Mwaura v Republic (Criminal Appeal E027 of 2023)
[2025] KEHC 1810 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E027 OF 2023

RN NYAKUNDI, J

FEBRUARY 14, 2025

BETWEEN

KENNEDY MWAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal on mitigation against sentence of 15 years' imprisonment for the offence of Defilement contrary to section 8(1) as read together with 8(3) of the Sexual Offences Act No.3 of 2006 in respect of original Criminal Case No. E115 of 2022 at CM'S Court in Eldoret)

RULING

Representation:

Kennedy Mwaura for the Appellant

1. The Appellant herein was charged, convicted and sentenced to serve 15 years' imprisonment for the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 at CM's Court in Eldoret in Criminal Case No. E115 of 2022.

2. The Appellant being aggrieved filed an appeal to have the conviction quashed and the sentence set aside at this Honourable Court vide his undated Petition of Appeal.

3. The Appeal is premised on the following grounds of appeal:

    a. That I am the sole bread winner to my young family and I will suffer a lot in the event that I serve the entire sentence thus it is my humble submission that this Honourable court consider my state of affairs and reduce my sentence to a reasonable term that will do justice to all parties.

b. That it is my prayer that this Honourable Court consider the time that my case has taken before it was concluded. May that period be factored because it has been in court since 3rd November 2016.

c. That I am a first offender and thus beg for leniency.

d. That I am remorseful, repentant and reformed since I have learnt incarceration in prison.

e. That I am a young man and I pray to be re-in constituted in the society to serve as a role model and a teacher/mentor to others of similar behavior.

f. That may this Honourable court be pleased to consider the sentencing policy of 2016 published by the Kenya Judiciary and establish the mitigating circumstances that would lessen the custodial sentence.

4. The Appellant prayed that may this Honourable Court be pleased to allow his appeal, set aside the sentence and review it to a lesser term of sentence and/or set such orders the court may deem fit.

Analysis and Determination

5. In deciding this application, I have perused and considered the judgment in Sexual Offences Case No. E115 of 2022 at Eldoret CM's Court which relate to the same case. I have also considered the Petition of Appeal and the grounds thereunder and the mitigation by the Appellant. The issue manifest for determination is:

Whether the sentence review is merited

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

7. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution* ,A further leapfrog development; under article 50(2)(p) of *the Constitution*:

50(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

8. In Philip Mueke Maingi & Others Vs Rep, Petition No E17 of 2021 specifically outlawed mandatory minimum sentence. It stated;

> There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.

9. A similar position was taken by the High Court, in Stephene Kimathi Mutunga v Republic [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

10. In Michael Kathewa Laichena & Another v Republic [2018] eKLR Majanja J. stated: "by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".

11. Article 50(6) of *the Constitution* of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—

    (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

    (b) new and compelling evidence has become available.

12. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas Mwambu Wenyi v Republic [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

13. Also in the case of Francis Karioko Muruatetu & Another v Republic (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

14. A glimpse of the Appellant's application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows: Every accused person has the right to a fair trial, which includes the right—

    p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

15. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.

(6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -

a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and

b. New and compelling evidence has become available.

16. The foregoing provisions are instructive in matters brought before the high court for a new trial. The application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

17. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the Muruatetu case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).

18. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner's offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

19. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

20. From the foregoing authorities, it is evident that mandatory sentences are unlawful. They result to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system.

21. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

22. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement.

> 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.

23. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

24. However, I take cognizant note that section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides that "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." From my reading of the Judgement from the trial court, I note that the Appellant was sentenced to serve 15 years' imprisonment. This thus means that the Appellant was given a lesser sentence other than the one prescribed in section 8(3) of the *Sexual Offences Act*.

25. The punishment prescribed by the law for the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* is imprisonment of not less than twenty years. I am alive to the fact that it is in the trial court's discretion to mete a reasonable sentence considering the circumstances of each case. As an appellate court I am guided by the principles in the court of Appeal case of Bernard Kimani Gacheru vs Republic (2002) eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

26. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

27. I have considered the petition of appeal and all the information available. From the principles laid down in the Benard Gacheru case (supra), I am inclined not to interfere with the 15 years' imprisonment imposed at the trial court. Consequently, the Appeal is devoid of merit and the same is dismissed. In considering the provisions of section 333(2) of the CPC the sentence shall run from the date of conviction at the trial court. The period of one year spent in custody shall be discounted from the 15-year sentence imposed.

DATED AND SIGNED AND DELIVERED VIS CTS AT ELDORET THIS 14TH FEBRUARY , 2025

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R. NYAKUNDI

JUDGE