Leteipa v Republic (Miscellaneous Criminal Application E010 of 2022) [2024] KEHC 466 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEHC 466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

MISCELLANEOUS CRIMINAL APPLICATION E010 OF 2022

F GIKONYO, J

JANUARY 24, 2024

BETWEEN

SALIM ABDALLAH LETEIPA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Sentence re-hearing

1. Before the court is a chamber summons dated 21/02/2022. The applicant is seeking for; i) a lenient definite sentence; and ii) the time spent in remand to be factored in the sentence to be awarded.

2. The application is expressed to be brought under articles 2, 3(a), 19(2), 20(1), 22(1), 23(1), 25(c), 26(1), 27(1)(4),28, 50(2)(p)(q), 159, and 165(3) of *the Constitution*, constitution of Kenya (protection of rights and fundamental freedom) practice and procedure rules 2010, section 216, 329 and 333(2) of the Criminal Procedure Code, section 295 as read with section 296(2) of the Penal Code.

Brief background of this case

3. The applicant was charged, convicted, and sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the Penal Code in Narok CMCR No. 71 of 2008. His first appeal, Nakuru HCCRA No. 233 of 2009, was dismissed. His second appeal, Court of Appeal CRA No. 151 of 2011, was also dismissed.

Directions of the court.

4. The application was canvassed by way of written submissions. Parties filed their respective submissions.

The applicant's Submission

5. The applicant submitted that mandatory sentences take away judicial discretion, and, therefore, unconstitutional. The applicant relied on the cases of Joseph Kaberia And 11 Others Petition No. 618 Of 2010, S V Mchunu and Another (ARA21/11) (2012) ZAKZPHC 56, S Vs Toms 1990 (2) SA 802 (A) At 806(L) -807(B), S V Mofokeng 1999 (1) SACR 502 (W) AT 509 (D), S V Jansen 199 (2) SACR 368 AT 373 (G) –(H), William Okungu Kittiny V Republic [2018] eKLR, Juma Iddi Mustapha V Republic [2019] eKLR, Julius Kitsao Manyeso Vs Republic, section 364,379(4), 316, 357 of the Criminal Procedure Code, Article 165, 48,23(1),25(c), 27(1)(2)(4), 50(2)(p) (q), 159(2) of *the Constitution*.

6. The applicant submitted further that, he has benefitted from rehabilitative programs offered at the correctional facility. To him, rehabilitation is an essential rationale in sentencing. The applicant relied on the case of Douglas Muthaura Ntoribi V Republic [2018] eKLR and policy direction 4.1. of the sentencing guidelines policy 20152.

7. The applicant submitted that he has been in custody for the past 15 years from 06/02/2008. He was convicted at the age of 34 years and is now 49 years.

8. The applicant urged this court to consider the time spent in remand, and find that the period already served is sufficient based on the rehabilitative programs undertaken. The applicant relied on section 333(2) of the criminal procedure code and the case of Vincent Sila Jona & 87 Others V Kenya Prison Service & 2 Others [2021] eKLR.

9. In his mitigation the applicant submitted that he was a first offender, a family man whose life has been greatly affected by imprisonment, and that he has reformed.

Respondent's submission.

10. The respondent submitted that there is no rational reason why the reasoning of the Supreme Court in the Muruatetu case, which holds that the mandatory death sentence is unconstitutional for depriving the courts of discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of robbery with violence which embodies the said deprivation. The respondent relied on section 296(2), 204 of the Penal Code, Francis Kariko Muruatetu & Another Vs Republic, James Kariuki Wagana Vs Republic [2018] eKLR, S Vs Mchuru & Another (AR 24/11) (2012) ZAKZPHC 6, S Vs Scott Crossely 2008 (1) SACR 223(SCA), Mithu Singh Vs State of Punjab 1983 AIR 473, Kisumu Court of Appeal Criminal Case No. 166 Of 2016 Cyrus Kavai Vs Republic.

11. The respondent submitted that the trial magistrate without consideration of any mitigating factors, and the fact that the petitioner did not use excessive force nor unnecessarily injure the complainant during the robbery, merely passed death sentence as was prescribed by the law. The violence unleashed on the victim was not sufficiently serious. The mitigating and aggravating factors were not put into consideration and the trial magistrate was tied to the prescribed law that imposed a mandatory death sentence upon the petitioner. The applicant has shown through the filed court documents that he has undergone rehabilitation, has reformed, and if given a second chance could be a productive member of society. The respondent relied on the case of James Kariuki Wagana Vs Republic [2018] eKLR.

12. The respondent submitted that the life sentence commuted is inappropriate sentence and thus conceded to the petition on review of both the death sentence and the life sentence. The respondent relied on the case of Julius Kitsao Manyeso Vs Republic [2023] eKLR.

Analysis and Determination

13. The application herein and the rival parties' written submissions raise two intertwined issues;

    i. Constitutionality and imposition of mandatory death sentence; and

    ii. The appropriate sentence in the circumstances of the case.

Basis, nature and scope of Re-sentencing or sentence re-hearing

14. The observation by the Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR explains the origin and basis of re-sentencing, thus: -

> " The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of *the Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."

15. Muruatetu decision dispatched distributional consequences as the principle laid down therein was applied by courts with the full force of judicial precedent to other penalty clauses which prescribed mandatory sentences, including mandatory minimum sentences, whose effect was to deprive the court of essential discretion in sentencing. And, despite the many 'controversies' which dogged application of the principle enunciated in the Muruatetu decisional law, re-sentencing was bolstered and is part of our jurisprudence.

16. Re-sentence is neither a hearing de novo nor an appeal. It is a proceeding undertaken on the basis of *the Constitution* and takes the form of an application for redress for denial or violation of a right, or fundamental freedoms in the Bill of Rights. It is conducted within the court's power to review sentences only. It does not therefore, concern conviction. Ordinarily, re-sentencing court will check on the legality or propriety or appropriateness of the sentence. Thus, resentence will be concerned with inter alia, the validity of the penalty clause, mitigating or aggravating factors, and the objects of punishments.

17. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made based on the unconstitutionality of a mandatory sentence.

Alleged violation

18. It bears repeating that, this proceeding is premised upon inter alia articles 22(1), 23(3), and 165 (3) of *the Constitution*. Therefore, an application for redress of denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

19. The applicant claimed violation of article 50(2)(p) of *the Constitution* which provides: -

    50(2) Every accused person has the 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 that the offence was committed and the time of sentencing

20. The applicant is specifically challenging the mandatory nature of the death sentence in section 296(2) of the Penal Code for denying the court discretion to impose an appropriate sentence. He prays for

the death sentence as well as life sentence to be set aside and to be given a definite lenient sentence. He says that he is rehabilitated and has learned new skills which makes him fit for re-integration in society. In addition, he submitted that he is advanced in age and hopes to get a sentence that will allow him to support his family.

21. In reacting to these submissions, the prosecution counsel has conceded to the application.

22. Mandatory sentences are arbitrary, and deprive courts of discretion to impose appropriate sentences, and therefore, unconstitutional. Judicial discretion in sentencing is a matter of justice and pertains to fair trial. Any person who suffers this kind of deprivation may claim denial or violation of the right to appropriate or less severe sentence- a principle embodied in *the Constitution* including article 50(2)(p) of *the Constitution*. And,

23. Section 296(2) of the Penal Code in contention herein provides: -

    If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. [Underlining mine and for emphasis]

24. The word 'shall' in Section 296(2) of the Penal Code discharges a mandatory command giving no room for any discretion by court in sentencing. Discretion in sentencing pertains to fair trial and justice. Therefore, the section, to the extent that it provides for a mandatory sentence of death, takes away the discretion of the court in sentencing, thus, inconsistent with *the Constitution*.

Construction of existing law

25. However, *the Constitution* provided the courts with new tools and techniques in construing existing law with such modifications, exceptions, adaptations, and alterations necessary to bring it in conformity with *the Constitution* (Section 7 of the Transitional Provisions, Sixth Schedule of *the Constitution*). There is therefore, no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the Penal Code for being inconsistent with *the Constitution* unless it is irreconcilable with *the Constitution*. These techniques were specially designed to avoid paralysis and confusion which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning it to *the Constitution*.

26. In this case, section 296(2) of the Penal Code is interpreted to prescribe death as the maximum sentence- this brings it into conformity with *the Constitution*.

27. Having stated that, re-sentencing provides an effective remedy to injustice arising from a violation of a right or fundamental freedom caused by imposition of a mandatory sentence- this was aptly explained by Majanja J in Michael Kathewa Laichena & Another -v- Republic (2018) eKLR that:

> " ...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence."

28. In addition, the authority of the court in articles 165(3) and 23 of *the Constitution* to, inter alia, uphold and enforce the Bill of Rights also formally gives the court power of consistently structuring, developing, and deploying progressive jurisprudence on enforcement of rights and fundamental freedoms across time and space under the command in article 20(3) of *the Constitution*, that: -

    In applying a provision of the Bill of Rights, a court shall—

a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and

b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Sentence

29. Applying the test, there is nothing to show that the trial court exercised discretion in imposing death sentence upon the applicant. The death sentence was imposed arbitrarily, and is, therefore, set aside.

30. Every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The court is aware that the President commuted the death sentence to life imprisonment.

31. A solemn debate ensued. Whether life sentence means the natural life of the person. Or it is not immutable. And, that it should be for a definite number of years. But, who should designate the scope- judicial or legislative intervention- has been the bigger issue. But, in a rather bold decision, the Court of Appeal defined life sentence in the case of Evans Nyamari Ayako Vs Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, Okwengu, Omondi & Joel Ngugi, JJ. A thus: -

'On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.'

32. But, the circumstances of the case should determine the appropriate sentence.

33. The Judiciary Sentencing Policy Guidelines list the objectives of sentencing on page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?

34. The court has considered the mitigating factors; his age, rehabilitation as well as family needs. Nevertheless, in the circumstances of this case, a deterrent sentence is most appropriate. Accordingly, the petitioner is sentenced to 30 years imprisonment. As the sentence is lenient, it will commence from the date he was first sentenced.

35. It is so ordered.

36. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 24TH DAY OF JANUARY, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:-

C/A Otolo

M/s Rakama for DPP

Petitioner