Kibor v Republic (Miscellaneous Application E004 of 2023)
[2024] KEHC 933 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS APPLICATION E004 OF 2023

RN NYAKUNDI, J

FEBRUARY 7, 2024

BETWEEN

ELIJAH CHESERE KIBOR ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant approached this court *vide* an application filed on 13th January 2023 seeking a review of his sentence. He was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Eldoret High Court Criminal Case No, 42 of 2010. Upon considering the evidence and the testimonies of the witnesses, the court sentenced him to suffer death. The gist of the applicants application is expressed to be brought in the matter of Art. 22 (1), 23 (1), 25 (c), 27 (10) (4), 50 (2) (p) (q), 159 (2) and 165 (3) of *the constitution* of Kenya, in the matter of petition no 15 & 16 of 2015 (Supreme Court) *Francis Karioko Muruatetu*, in the matter of section 332 (2) of the *Criminal Procedure Code* Cap 75 laws of Kenya and in the matter of the High Court in *Douglas Muthaura Ntoribi* Misc. App no. 4 of 2015 at Meru.

2. The applicant filed submissions on 13th January 2023 urging that he lodged an appeal at the court of appeal and withdrew the same in the interest of pursuing the resentencing hearing. He submitted that he has been in custody for 14 years and is remorseful for his actions. That the offence was brought about by the misuse of alcohol and he had no motive to kill the deceased. Further, that he left a very young family behind without the presence of fatherly love. He maintained that he was reformed and that he has been rehabilitated. He cited the case of *Francis Karioko Muruatetu & Another v republic* (2017) eKLR on the severity of the death sentence and urged the court to reconsider his sentence. he maintained that he had served some time in remand before the sentence and urged the court to allow his application. He attached certificates of the qualifications he has obtained while in prison.

Analysis & Determination

The issue that arises for determination is as follows;

Whether the court should review the sentence of the applicant

3. The Supreme Court declared the mandatory death sentence unconstitutional in *Francis Karioko Muruatetu & Another v republic* [2017] where it held as follows;

> " The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.....

4. The court gave guidelines on the implementation of resentencing as follows;

> " (69) Consequently, we find that Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

5.

> (71) As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> (a) age of the offender;
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> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
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> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaptation of the offender;
>
> (h) any other factor that the Court considers relevant.

6. At the applicant's sentence hearing he was sentenced to death which was later commuted to life imprisonment. The imprisonment for life in Kenya means imprisonment without possibility of parole or early release as the law accords other crimes with terminable period of sentence. Under the Supreme Court in *Muruatetu* retroactivity precedent a new predominant ratio decidendi relevant here is a substantive constitutional rule that prohibits mandatory death sentence under section 204 of the *penal code*. It was followed by a decision in *Philip Mueke Maingi & 5 others vs Director of Public Prosecution & AG.* HC petition No. E017 of 2021 in which the court held *inter alia* that the mandatory minimum sentences under the *sexual offence Act* are unconstitutional right to Human dignity where penal provisions prescribed mandatory minimum sentence without granting the trial court the discretion to

determine the appropriate sentence. Put differently in *Muruatetu* and *Mueke Maingi case* (*supra*) what the courts did is to invalidate mandatory sentence schemes without giving the trial court the discretion to consider the individualised circumstances of each offender. That requirement flows directly from the two key strands of taking into account aggravating and mitigations factors and the details of it is to apply weighted measure likely to diminish culpability of the offender and whether they are greater prospects for reform for him/her to deserve a lesser severe sentence.

7. In particular to this case the death sentence was committed to life imprisonment without parole as it is the practice in Kenya. In my considered view there is no distinction between life imprisonment and the mandatory death sentence invalidated by the supreme court in the *Muruatetu dicta*. It is a fact that life imprisonment in our jurisdiction amounts to putting an individual in the prison ward until his/her last breath. As put eloquently in

S vs Tijijo 1996 1 SACR 390 by Levy J thus;

> " When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of goal a free person, life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Even though he may be out of a goal on parole, he is conscious of his life sentence and conscious of the fact that his debt to society can never be paid. Life Imprisonment, makes a mockery of the reformative end of punishment.

8. The entrenchment of this constitutional discourse on sentencing regime is to make it clear that the landscape of constitutionalism and constitutional justice guaranteed by the Bill of Rights has changed considerably. Although the progress is often not perfect it is still along way to provide a solid foundation in so far as the pillars on sentencing scheme of the various offences is concerned. The Caribbean court in *Hary William v The Queen* (28 November 2005 rightly pointed out as follows;

> " The foregoing cases establish that the first principle by which a sentencing judge is to be guided in the case is that there is a presumption in favour of an unqualified right to life. The second consideration is that the death penalty should be imposed only in the most exceptional and extreme cases of murder. The death sentence should only be imposed in those exceptional cases where there is no reasonable prospect of reform and the object of punishment would not be achieved by other means".

. This question also came up for determination in *R v Kehoe* [2008] EWCA crim 819 [2009]. Where one can draw an inference that the provision of a statute should be interpreted to achieve the general purposes of the *Constitution* and the core values of our legal system in bringing it into conformity with the needs of the time. In the Kehoe case the Court of Appeal expressed the view that;

> " When, as here, an offender meets the criteria of dangerousness, there is no longer any need to protect the public by passing a sentence of life imprisonment for the public are now properly protected by the imposition of the sentence of imprisonment for public protection. In such cases, therefore, the case decided before the Criminal Justice Act 2003 came into effect no longer offer guidance on when a life imprisonment should be imposed. We think that now, when the court finds that the defendant satisfies the criteria for dangerousness, a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself particularly grave. It is neither possible nor desirable to set out all those circumstances in which a life sentence might be appropriate, but we do not think that this unpremeditated killings of one drunk by another, at a time when her responsibility was

diminished, and after she was provoked, can properly be said to be grave that a life sentence is required or even justified. Accordingly, we quash the life sentence and substitute a sentence of imprisonment for public protection.

9. The present case concerns a mandatory death penalty in the first instance and later commuted by the executive to that of life imprisonment without the possibility of parole. It is apparent under the Kenyan Laws the president has a constitutional and statutory discretion under the power of mercy to commute sentences or to authorise the release of a prisoner serving sentence without such decision being reviewed by the courts. It may be that life sentence without any possibility of early release like in the current case such a life sentence should be regarded per se as constituting in human or degrading treatment or punishment in Ar.25 (a) of the *Constitution*. The true position of the law is that in murder cases sentencing convicts must follow the trajectory outlined in the Muruatetu dictum. Similarly, in re-sentencing or review as contemplated in Art.50 (6) (a) & (b) of the *Constitution* if the matter is not remitted to the trial court to consider the issue, the duty of the reviewing court bear in mind the principles in the Court of Appel, 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".

10. In *Mokela v state* (135/11) [2011] ZASCA 166 the Supreme Court of South Africa held that;

> " it is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served".

11. This is the backdrop upon which the applicant's application must be evaluated and considered for appropriateness. Therefore, if the sentence is said to be manifestly excessive on the first limb of the totality principle, it would be necessary for the reviewing court in resentencing to look at the total criminality or culpability of the offender and how that sentence stands out in relation to other offenders in similar circumstances. It is that disconnection which the court must make an attempt to address. It follows from the observations as contended by the applicant aggravating and mitigation factors have a profound role to play in the sentencing scheme by the trial court. However, this is a case where in most if not all the hands of the trial court was tied by the legislature providing for a mandatory sentence of death. In consonant with the Art.50 (2) (p) of the *Constitution* due to the development of jurisprudence more so from the landmark decision by the Supreme Court on the case of Muruatetu (supra) the effect of which was that for the offence of murder punishable under section 204 of the penal code mandatory imposition of the death penalty is unconstitutional. The reasoning of the Supreme Court is helpful in that it now articulates some of the major reasons for the justification for a general

prohibition on the imposition of the death penalty against any convict in Kenya unless in the rarest occasions. There is no evidence that this was one such case capable of attracting the death penalty.

12. This situation in combination with the legal framework on the sentence regime in Kenya I take the liberty to exercise discretion in favour of the applicant under Art.50 (6) (a) & (b) of the *Constitution* consistent with the principles in the case of *Tom Martins v Republic*, Supreme Court Petition no. 3 of 2014 eKLR expressed as follows;

13.

> " a. Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window or opportunity for such a new trial is subject to two conditions. First, a person must have exhaust the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be new and compelling evidence.
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> b. "We are in agreement with the Court of Appeal that under Article 50(6) "new evidence" means "evidence which was not available at the trial and which, despite exercise of due diligence, could not have been availed at the trial, and "compelling evidence" implies evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict. A court considering whether evidence is new and compelling for a given case, must ascertain that it is, *prima facie*, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person."

14. For those reasons the commuted life imprisonment sentence be reviewed and substituted with a custodial sentence 30 years imprisonment from the date of arrest as captured from the record in compliance with section 333 (2) of the *CPC*. The committal warrants to prison be amended by the Deputy Registrar of the High Court in adherence to this order for the sentence to commence 27/7/2010.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7th DAY OF FEBRUARY, 2024

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R. NYAKUNDI

JUDGE