Mengesa v Republic (Criminal Miscellaneous Application E012 of 2024) [2025] KEHC 5448 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5448 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E012 OF 2024

JN KAMAU, J

APRIL 24, 2025

BETWEEN

BRIAN MENGESA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with another with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to fifteen (15) years imprisonment.

2. On 24th January 2024, he filed a Notice of Motion application dated 30th November 2023 seeking a review of his sentence. He pointed out that the delay in filing his appeal was due to financial constraints and his family's failure to engage a legal representative to fast-track his appeal.

3. His undated Written Submissions were filed on 2nd August 2024 while those of the Respondent were dated 21st November 2024 and filed on 22nd November 2024. The Ruling herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. The Applicant submitted that he was a young man who had learnt of his ugly side of the law and had now met all the aspects of sobriety. He sought for a second chance to re-integrate with the general public. He pleaded with the court to consider that he was a first offender and had undergone various rehabilitation programmes in vocational training. He added that he had trained in carpentry

and joinery and had been tested by the relevant authority where he qualified in grades (III) and (II) respectively.

5. He further explained that he had also pursued Biblical Studies and graduated in a diploma and certificate from Emmaus Bible School and had led an exemplary life. He thus urged this court to consider Cap 64 (Laws of Kenya) (sic) and Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) while reviewing his sentence.

6. On its part, the Respondent placed reliance on the case Supreme Court Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi* (eKLR citation was not given) where it was held that although sentencing was an exercise of judicial discretion, it was Parliament and not Judiciary that set the parameters of sentencing for each crime. It was further held that mandatory sentences left no discretion to the judicial officer while minimum sentences set the floor rather than the ceiling of such sentences.

7. It contended that it was clear that the minimum sentence provided for in Section 8(3) of the *Sexual Offences Act* was lawful but not necessarily mandatory and therefore the Trial Court exercised discretion and considered the Applicant's mitigation before sentencing him.

8. It further relied on the case of *Francis Karioko Muruatetu & another v Republic, Katiba Institute & 5 others (Amicus Curiae)*[2021]eKLR which clarified that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under Section 203 and 204 of the *Penal Code*.

9. It further cited Section 329 of the *Criminal Procedure Code* and was emphatic that the Trial Court took into account the evidence, the nature of the offence and the circumstances of the case in arriving at the appropriate sentence. It added that the Trial Court meted a lenient sentence as the Act provides for a term of not less than twenty (20) years.

10. It was not opposed to the Applicant's prayer under Section 333(2) of the *Criminal Procedure Code*. In this regard, it relied on the case of *Ahamad Abolfathi & another v Republic* [2018]eKLR where it was held that courts were obliged to take into account the period that the accused spent in custody before they were sentenced.

11. The Applicant herein was sentenced under Section 10 of the *Sexual Offences Act*. The same provides as follows: -

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

12. This court could not therefore fault the Trial Court for having sentenced him to fifteen (15) years imprisonment as that was lawful. This court noted that the Respondent relied on the defective charge sheet instead of the amended charge sheet and therefore focused on the offence of defilement instead of gang defilement under which the Applicant was convicted and sentenced. It was worth noting that it ought to be keen while writing submissions in line with its duty to the State as such an omission could otherwise lead to it losing a good case.

13. The above notwithstanding, prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case

was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

14. Notably, in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the Legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be appropriate sentences.

15. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

16. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic* (*supra*) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

17. As this court was bound by the decisions of courts superior to it, its hands were tied regarding exercising its discretion to reduce the Applicant's sentence. It had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.

18. Going further, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code*. The said Section 333(2) of the *Criminal Procedure Code* stipulates that:

> " 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 (emphasis court)".

19. This duty is also contained in the *Judiciary Sentencing Policy Guidelines* where it is provided that: -

> " 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. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & another v Republic*(*supra*).

21. The Charge Sheet herein showed that the Applicant herein was arrested on 1st October 2016. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 13th June 2017.

22. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought. A reading of the Trial Court's Sentence showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

23. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 30th November 2023 and filed on 24th January 2024 was not merited save for his prayer that was brought pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

24. It is hereby ordered and directed that the period that the Applicant spent in custody between 1st October 2016 and 12th June 2017 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

25. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF APRIL 2025

J. KAMAU

JUDGE