



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. E007 OF 2021

(From original criminal case No. 559 of 2013 at Kilifi)

THE CONSTITUTION OF KENYA 2010(SUPERVISORY JURISDICTION AND PROTECTION FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTICE RULES 2013.

AND

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION 2010

AND

IN THE MATTER OF ARTICLES 23 (1) AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 19,20,21,22,23,24,25,27,28,48,50,258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SEEKING FOR REVIEW OF MITIGATION AND RE-SENTENCING UNDER ARTICLE 50(2) (Q) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 10 OF THE SEXUAL OFFENCES

ACT NO. 3 OF 2006

JUMAA MALUNJA LUGOPETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

The Petitioner

Mr. Mwangi for the state

R U L I N G

This is a petition for the review of sentence of twenty years imposed against the Petitioner for the offence of gang rape contrary to section 10 of the Sexual Offences Act of 2006, by the trial court. Thereafter, on appeal the matter found its way to the High Court on appeal and subsequently to the apex court as authorized by the Constitution. In both appeals Court the conviction and sentence of the trial court was affirmed, by dismissing the appeals in their entirety. The petitioner believe that the fourth attempt bite at the cherry is constitutionally viable by petitioning the High Court for a review of the sentence. The question is whether the petition as framed has substantial grounds to merit interference of the order on sentence.

Determination

This case is concerned with the review of sentence under the conditions set out in Article 50 (6), (a), (b) of the Constitution it reads as follows:-

“A person who is convicted of a criminal offence may summon the High Court for a new trial if;-

(a) The person’s appeal, if any has been dismissed by the High Court to which the persons entitled to appeal, or the person did not appeal, within the time allowed for appeal and

(b) New and compelling evidence has become available”

The Petitioner argues that in the present case he should be allowed recourse as provided for in Article 50 (2) (Q) of the Constitution to benefit from a lesser sentence than that of twenty years imprisonment.

The law on which the petitioner may seek review on sentence provided for under Article 50 (6) (a) and (b) of the Constitution and not as incorrectly referred by the petitioner in Article 50 (2) (P) and (Q). In so far as the petitioner argues, there is justifiability of the matter and for this Court to review the sentence which has been litigated up to the high court and found to be without merit. To the contrary this court has no jurisdiction to entertain the petition unless there is existence of substantial and compelling evidence to that effect. Which evidence has become available to the petitioner for the Court’s consideration to remedy the sentence by way of review. The sentence of the petitioner though unpleasant and occasioning him unhappiness is legal by overall appreciation of the facts of the case and the benefit it is likely to bring to meet the societal cry for Courts to come out strongly on gender based sexual violence.

The principle in this case of ***R V Robert [1961-1963] 2 ALR Mal 291*** has a widespread application, on the objective in criminal law jurisdictions. It is a creed universally appealing in which ***Villheira J*** held:-

“The first and foremost consideration in sentencing is the public interest. The criminal law is publicly enforced, not only with the effect of punishing crime, but also in the hope of preventing it. A proper sentence passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime. If the offender is caught and brought to justice, the persuasion will be negligible, since a sentence may also deter the particular offender from committing a crime again and induce him to turn from criminal to honest living.”

From the foregoing the following observations may be made in the context of this petition. First for the review court to vary the sentence confirmed by other superior courts including the last resort jurisdiction under Article 50 (b) of the constitution there ought to be evidence that the sentence in question was unconstitutional and a violation of the fundamental rights of the petitioner. Second, the sentence on the face of it was illegal and unjust that overall it occasioned prejudice, or injustice. (See the provisions of section 382 of the Criminal Procedure Code).

Third, there was an error or mistake apparent on the face of the record in the custodial sentence of twenty years which is likely to defeat the objectives and principles of sentencing.

Fourth, infliction of punishment being purely a discretionary matter donated to the trial court by the Constitution and enabling statutes that unfettered discretion was wrongly invoked and exercised. Those circumstances remain non-existence in this petition in furtherance to what constitutes substantial and compelling evidence within which the sentence can be reviewable, ***Stegnann J as Sr Mofokeng[199] 1 SACR 502*** held:-

“For substantial and compelling circumstances to be found, the facts of the particular case must present some circumstances that is so exceptional in nature, and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, to the extent that could be described as compelling the conclusion that the imposition of a lesser sentence that the one prescribed by parliament is justified.”

From the above passages, the test fixed by the constitutional provisions under Article 50 (6) (a) & (b) relied upon by the petitioner to sustain the petitioner is inapplicable.

One of the areas which requires greater attention by the High Court sitting as a constitutional reference point is to examine the precise nature of the issues determining in the past visa viz the issue posed in the petition. Lack of clear thinking in this area, can be the source of great trouble given the avalanche of petitions currently underway in the various courts disguised as valid cause of action under the constitution. In most of the cases referred to by the petitioners the points in controversy have already been adjudicated upon by either the trial or superior court.

The courts must remember that even in matters of criminal law res judicata or preclusion is essential in ascertaining whether the court has jurisdiction to reopen the proceedings.

“Res judicata or preclusion, an embodiment of a principle that is well established in the law, is a manifestation of the recognition that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in court, justice, expediency, and the preservation of the public tranquility requires that the matter be at an end.” (See Greenfield v Mather, 184 Cal. 462, 194. P2d 1 [1948]).

In our own jurisdiction, the Court of Appeal in ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport***

and Infrastructure & 3 Others [2015] eKLR held as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

In our scenario it would seem only desirable to consider reopening criminal proceedings afresh based on the criterion under Article 50 (6) (a) & (b) of the constitution. The court has noted the evidence on the issue as claimed by the petitioner all those circumstances together with the facts are inconsistent with the provisions of this Article. It follows that the making of the case by the petitioner to review his sentence of twenty years imprisonment fails and consistent with the previous decisions it lacks merit. There is nothing which this court can do in the matter and consequently the petition is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021.

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R. NYAKUNDI

JUDGE

In the presence of

Mr. Mwangi for the state