Boit v Republic (Miscellaneous Criminal Application E019 of 2024) [2025] KEHC 4438 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4438 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2024

E OMINDE, J

APRIL 8, 2025

BETWEEN

JOSEPH BOIT ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein was with others charged, tried and convicted for the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code* vide Eldoret High Court Criminal Case No. 96 of 2003 and he was sentenced to death.

2. Dissatisfied with the sentence and conviction, the Petitioner lodged an Appeal against the sentence and conviction in Eldoret Criminal Appeal No. 10 of 2012. The Appeal was heard and dismissed and the conviction and sentence upheld. Pursuant to the holding in Muruatetu, the Applicant approached this Court vide Eldoret Crimi*nal Petition No. 77 of 2019* seeking for resentencing from the death sentence. In dismissing the Petition, Hon. Justice Nyakundi, found no reason to interfere with the death sentence. The Applicant, having had his sentence of death commuted to life imprisonment through the President's exercise of power of mercy filed a second Petition being Eldoret Criminal Petition No. 23 of 2018, seeking that his life imprisonment be substitute with a determinate term. Being guided by the findings in the case of Julius Kistao Manyeso V Repubic; Criminal Appeal No. 12 of 2021, Hon. Justice Nyakundi, in his ruling, set aside the life imprisonment and substituted it with a terminable period of 45 years' imprisonment to run from the date of his arraignment in Court.

3. The Applicant has now approached this Court by way of undated Chamber Summons seeking for sentence review. He stated that this instant application is made on account of medical grounds and pursuant to Sections 362 and 364 of the *Criminal Procedure Code* as read with Article 165(3)(b), (5) and (6) of *the Constitution* of Kenya. He pleaded that he is 70 years, prevalent to opportunistic diseases due to old age, that he is presentably suffering dementia, diabetes, stroke and paralysis which

require constant specialized medical care not found in prison. He further stated that he has been in prison custody for a record of 19 years since his arrest and arraignment in Court and that he has undergone various rehabilitative programs offered in prison and thus he is fully reformed, rehabilitated, transformed and ready for reintegration.

4. The Applicant, through the firm of Messrs Oduor, Munyua & Gerald, Attorneys at Law LLP also filed Amended submissions dated 10/12/2024. Counsel for the Applicant submitted that his sentence should be reviewed for the following reasons; advanced age, deteriorating health and life expectancy, Applicant's remorsefulness and efforts towards rehabilitation and attempts by the Applicant to make amends with the Victim's family post-conviction.

5. With regard to Advanced age, deteriorating health and life expectancy, Counsel submitted that the Applicant is currently 72 years of age and suffers from several medical conditions, including diabetes mellitus, high blood pressure and stomach ulcers for which he is under regular medication. Counsel further submitted that the Applicant, additionally, experiences chronic pain in his left leg, which radiates from his lower back and as a result, he walks with a walking stick. Counsel urged that the Applicant's conditions and his advanced age significantly impair his mobility and quality of life as evidenced by the medical records presented before this Court. Counsel added that as at now the Applicant has served of 21 years of incarceration, leaving him with 24 years. Counsel contended that that the sentence of 45 years is excessive, harsh and disproportionate, considering the Applicant's advanced age and deteriorating health. Counsel relied on the case of Evans Nyamari V R; Kisumu CACR No. 22 of 2018 wherein the Court cited the Supreme Court of Appeal of South Africa in S v Nkosi & others 2003 (1) SACR 91 (SCA) where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively, stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of *the Constitution* of the Republic of South Africa *Act 108 of 1996*.
>
> The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

6. Counsel also relied on the case of Ali Abdalla Mwanza V Republic [2018] eKLR where the Court held as follows;

> "(15) In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case, it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that

> we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction."

7. Counsel also cited several other cases in support of his submissions.

8. With regard to the Applicant's remorsefulness and efforts toward rehabilitation, Counsel submitted that the Applicant has shown substantial remorse and a demonstrated commitment to personal reform and rehabilitation during his time in prison.

9. Regarding, attempts by the Applicant to make amends with the Victim's family post-conviction. Counsel urged the Court to consider the Applicant's sincere and concerted efforts to amends for the harm caused by his actions. Counsel submitted that the Sentencing Guidelines outline the importance of the offender's commitment to repairing the harm done to the victim and their family. Counsel maintained that the Applicant has shown a proactive commitment to reconciliation through traditional means, that the family of the late Hillary Malakwen, the victim and the Applicant's family (the Boit family), embarked on traditional healing process aimed at restoring peace and harmony between the two families and that this process was carried out in January 2022, in Kabore Location, Chesumei Sub-County, within Nandi County.

10. In the end, Counsel urged the Court review the 45 years term sentence imposed upon the Applicant and that the sentence be commuted to the time already served or a lesser term that this court deems appropriate, in alignment with the principles of fairness, justice and rehabilitation.

11. The Respondent, on its part, filed its Submissions dated 21/12/2024 through Prosecution Counsel, Mr. Leonard A. Okaka. He gave a history of the matter and with regard to the issue of jurisdiction, he submitted that the resentencing being sought herein is untenable for reasons that this Court is functus officio.

12. Regarding the Applicant's advanced age of 70 years, Counsel submitted that this ground was considered in the ruling having previously formed part of the Applicant's paragraph 2 of his affidavit filed in Petition No. 23 of 2018. Counsel contended that the Applicant's further argument on age, now guised as life expectancy, ought to have been raised in that petition.

13. With regard to suffering from deteriorating health, Counsel submitted that these grounds were also considered, having been raised in paragraph 4 to 6 of the Applicant's Affidavit and elaborated further on page 4 at paragraph 6 of his Submissions filed in Petition No. 23 of 2018.

14. Counsel further submitted that grounds on restorative justice were also considered at paragraph 11, item 4 of the ruling. Counsel contended that the January 2022 traditional process, now raised on page 7 of the submissions, should be nothing new. Counsel maintained that this came almost 2 years before the ruling was delivered on 7/08/2023 and if anything, the Applicant, by paragraph 17 of his affidavit, he invited the judge to consider all objectives of sentencing, restorative justice inclusive.

15. Counsel urged that Justice Nyakundi, is a judge of concurrent jurisdiction. Counsel cited the case of Boit V Republic [2023] KEHC 21245 KLR. Counsel also relied on the holding in the case of Lelei *V Republic; Eldoret Criminal Petition No. 57 of 2020*, where a bid by a 63-year-old to review a 20-year jail term on like grounds and at like forum, failed.

16. Counsel maintained that this Court bereft of appellate jurisdiction over its own sentences. Counsel contended that the (45) year jail term as reviewed post Manyeso, ought to be served.

Determination

17. In light of the above, I find that the issue that arises for determination herein

> " Whether this Court should review the sentence imposed on the Applicant".

18. The Applicant's sentence was reviewed from life imprisonment to 45 years' imprisonment by Justice Nyakundi in Eldoret High Court Criminal Petition No. 23 of 2018. Because the sentence was imposed by a Court of concurrent jurisdiction, this Court is functus officio and cannot sit as an appellate Court on its own decision. In respect thereto, Section 364(5) of the *Criminal Procedure Code* provides as follows;

> (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.

19. Further on the functus officio principle, the Court of Appeal in Telkom Kenya Limited vs John Ochanda [2014] eKLR, stated as follows:

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

20. In light of the above and also in considering that the grounds being raised in this appeal were considered and conclusively determined by the Hon Justice Nyakundi in Eldoret High Court Criminal Petition No. 23 of 2018, as submitted by Counsel for the State, it is my finding that the instant application lacks merit and the same is accordingly dismissed in its entirety. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 8TH APRIL 2025

E. OMINDE

JUDGE