Nalianya v Republic (Miscellaneous Criminal Application E002 of 2024) [2025] KEHC 4638 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2024

JR KARANJA, J

APRIL 10, 2025

BETWEEN

HUSSEIN WEKESA NALIANYA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant, Hussein Wekesa Nalianya, vide the application dated 8th January 2024 essentially seeks a review of the sentence of life imprisonment imposed upon him by the Senior Resident Magistrate on the 18th May 2015 in Kapsabet PMCC No. 29 of 2015 for the offence of defilement, Contrary to Section 8[1] as read with Section 8[2] of the *Sexual Offences Act*.

2. Accordingly, the Applicant prays for a lenient definite sentence on the basis of Article 50[2] [p][q] of *the Constitution* of Kenya and the decisions of the High Court in Petition No. 97 of 2021 at Mombasa and Petition No. E017 of 2021 at Machakos.

   It is instructure to note that this application was brought after the Applicant exhausted the appeal process, hitherto unsuccessfully.

   Thus, the life imprisonment sentence was upheld on appeal by the High Court on 8th June 2017 and by the Court of Appeal on 17th March 2023.

3. On sentence, the Court of Appeal rendered itself thus: -

   > " The Appellant was sentenced to life imprisonment as provided under Section 8[2] of the *Sexual Offences Act*.
   >
   > We have considered the circumstances under which the offence was committed. The Appellant defiled his step daughter and breached the trust bestowed on him by society to

protect such a child. Additionally, he did not appear remorseful. In our considered opinion, he doesn't deserve any mercy.

We are therefore not inclined to disturb the sentence."

With that conclusion, the Applicant's fate was sealed, but not being a person to give up easily he took advantage of *the Constitution* of Kenya 2010 and in particular, Article 50[2][p][q] which provides as follows: -

4. "Every Accused Person has a 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 and that offence was committed and the time of sentencing; and

[Q] If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

5. However, the Applicant does not herein establish or show how his right to fair hearing was curtailed on account of the aforementioned provisions of the Law. If anything, his due rights under Article 50 of *the Constitution* were accorded to him. He did not invoke herein Article 50 [6] which provides 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.

b. New and compelling evidence has become available."

6. This application is clearly not the petition contemplated under the provision. It is simply an application for review of the sentence on the basis of the holding by the high court in the cases mentioned in paragraph 6 of the supporting affidavit to the effect that a court's discretion in sentencing should not be fettered by the mandatory minimum sentencing provisions.

7. Such provisions include Section 8[2] of the *Sexual Offences Act* under which the Applicant was sentenced. It provides that: -

"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

Therefore, the life imprisonment sentence imposed on the Applicant by the trial court and twice confirmed on appeal to the High Court and the Court of Appeal was for all intents and purposes proper and lawful despite its mandatory nature which fettered the discretion of the trial court to impose any other sentence even if the circumstances of the offence demanded so.

8. Both the trial court and the appellate courts found and confirmed that the circumstances of the case against the Applicant demanded that the prescribed mandatory sentence under Section 8[2] of the *Sexual Offences Act* be imposed without any hesitation.

9. In Machakos Petition No. E017 of 2021, which was relied upon by the Applicant the issues for determination included whether the minimum mandatory sentencing provisions under the *Sexual Offences Act* fetter the discretion of judges and magistrates in meting out sentences. Among the prayers

sought by the Applicants therein was that a declaration be issued that the minimum maximum sentencing provisions under the *Sexual Offences Act* are unconstitutional in so far as they infringe on the inherent right of every Accused Person to mitigate as envisaged under Article 50 of *the Constitution* as read with Section 216 and 329 of the *Criminal Procedure Code*.

10. The Court noted that: -

> " To remove from the courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing "sensible sentences" in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision."

Ultimately, the court held that the minimum mandatory sentences prescribed by the *Sexual Offences Act* with no discretion to the trial court to determine the appropriate sentence to impose fell foul of Article 28 of *the Constitution*, but the courts were at liberty to impose sentences prescribed under the Act so long as they are not deemed to be the mandatory minimum prescribed sentences.

11. In Mombasa Petition No. 97 of 2021 which was also relied upon by the Applicant; it was held that: -

> " To the extent that the impugned provisions prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an Accused Person's individual circumstances and mitigation, such sentences fell foul of the right to a fair trial guaranteed under Article 50 of *the Constitution* because mitigation and sentencing were part and parcel of a fair trial process."

In both the aforementioned cases it was stated that persons convicted and imprisoned under the said offences were at liberty to petition the high court for mitigation and re-sentencing.

12. In the present case, the Applicant was accorded the right to mitigate before the life imprisonment sentence was imposed upon him in terms of Section 8[2] of the *Sexual Offences Act*.

Nonetheless, a reading of the decisions referred to hereinabove indicate that the mandatory or mandatory minimum sentences prescribed by the *Sexual Offences Act* were unconstitutional.

13. However, in the case of Athanus Lijodi Vs. Republic [2021] eKLR, cited herein by both sides the Court of Appeal reiterated that the life sentence imposed therein by the trial court and affirmed by the High Court was not unconstitutional and could still be meted out in deserving cases. Further that, the court would uphold a sentence prescribed by the *Sexual Offences Act*. If upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.

14. In the recent decision of the Supreme Court of Kenya in Republic Vs. Gichuki Mwangi & Others Petition No. E018 of 2023, the issues arising for consideration included whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and whether the courts have discretion to impose sentences below minimum those prescribed by the *Sexual Offences Act*.

15. In that regard the Supreme Court made a distinction between mandatory sentences and minimum sentences as follows: -

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences.

> What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two word..... In this country a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances."

16. The court then went on to state 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, significantly 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 the legislation, the judicial arm should adjudicate disputes based on the provisions of the Law.
>
> However, in the special circumstances of declaration of unconstitutionality, the process is reversed."

17. In conclusion, the court stated that the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remain lawful as long as Section 8 of the *Sexual Offences Act* remains valid. That, the Court of Appeal had no jurisdiction to interfere with that sentence.

18. So, on the basis of the conclusion aforementioned this court, it may be said, has no jurisdiction to interfere with the sentence imposed upon the Applicant by the trial court and affirmed by both the High Court and the Court of Appeal. However, it would appear that this application is not challenging "perse" the prescribed sentence under Section 8[2] of the *Sexual Offences Act*, but rather its indefinite nature. That is why prayer [1] of the application is for a lenient definite sentence.

19. With regard to the indefinite nature of the sentence under Section 8[2] of the *Sexual Offences Act*, the Court of Appeal in the case of Julius Kitsao Manyeso Vs. Republic [2023] KECA 877 stated as follows: -

> "The reasoning in Francis Karioko Muruatetu & Another Vs. Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28."

20. In arriving at the aforementioned finding, the Court of Appeal was informed by the decision in the European Case of Vinter & Others Vs. The United Kingdom [Apps Nos. 66069/09 130/10 and 3896/10 [2016] III ECHR 317], where it was stated that:-

> " An indeterminate life sentence without any prospect of release or possibility of review is degrading and inhumane punishment and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

21. In the same case, the European Court of Human Rights further held "inter-alia" that: -

> " It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention ..... these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications. For detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentences that these factors or shifts can be properly evaluated."

22. The court continued to state that: -

> " Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for the offence. Whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes..... a poor guarantee of just and proportionate punishment."

23. In the Manyeso case [supra], the Court of Appeal also relied on the English case of Republic Vs. Bieber [2009] IWLR. 223, where it was held that: -

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation, and protection of the public. Where a mandatory life se3ntence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the life time 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....."

24. In the Muruatetu case [supra], the question whether the indeterminate life sentence was unconstitutional was raised but was not available for determination by the Supreme Court as it was never canvassed before the High Court and the Court of Appeal.

Nonetheless, the Supreme Court stated that: -

> " We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purposes of rehabilitation, it is also for the rehabilitation of the prisoner as well as for the protection of civilian who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

25. Ultimately, the Court of Appeal in the Manyeso case [supra] found that the sentence of life imprisonment under the *Sexual Offences Act* and indeed, any other statute was unconstitutional. The court therefore used its discretion to set aside the sentence of life imprisonment imposed upon the Appellant and substituted it with a sentence of forty [40] years imprisonment. The Appellant had been convicted by the trial court for defilement of a four and a half [4½] years child Contrary to Section 8[1] of the *Sexual Offences Act* and sentenced to life imprisonment under Section 8[2] of the Act.

26. In this case, the Applicant was lawfully sentenced to life imprisonment for defiling a child aged eight [8] years, but the prevailing legal position being that mandatory indefinite sentences are unconstitutional it behooves upon this court to exercise its discretion to review the sentence and substitute it for a determinate or definite period of time.

27. In Ayako Vs. Republic [2023] KSCA 1563 KLR, the Court of Appeal following the Manyeso case [supra] stated that the emerging jurisprudence on life sentences was a product of a purposive reading of Article 27 and 28 of *the Constitution* as applied to sentencing and went on to state that: -

> " We are in agreement that an indeterminate life sentence falls afoul the provisions of Articles 27 and 28 of our Constitution purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of Articles 2[5] and 2[6] of *the Constitution* that indeterminate life imprisonment is cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence."

28. In conclusion, the Court of Appeal in the case aforementioned stated that: -

> " In the circumstances of this case, given the objective severity of the offence committed by the Appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years imprisonment."

Taking cue from this decision and considering that the Appellant defiled a child aged eight [8] years who was his step-daughter, but that he was a first offender and has since expressed remorse for his unlawful action for which he has already served about ten [10] years from the date of sentence on 18th May 2015 and had been in remand custody for nearly five months from the date of his arrest on 4th January 2015, this court hereby deems it fair and just to set aside the life imprisonment sentence imposed on the Applicant and substitutes it for a determinate period of the time already served inclusive of the period he was in remand custody prior to the date of sentence i.e. approximately ten [10] years and a few months.

29. In sum, the application is allowed with the result that the Applicant be treated as having fully served his term of imprisonment and be released forthwith unless otherwise lawfully held.

Ordered accordingly.

DELIVERED AND DATED THIS 10TH DAY OF APRIL 2025

HON. J. R. KARANJAH,

JUDGE