WSC v Republic (Miscellaneous Criminal Application E013 of 2021) [2025] KEHC 192 (KLR) (20 January 2025) (Ruling)

Neutral citation: [2025] KEHC 192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

MISCELLANEOUS CRIMINAL APPLICATION E013 OF 2021

RL KORIR, J

JANUARY 20, 2025

BETWEEN

WSC ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He was convicted of the offence of defilement by the trial court (N. Barasa, Resident Magistrate) on 29th April 2015 and was sentenced to serve 20 years imprisonment.

2. The Applicant appealed his conviction and sentence in the High Court at Kericho *vide* Criminal Appeal Number 20 of 2015. The Appeal was transferred to this court and became Criminal Appeal Number 60 of 2015. In a Judgement dated 25th July 2016, this court (Muya J.) dismissed the Appeal and upheld the conviction and sentence.

3. The Applicant then appealed the Judgement of this court in the Court of Appeal in Nakuru *vide* Criminal Appeal Number 35A of 2020. In its Judgement dated 17th February 2023, the Court of Appeal dismissed the Applicant's Appeal in its entirety.

4. In a Petition filed on 4th February 2021, the Applicant applied for re-sentencing on the ground that the Supreme Court of Kenya had held that a mandatory sentence was unconstitutional.

The Applicant's submissions

5. In his submissions filed on 22nd July 2024, the Applicant submitted that he had been in custody for 9 years and had undergone rehabilitation. That his 20 year sentence was harsh and did not serve the objectives of rehabilitation.

6. It was the Applicant's submission that he serve the remaining part of his sentence as a non-custodial sentence either on community service or probation. He relied on *Sammy Wanderi Kugotha v Republic* [2021] KEHC 2394 (KLR).

7. The Applicant's daughter, Brenda Chemutai addressed this court on 24th July 2024 and asked this court to forgive the Applicant. She stated that they were suffering at home as they had no one to pay their school fees. That her sister had dropped out of school.

The Respondent's submissions

8. The learned Prosecution Counsel Mr. Njeru submitted that the Applicant was convicted and sentenced to serve 20 years for the offence of defilement. That the Applicant appealed to this court and the conviction was upheld and he thereafter moved to the Court of Appeal where the conviction was upheld.

9. It was the Respondent's submission that because of emerging jurisprudence, this court may consider the sentence. It was the Respondent's further submission that they had no problem if the sentence was interfered with.

Analysis and determination

10. In applying for re-sentencing, the Petitioner stated that the mandatory nature of the sentence as provided under section 8(3) of the *Sexual Offences Act* was unconstitutional. Section 8 (3) of the *Sexual Offences Act* provided:-

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

11. The Applicant laboured under the holding in *Francis Karioko Muruatetu & another vs Republic* (2017) eKLR , also known as Muruatetu 1, where the Supreme Court held:-

> " The mandatory nature of the death sentence as provided for under Section 204 of the *Penal Code* is hereby declared unconstitutional....."

12. After declaring the death sentence for the offence of murder unconstitutional, the Supreme court in *Francis Karioko Muruatetu* (supra) (Muruatetu 1) directed that:-

> " This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment."

13. The Supreme Court clarified in *Muruatetu & another vs Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) (2021) KESC 31 (KLR) (6 July 2021) (Directions), also known as Muruatetu 2, that:-

> " The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code....." (Emphasis mine)

14. In the present case the Petitioner had been convicted of defilement and was sentenced to serve 20 years imprisonment. From the above decisions by the Supreme Court, the Petitioner could only move this court for resentencing if he had been convicted of murder and sentenced to death, which he was not.

Under these circumstances, determining the present Petition would be akin to this court sitting on an appeal on its own decision.

15. As a general rule, the High Court can only review the Judgment of a subordinate court as provided for under sections 362 to 364 of the *Criminal Procedure Code.* This court therefore does not have the jurisdiction to review its own decision. In*John Kagunda Kariuki v Republic* [2019] KEHC 5480 (KLR), Ngugi J. (as he then was) held that:-

> " In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal".

16. In the case of*Daniel Otieno Oracha v Republic* [2009] KECA 187 (KLR), the Petitioner had applied for review of a sentence imposed by a court of concurrent jurisdiction and Aburili J. held that:-

> " The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....
>
> The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.
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> Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court....."

17. I am further persuaded by Njuguna J. in*Lawrence Kariuki Njeru v Republic* [2017] KEHC 3304 (KLR), where she held that:-

> " .....Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors.
>
> The petitioner ought to ventilate the issue on the resentencing and/or excessive sentence at the Court of Appeal....."

18. This court has already determined the Applicant's Appeal and upheld his conviction and sentence. The Court of Appeal thereafter dismissed his Appeal. In as much as this court empathizes with the plight afflicting the Applicant's family, this court has no jurisdiction to resentence the Applicant.

19. In the end, the Application lacks merit and the same is dismissed.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 20TH DAY OF JANUARY, 2025.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person, N/A for Mr. Njeru for the Respondent/ State. Siele (Court Assistant).