Muremi v Republic (Criminal Revision E176 of 2024)
[2025] KEHC 10788 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10788 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E176 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

DERRICK MURIITHI MUREMI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an application by the Applicant seeking to review sentence meted out against him in *Nyeri CMCC No. E006 of 2021 vide* the Judgment dated and delivered by Honourable Mr. Mathias Okuche, Senior Principal Magistrate.

2. The trial court sentenced the Applicant having found him guilty of the offence of gang rape. He was sentenced to 15 years imprisonment. He seeks that the 2 years he has been in prison be deemed sufficient.

3. The offence of gang rape is provided under Section 10 of the *Sexual Offences Act*. It 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.

4. However, the sentence meted out was a minimum sentence. In *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), the Supreme Court stated as follows:

> 65. 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 words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. 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.

66. 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.

5. The minimum sentence for the offence herein is 15 years. The court gave out to the applicant the bare minimum. Whereas sentencing is the discretion of the court, the same is governed by sentencing guidelines and surrounding circumstances. The court cannot interfere with discretion unless the same was meted out injudiciously. Further, there is no discretion as regards to minimum sentences in sexual offences. The power to alter the sentence is set out in Section 354 of the *Criminal Procedure Code*.

   The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

   (a) ....

   (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

6. A sentence can only be set aside if it is manifestly excessive having regard to the circumstances of each case. In the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus:-

   > " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R.* (1989 KLR 306)"

7. Sentence is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

   > " 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 states is shown to exist."

8. The applicant stated that he was remorseful as first offender and ready to change. However, stakes were stark against him. He was given the minimum sentence hence there are no discretionary powers to exercises. The discretion lies elsewhere.

9. The Applicant has two options, though the first is more reliable. First, is to await his fate and serve the sentence as given. Secondly, petition the President under Article 133 of the *Constitution*, which provides as follows:

(1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-

(a) granting a free or conditional pardon to a person convicted of an offence;

(b) postponing the carrying out of a punishment, either for a specified or indefinite period;

(c) substituting a less severe form of punishment; or

(d) remitting all or part of a punishment.

(2) .....

(3) ...

(4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.

10. The court finds no justifiable basis to interfere with the sentence imposed in this matter. The next issue is whether, the court took into consideration the time spent in custody.

11. The Applicant was out on bond until the time of his conviction. The law under Section 333(2) of the *Criminal Procedure Code* provides as doth:

> " Subject to the provisions of Section 38 of the *Penal Code*, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

12. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018]eKLR stated as follows as regards time spent in custody:

> " 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 19th June 2012."

13. This is buttressed in the *Judiciary Sentencing Policy Guidelines*, 2023 as follows:

> 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.

14. The Applicant was arrested, arraigned in court and released on bond on 23.04.2023. The Applicant remained in custody after taking plea until 23.04.2023, when he we was released on bond. He was re-arrested on conviction. Section 333(2) of the *Criminal Procedure Code* provides that the period spent in custody pending trial shall be taken into account during sentencing. It is clear that the time spent in custody was not considered. The period spent in custody must mean something and the imposed sentence be reduced mathematically.

Determination

15. I therefore make the following orders: -

    a. The application filed on 2.06.2024 for revision is partly allowed to the extent that it is ordered that the sentence imposed shall commence from the date of arrest, excluding the period between 23.04.2023 and the date of conviction.

    b. The prayer to revise the sentence is dismissed.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se Applicant

Mr. Kimani for the Respondent

Court Assistant – Michael