's court Sexual Offence case No 141/2011 by Hon B.O Ochieng.

2. He was aggrieved by that conviction and sentence so he filed an appeal at Kisii High Court *vide* Kisii HCRA 184/2011 which appeal was heard and determined by Sitati J (as she then was on September 27, 2013), dismissing the appeal.

3. Aggrieved further, he filed an appeal before the Court of Appeal at Kisumu *vide* COA CRA 138/2017 which appeal he withdrew *vide* an order made on May 17, 2022.

4. By the time the petitioner was terminating his second appeal, he had filed this petition on March 10, 2021 seeking for resentencing. He also filed written submissions in support of his petition and annexed documents including recommendation from the officer in-charge Kisumu Maximum Prison dated August 31, 2020 to demonstrate that the petitioner had undergone various transformative programs in vocational skills training in welding and fabrication and was tested by the National Industrial Training Authority where he qualified in grade III, II and I respectively. It is claimed that his general character

and discipline are exemplary, and as a result, he was promoted to special stage due to hard work where he supervised other inmates in the workshop. That he is able to reintegrate well back into the society.

5. On June 22, 2022, the petitioner was said to have withdrawn his appeal from the Court of Appeal hence the learned Judge F.A Ochieng (as he then was) directed that this petition be heard on June 23, 2022 and on that date, Ms Odumba for the state informed the court that the petitioner had invoked the power of mercy which is not applicable or exercisable in defilement cases where the minor was aged 13 years old and that the petitioner had admitted that he had "married' her". She further submitted that the 'Muruatetu' decision was not applicable to the sexual offenses cases. She urged the petition to be dismissed.

6. The petitioner was present but the court fixed the matter for July 14, 2022 for further directions and on the latter date, the petitioner was absent so the petition was pushed further to October 13, 2022 for further directions.

7. On the latter date, the learned judge had been elevated to the Court of Appeal hence this court now handling matters pending before the learned judge.

8. The petitioner had already filed his mitigation, recommendations from G.K prisons and the written submissions in support of the petition hence there is no need to adjourn the matter further.

9. In his submissions filed on August 2, 2021, the petitioner mitigates that he is very remorseful for what happened, that he has learnt his lesson and promises not to indulge in crime, given a second chance to reintegrate back into the society.

10. That he was a first offender and had been undergoing rehabilitation programs in prison and acquired skills as per the officer in-charge G.K Prison's recommendations.

11. That he was only aged 19 years at the time of arrest hence he pleads for mercy of the court. He relies on the decision by S. Chitembwe J at Malindi in *Martin Charo v Republic* [2016] eKLR.

12. That he regrets marrying a child and was willing and ready to tender a written apology to the victim and her family. He prayed for non-custodial sentence since he had been in prison for long. He invokes sections 19 & 20 of the *Power of Mercy Act*.

13. I take judicial notice of the fact that this court does not exercise the power of mercy under sections 19 & 20 of the *Power of Mercy Act*.

14. The petitioner blames his Masai culture which he claims, contributed to him committing the offence but that he now promises, given a chance, to be an ambassador of peace against an outdated culture.

Determination

15. Having considered all the above pleas for resentencing and the oral submissions by Ms Odumba, Senior Principal Prosecution counsel, I observe that the petitioner pleaded guilty to the offence as charged being, defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offence Act vide* charge sheet dated August 29, 2011.

16. The minor victim was aged 15 years and in standard 7. She had eloped with the petitioner herein between 7th and August 8, 2011 and he took her in as his wife for some stays before her parents reported the matter to the police and he was arrested on August 24, 2011.

17. In his unequivocal plea of guilty, he informed the court that he had married the victim who was his wife.

18. In mitigation, he prayed for leniency saying he should not have married an underage girl although she had agreed.

19. The court observed that the accused had committed the offence out of ignorance and as there was no other option in sentencing, he sentence him to serve 20 years imprisonment in accordance with section 8(3) of the *Sexual Offence Act*.

20. That sentence which is lawful was upheld by Sitati J *vide* judgment delivered on September 27, 2013.

21. The P3 form dated August 24, 2011 filed in respect of the victim shows that she was 15 years old then and that she claimed that she had gone to cohabit with a man. The age assessment report produced as PEX2 shows that she was aged 13 years.

22. However, the conviction and sentencing remarks show that she was aged 15 years old. Nonetheless, the sentence was lawful under section 8(3) of of the *Sexual Offence Act*.

23. The question is whether this court can reduce or review that sentence.

24. Prior to July 6, 2021, the Supreme court in *Francis Karioko Muruatetu & another v Republic* [2017] had set a precedent which all courts were applying to the effect that mandatory sentences were unconstitutional to the extent that they deprived the trial court of its inherent discretion in sentencing having regard to the circumstances of each case and further, that mandatory sentences denied the convict an opportunity to mitigate as sentence was fixed by law.

25. The *Francis Muruatetu* case was a murder case where mandatory death sentence had been imposed on the petitioner convict.

26. The Court of Appeal imported the above decision and applied it to several appeals before it including *Jared Koita Injiri v Republic* [2019]eKLR and by extension, therefore, all sexual offences and even robbery with violence where the law provides for mandatory sentences and minimum mandatory sentences.

27. With the clarification settled by the Supreme Court in the *Muruatetu 2* decision, it follows that each case must be considered on its own merits.

28. in *WOR v Republic* (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022) (Judgment) F.A Ochieng J (as he then was) faced with a similar situation as the one herein stated *inter alia* that:

> "If the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in section 8 of the Sexual Offences Act and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of murder, and the mandatory minimum sentence for the offence of defilement and that in his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the court from exercising any discretion, regardless of whether or not the circumstances so require.

29. Odunga J(as he then was) in Machakos HC petition E017/2022 had a chance to hear a constitutional petition substantively, where the minimum mandatory sentences under the *Sexual Offences Act* were challenged. The learned judge pronounced himself authoritatively and I have no reason to differ from him, that such sentences interfered with the inherent discretion of the trial courts in sentencing, denied a convicted person the opportunity to mitigate for the court to arrive at an appropriate sentence having regard to the circumstances of each case and, and among others, interfered with the principle of

separation of powers where the legislature curtailed the judicial discretion of the courts in sentencing. As a consequence, there are a plethora of petitions filed before this court seeking for resentencing in sexual offences cases.

30. I will quote the learned judge extensively as follows, to capture the spirit and letter of his judgment:

> " "This court does not doubt the good intentions of the drafters of the Sexual Offences Act in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence. The perpetrators of the said offences must be condemned by all means. However, the sentences to be imposed must meet the constitutional dictates.
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> 110. It is also debatable whether minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing are in tandem with the *International Covenant on Civil and Political Rights of 1966*, which Kenya ratified in 1972 and for that reason, covenant forms part of Kenyan law pursuant to article 2(6) of the Constitution. Article 10(3) of the covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." A sentence that does not provide for other options save for custodial sentence may well be frowned upon the ground that it may not achieve the essential aim of sentencing.
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> 111. 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.
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> 112. 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 that:
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> > " 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."

113. I however associate myself with the sentiments of the Court of Appeal in It was noted that the Court of Appeal in *Eliud Waweru Wambui v Republic* [2019] eKLR has also rallied the above call for legislative amendments to the *Sexual Offences Act* by opining that; -

> " We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421);
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> "If the law should impose on the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At p 422. In England, for instance, only sex with persons less than the age of 16, which is the age of consent,is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See *Archbold Criminal Pleading, Evidence and Practice*, [2002] p1720.
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> The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation. For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive."

114. That a strict application of some of the provisions of the *Sexual Offences Act* may cause injustice was appreciated by the Court of Appeal in *Evans Wanjala Siibi v Republic* [2019] eKLR.

"Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term."

115. This court also had occasion to weigh in on the same matter in *Yawa Nyale v Republic* [2018] eKLR where it expressed itself as hereunder: " It is now clear that certain provisions of the *Sexual Offences Act*, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question."

116. Having said that the ultimate decision as to what ought to be done must remain that of the legislature. Ours is simply to align the legislation that were in existence before the promulgation of the *Constitution* of Kenya, 2010 with the letter and spirit of the *Constitution*. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

1) To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu 1*) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

3) Save for the foregoing, the other reliefs are declined since this court cannot grant a blanket order for resentencing in the manner sought.""

31. However, this petition was filed before the decision in the Machakos petition was rendered.

32. Having considered all the above and the mitigation by the petitioner who pleaded guilty to the charge, mitigations showing remorse to the victim and his age then which is not controverted at 19 years and the age of the complainant which the trial court found to be 15 years old and the recommendations from prisons on the rehabilitation of the petitioner who is ready to be reintegrated into society and preach against harmful and unlawful cultural practices such as child marriage, and considering the length of time the petitioner has been in prison from August 24, 2011, which is over 11 years, I am persuaded that the petitioner deserves a second chance to return into the community as he has learnt his lesson behind bars for 11 years considering his youthful age at the time he committed the offence.

33. For the above reasons, I hereby allow the petition for resentencing and order that the 20 years prison term imposed on the petitioner is hereby set aside and substituted with the prison term already served by the petitioner which is 11 years and two months.

34. Therefore, unless otherwise lawfully held, the petitioner herein Douglas Tumboseno shall forthwith be released from prison upon service of this judgment and signal.

35. I so order.

36. File is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE