**Macharia v Republic (Criminal Case E140 of 2021)**
**[2022] KEHC 15888 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15888 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CRIMINAL CASE E140 OF 2021**

**GL NZIOKA, J**

**NOVEMBER 17, 2022**

**BETWEEN**

**NANCY WAITHIRA MACHARIA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged *vide* Criminal Sexual Offence No 04 of 2014, in two counts with the offences of; defilement contrary to; section 8(1)(2) of the *Sexual Offences Act* (herein "the act"), and alternative offences of; committing an indecent act with a child contrary to; section 11 (1) of the *act*. The particulars of each charge are as per the charge sheet.

2. The applicant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the case the trial court acquitted her on the charges of; defilement but convicted her on the alternative charges of; committing an indecent with a child and then sentenced her to serve ten (10) years imprisonment on each count and ordered the sentence to run consecutively.

3. However, on July 28, 2021, the applicant filed a notice of motion application seeking that, the custodial sentence herein, be reduced and/or converted to a non-custodial sentence or be ordered to run concurrently.

4. The applicant has relied on the memorandum of review of sentence in which she lists mitigating grounds as here below reproduced: -

    a. That, your lordship, I pleaded not guilty and I am not appealing against the conviction and sentence.

    b. That, your lordship I pray that you revise the sentence to run concurrently.

c. That, I have completed a third (1/3) of my sentence since the date of my incarceration.

d. That I have learnt from my mistakes and I am remorseful since my incarceration.

e. That I desire to go back to society and construct my family and look after my children.

f. That while in custody I attended vocational training at prison industry as part of rehabilitation program, hence I can provide for my family when released.

5. On September 22, 2022, when the matter was scheduled for hearing, Ms Maingi, learned state counsel for the respondent opposed the application orally and submitted that, the offences the applicant was charged with, are distinct and involved children of tender years. That the sentence provided for the offences under the law is life imprisonment. As such the sentence meted out is lenient in the circumstances.

6. At the conclusion of the arguments by the parties and in considering the subject application, I find that, the law that govern revisionary power of the High court is provided for under; sections 362 of the *Criminal Procedure Code* which states as follows:

> "The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court." (Emphasis added).

7. The aforesaid provisions are supported by the provisions of; section 364 of the *Criminal Procedure Code* which states that: -

> (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

8. It is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

9. It therefore follows that, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna v Brig FJ Dillon 1964 AIR 497, 1964 SCR (4) 409*).

10. It is noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another v Republic [2017] eKLR*, *Republic v Everlyne Wamuyu Ngumo (2016) eKLR*, *Public Prosecutors v Muhavi Bi Mond Jani & Another 1996 4 LRC 728, 743-5*, *DPP v Samuel Kimuche*.

11. Having considered the application in the light of the materials placed before me, I find that, the applicant was charged with and convicted of offences under section 11 (1) of the act, which states as follows: -

" Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".

12. It is therefore clear from the aforesaid provisions, that the mandatory minimum sentence for the subject offences is ten (10) years and therefore, the sentence meted out is legal, proper and correct. The applicant does not seem to have an issue with that sentence, save that, she prays it runs concurrently.

13. In that regard, the provisions of; section 14 (1) of the *Criminal Procedure Code* (cap 75), that states as follows:

1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

14. Furthermore, the *Judiciary of Kenya, Sentencing Policy Guidelines* provide as follows:

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

15. This position was affirmed by the Court of Appeal in the case of *Peter Mbugua Kabui v Republic [2016] eKLR* where it stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

16. Indeed the courts often have the discretion to decide whether to give persons who are convicted of separate crimes concurrent or consecutive sentences. The decision can come up when the person is convicted of multiple offenses in the same case or when the convict is already serving time for a conviction but is tried later for another crime.

17. However, in exercising the aforesaid discretion the court should remember the "principle of totality". The principle was well articulated by; DA Thomas' exposition of the common law principle, that where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour.

18. The principle has been applied or quoted by the court, with the most recent being *Johnson v The Queen (2004) 78 ALJR 616* at [18]:

> " In *Mill [Mill v The Queen (1988) 166 CLR 59 at 63]* Wilson, Deane, Dawson, Toohey and Gaudron JJ adopted a statement from Thomas, Principles of Sentencing ... at pp 56–57 [footnotes omitted]:
>
> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ']; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

19. Pursuant to the aforesaid principle of totality, the aggregate sentence of twenty (20) years seems inappropriate and harsh. However, the circumstances of the case herein reveal that, the offences that the applicant was charged with occurred on diverse dates between; 1st and December 20, 2013. The offences were committed against two different complainants, being children of tender years, as stated in the charge sheet. In my opinion, they are distinct offences, although the applicant was charged in different counts in the same charge sheet. Furthermore, they attract minimum sentences of ten (10) years for each.

20. The question is whether, this is an appropriate case for exercise of discretion by ordering the sentence run concurrently. To quote; Hon Thomas A Zonay in his article: "Judicial discretion in sentencing", he states that:

> " The basic judicial discretion definition is the act of making a choice in the absence of a fixed rule and with regard to what is fair and equitable under the circumstances and the law. Its judicious use increases fairness and can help to promote an equitable legal process by allowing the judge to consider individual circumstances in instances when the law is insufficient or silent. Conversely, because judicial discretion involves situational considerations, its misuse can adversely impact the court's authority and good reputation, create a feeling of result-oriented decision making and, when abused, lead to gross injustice" .

21. To revert back to the matter herein, the offences were committed in distinct transactions, there are more than one victim, the law is clear the imprisonment sentence in such circumstances shall commence, one after the expiration of the other in the order the court may direct. The discretion to order otherwise is left to the trial court and unless there is any legal ground to interfere with the sentence, the sentence should be upheld.

22. In my considered opinion, justice is balanced on a scale. Therefore the victims' herein deserve justice as much as the applicant does. Furthermore, the minimum sentence for each offence is set by statute, discretion should not override statutory law. I therefore find that, it will not be in the interest of justice to order the sentence herein to run concurrently and therefore dismiss the application.

23. As a matter of observation, this matter was not brought as an appeal nor under the revisionary powers of the court and therefore the court considered it purely under its supervisory jurisdiction, pursuant to article 165(6) and (7) of the *Constitution* which states:

> (6)The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice"

24. It is so ordered

**DATED, DELIVERED VIRTUALLY, AND SIGNED ON THIS 17TH DAY OF NOVEMBER, 2022.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of;**

Applicant in person

Ms Maingi for the respondent

Ms Ogutu Court Assistant