Munene v Republic (Criminal Petition E004 of 2021)
[2025] KEHC 3233 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E004 OF 2021

E OMINDE, J

FEBRUARY 13, 2025

BETWEEN

JOHN MUNENE ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* o. 3 of 2006 in Eldoret Chief Magistrates Case (SO) 223 of 2016. The particulars of the offence were that on the diverse dates between 30th August 2016 and 1st of September 2016 at [Particulars Withheld] village within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into genital organ (anus) of CO, a boy aged then 12 years.

2. In the alternative, the appellant faced a charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the diverse dates between 30th August 2016 and 1st September 2016 at [particulars withheld] Village within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (anus) of CO, a boy aged then 12 years.

3. The Petitioner was convicted of the main charge and sentenced to serve 20 years' imprisonment. Being aggrieved with the sentence and conviction, he appealed vide Eldoret Criminal Appeal No. 16 of 2020 which appeal was dismissed vide a judgement of the High Court delivered on 11th August 2021 in which the Court upheld both the conviction and the sentence.

4. The Petitioner then approached this court vide a Petition filed on 9th May 2022 seeking a sentence review under section 50(2) (p)(q) of *the Constitution* with reliance on Sections 213, 216, 329 and 365 of the *Criminal Procedure Code*.

Hearing of the Petition

5. The parties prosecuted the petition for resentencing vide written submissions. The Appellant filed his submissions dated 7th November 2024 whereas the respondent filed submissions through Prosecution Counsel S.G Thuo on 18th December 2024.

Petitioners' submissions

6. The Petitioner submitted that the trial court has the judicial discretion to impose an appropriate or less severe sentence in the circumstance of his case. He urged that the Supreme Court recently ruled that mandatory sentences are unconstitutional and further, that courts are empowered with judicial discretion in matters of sentencing. He submitted that the court, in the exercise of discretion, may impose sentences that may be influenced by many factors that may include and not limited to mitigation, personal circumstances, circumstances of the case among others factors.

7. The Petitioner's case is that the 20-year sentence was harsh and excessive because some of the sentencing principles were not applied to make the sentence less severe or appropriate. He stated that he was given an opportunity to offer his mitigation statement before he was sentenced but unfortunately, this activity was done as a formality as it did not have any effect on his sentence in terms of a reduced lenient sentence. Additionally, he urged that the mitigations that are relevant to the case according to the determination scale in the Sentencing *Policy Guideline of 2023* are indicated to reduce the Petitioner's sentence by up to one third of the prescribed sentence.

8. That in this instance, the reduction comes to about 7 years off the imposed sentence of 20 years. The Petitioner submitted that the trial court limited his constitutional right under Article 25 (c) of *the Constitution* which provides that the right to a fair trial cannot be limited. That the failure to consider mitigation amounted to a procedural irregularity which led to another violation of denying him the benefit under article 50(2)(p) of Constitution which entitles the Petitioner to a less severe sentence or appropriate sentence that is dependent on mitigating factors or circumstances.

9. The Petitioner urged the court to consider that he was a first offender and begs for forgiveness and leniency from the court. Additionally, that he is still remorseful for the pain he caused the complainant and his family. He stated that he is a young man with a bright future which is being ruined by the lengthy sentence. That he has served six years' part of which was served during pre-trial custody of three years, 2 months and 19 days which was not counted as part of his sentence pursuant to Section 333 (2) of the *Criminal Procedure Code*.

10. He urged that he has taken positive steps to develop his life through programs that have been part of his rehabilitation. The Petitioner reiterated that he was a sole bread winner to his family and was gainfully employed as a teacher before the incident. His family was devastated with his incarceration and it is in their interests that he re-joins them.

11. It is the Petitioners' case that his sentence was not proportionate, fair and transparent. He submitted that the non-application of the principles of proportionality and fairness contributed to the sentence being harsh and excessive. The failure to consider the period spent in pre-trial custody as provided under Section 333(2) aforementioned made the Petitioner serve a disproportionate and unfair sentence. He submitted that this section obligates the sentencing court a duty to consider this period to be part of the sentence already served to make the sentence proportionate. He pointed out that he was in custody from his date of his arrest on 26/09/2016 to the date of sentence on 5/01/2020 which comes to 3 years 2 months and 19 days. He was not granted bail during this time and as such, he urged the court to make this sentence proportionate and fair pursuant to Section 333 (2) of the CPC.

12. The Petitioner urged that the Sentencing *Policy Guidelines of 2023* contain progressive sentencing objectives which are relevant to his case. Further, that the objectives applied to the case were solely used to torment him by awarding very harsh and excessive sentence to teach him a very tough lesson. Considering that he has learnt his lesson by spending time in incarceration, he seeks that the court considers the sentencing objectives when resentencing the Petitioner.

13. The Petitioner submitted that the sentence that can be imposed as stipulated in the section he was charged under of being Section 8 (1) as read with 8(4) of the said act is 15 years yet he was sentenced to 20 years meaning the sentence is five years more. He reiterated that the sentence was excessive and urged the court to allow his petition.

Respondents' submissions

14. Counsel for the prosecution submitted that the State is agreeable to the remission of the sentence by having the pre-trial detention period credited to the term of 20-years'imprisonment imposed by the Trial Court as provided under Section 333(2) of the *Criminal Procedure Code* as well as the authority in Ahamad Mohammed vs R (2018) eKLR

15. Counsel submitted that the offence for which the applicant was charged and convicted for attracts a minimum sentence of 15 years. He referred the court to the reasoning of the Supreme Court of Kenya in Petition No. E018 of2023 R vs Joshua Gichuki Mwangi & Others where the apex court observed that the Muruatetu decision did not alter the mandatory or minimum sentences in the *Sexual Offences Act*.

16. Counsel urged that the prosecution proved its case beyond reasonable doubt as affirmed by the High Court of Eldoret vide HCCRA. No. 16 OF 2020 that the applicant herein committed the most humiliating and heinous act to a hapless and stranded minor, who entrusted an adult stranger in Eldoret town only to be penetrated repeatedly through the anal organs. We urge this court to consider the traumatizing ordeal of the victim and sustain this sentence.

Analysis & Determination

17. Section 8(3) of the *Sexual Offences Act* states as follows;

    (3) 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.

18. Section 333(2) of the *Criminal Procedure Code* provides that;

    (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include 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.

19. The Judiciary Sentencing Policy Guidelines & Directions Clause 7.10 provides;

> The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In

determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

20. In Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR the Court of Appeal held that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

21. In the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) in setting aside the declaration of the unconstitutionality of mandatory sentences as laid out in Mwangi v *Republic (Criminal Appeal 84 of 2015*) [2022] KECA 1106 (KLR), the learned justices of the Supreme Court expressed themselves as follows;

> We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed

22. In the instant case, the accused was sentenced to 20 years' imprisonment and The provisions of Section 8(3) of the *Sexual Offences Act* under which the applicant was sentenced provides that upon conviction, the minimum mandatory sentence is imprisonment for a period of not less than twenty years where the child defiled is between the ages of 12 and 15 years.

23. The sentence to imprisonment to a term of not less than 15 years that the applicant submitted ought to have been the correct sentence for him is applicable where the child defiled is between the age of 16

and 18 years. In this case, the child was 12 years old and so the sentence of 20 years meted out upon the applicant is legal, is lawful and is valid and the same is upheld for reasons that a less severe sentence as envisaged under the provision of Article 50(2)(p) of *the Constitution* is not available to the applicant in light of the above decision of the Supreme Court herein above cited and is also not warranted by dint of the legality of the sentence.

24. On the issue that the period that the applicant spent in remand be considered, I have perused the lower court proceedings as well as the judgement of the High Court. There is no indication in either that this period was factored into the sentence of 20 years meted out on the accused. In this regard, I find merit on this limb of the applicant's application.

25. From the record of the Lower Court, the charge sheet indicates that the applicant was arrested on 23rd September 2016 and judgement delivered on 24th January 2020. On 27th May 2017, the applicant was granted bond and his surety approved. On 12th June 2017 he failed to attend Court and a warrant for his arrest was issued. The warrant was executed on 16th April 2018 and the applicant stayed in remand until the judgement was delivered. The aggregate amount of time that the applicant was in custody therefore comes to 2 years and 5 months. This period is to be computed in the 20 years' imprisonment.

26. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 13TH FEBRUARY 2025

E. OMINDE

JUDGE