**Lochii v Republic (Miscellaneous Criminal Appeal E004 of 2021) [2024] KEHC 811 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 811 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT LODWAR**

**MISCELLANEOUS CRIMINAL APPEAL E004 OF 2021**

**RN NYAKUNDI, J**

**FEBRUARY 2, 2024**

**BETWEEN**

**JEREMIAH EKENO LOCHII ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being a review in sentence in Cr. Case no. 54 of 2011)***

**RULING**

1. The applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The petitioner underwent a full trial and the trial magistrate sentenced him to life imprisonment. Being aggrieved by the conviction and sentence, the applicant appealed the decision and the same was dismissed by this court. This court enforced the trial court's sentence. It is apparent the applicant did not prefer an appeal to the apex court of appeal. He therefore, elected to move this court by way of a notice of motion expressed under Art. 22(1), (3),19(3),26,26,27(1),28,29,50(2) (q), 160 (1), 159(1), 165(3) (b) of *the Constitution* of Kenya 2010 and Section 261 of the *CPC*. The motion is couched in the following terms:

    i. That, this court be pleased to determine my application for re-hearing of sentence imposed against me.

    ii. That, it is within the rules of law for the same to be considered.

    iii. That, this application is grounded upon the annexed affidavit.

2. The aforesaid affidavit on oath states as follows:

    1. That, I was tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offence Act* no.3 of 2006.

2. That, I humbly make this humble application in regard to the above mentioned matter in reliance on Article 165(3)(b) of *the constitution* which empowers this honorable court to handle applications of this nature.

3. That, I the appellant herein was not accorded a fair trial in sentencing by the trial court in contravention of Art. 50(2) (q) of *the constitution* and I rely on the case of Douglas Muthaura Ntoribi, Misc.App. No. 4 of 2015 at Meru High Court and in the case of John Nganga Gacheru & another in HCCR No. 31 of 2016 at Kiambu High Court.

4. That, I am the applicant herein further relying in the case of Francis Karioko Muruatetu & Another vs Republic (Supreme Court Petition No. 15 of 2015) that death penalty is unconstitutional thus seeking for appropriate sentence.

5. That, further grounds will be adduced at the hearing of this application.

6. That, all I have stated herein is true and correct to the best of my knowledge, information and belief.

3. The gist of this application is in the matter of re-hearing of sentence of life imprisonment imposed by the trial court and later affirmed by the High Court.

**Analysis and Determination**

**The law**

4. In Art. 50 (2) (p) & (q) of *the Constitution* that the accused person has the following rights.

5. (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 resentencing and (q) if convicted, to appeal to, or apply for review by a higher court as prescribed by law.

6. The jurisdiction on review is exercisable under Art. 50(6) (a) & (b) of the same Constitution expressed providing as follows;

7. 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 and (b) new and compelling evidence has become availed.

8. It is trite law that a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. (See Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011).

9. The jurisdiction of this court on re-sentencing follows from Art. 50(6) (a) & (b) of *the Constitution* as underpinned in the factual matrix of this notice of motion. In addition, Art. 50 (p) & (q) of *the Constitution* does apply in construing the predominant issue on re-sentencing. What is the court confronted with whether the minimum mandatory life sentence imposed by the trial court and as confirmed by the High Court can be a subject of review based on the above provisions of *the Constitution*? As would be seen shortly the law has since changed on this issue given the various jurisprudential pronouncements by the superior courts. The first criteria to be satisfied by the applicant

is one laid down by the court in The court in *Tom Martins vs Republic, Supreme Court Petition no. 3 of 2014* eKLR expressed as follows;

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.

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."

10. A competing version of the fundamental rule in Civil Law does entrench the requirements and safeguards to secure the court's review jurisdiction. The context of Art. 50 (6) (a) & (b) of *the Constitution* can borrow a leaf in the case of *Turbo Highway Eldoret Limited Vs Synergy Industrial Credit Limited (2016)* eKLR, *Rose Kaiza Vs. Angelo Mpanjuiza (2009)* eKLR where the Court of Appeal considered an application for review on the ground of new evidence as held that;

> "Application on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the material placed before it in accordance with the formalities of the law do prove the existence of the fact alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge, where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

11. On the flipside, it is my considered view that the question on minimum sentences is no longer lawful. With the advent of the 'Muruatetu case' courts are now inclined to considering the objectives of sentencing in totality.

12. The advent of the Supreme Court case occasioned a paradigm shift permitting the courts to look into the interpretation of mandatory minimums of sentencing provided by our statutes to enable sentencing take a trajectory of giving more weight to judicial discretion. As a consequence of this dicta the court provided guidelines applicable in a rehearing sentence for the conviction of a murder charge which Mutatis Mutandis in my view would be applicable to the current application notwithstanding the instruction note in Muruatetu II

a. The age of the offender.

b. Being a first offender.

c. Whether the offender pleaded guilty.

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.

13. The Muruatetu case and other recent decisions in the development of the law in this area of sentencing represents a significant contestation in the tug of war between the Judiciary and the Legislature over control of sentencing process. The Muruatetu case imposes some guidelines upon which mandatory minimum penalties for the trial court to deviate from for good reasons to pass a sentence outside the stipulated minimum. Following the queue from Muruatetu decision the court in Philip Mueke Maingi & 5 others vs Director of Public Prosecution & AG HC Petition no. E017 of 2021 made the following observation;

> That the mandatory minimum sentence under the *Sexual Offences Act* are unconstitutional. Right to human dignity where penal provisions prescribed mandatory minimum sentences without granting the trial court the discretion to determine the appropriate sentence. What were the guiding principles in determining what part of the judgment was the ratio decindi. What were the guiding principles in determining what part of the judgment was the obiter dictum.

14. The foregoing cases establish that the mandatory minimum sentences in no longer the norm but the exception. In considering the appropriate penalty to impose the trial magistrate or Judge need to consider as including the gravity of the offence, the character and record of the offender, mitigation and aggravating factors, factors that may have influenced the offender to design and the manner of execution of the offence and finally the possibility of reform and rehabilitation. It is obvious that the trial court never took into account the above guidelines in the sentencing judgment. It is also important to appreciate that the sentencing policy guidelines where not invoked towards aligning the final verdict for the offence against the applicant.

15. More significantly the criteria of imposing a life sentence by a trial court should be clearly set out having analyzed the spectrum of case law, objectives of sentencing in the judiciary policy 2023, the letter and spirit of the penal sanctions as legislated by parliament. As the law stands in Kenya now a sentence of life imprisonment is now the most severe sentence that the court can impose and it is in my judgment that one should not ever impose it unless in the rarest of the circumstances based on the offence which the offender has committed. In this respect I find the pronouncement in the comparative dicta in R vs Kehoe [2008]EWCA Crim 819; resonating well with the facts of this case 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 cases decided before the Criminal Justice Act 2003 came into effect no longer offer guidance on when a life sentence 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 killing of one drunk by another, at a time when her responsibility was diminished, and after she was provoked, can properly be said to be so 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".

16. Logically it's notable that the transformative jurisprudence in Kenya on life imprisonment has taken the approach and mandatory life imprisonment in unconstitutional. To that extent the threshold for imposition of a discretionary life sentence in the form of terminable sentence is now available in the scheme of sentencing of offenders in such category.

17. The sentencing objectives in Kenya have been captured in the Judiciary Sentencing Policy Guidelines at page 15 to be the following: -

    1) Retribution: to punish the offender for his/her criminal conduct in a just manner.

    2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    5) Community protection: to protect the community by incapacitating the offender.

    6) Denunciation: to communicate the community's condemnation of the criminal conduct.

18. The text in Art. 26 of *the Constitution* recognizes the right to life. At the Regional level The African Charter on Human and People's Rights places a high premium on the requirement of due process where the right to life is threatened it reads:

    "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

19. It must be stressed that the minimum mandatory sentence imposed upon the applicant deprived the sentencing trial court empowered discretion rendering him hostage from departing in giving effect to a sentence which takes into account particular circumstances of the case to justify departure. The learned author Kranostein and Freiberg pursuing consistency in an individualized sentencing framework remarked as following sentencing is founded upon two premises that are in perennial conflict individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all the circumstances of each particular case. The second hold that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentences as they attempt to meet the conflicting demands of each premise. In the comparative jurisprudence by the Constitutional court of South Africa in Dawood Vs Minister of Home Affairs, Salabia Vs Minister of Home Affairs, Thomas vs Minister of Home Affairs (2003 3 SA 936 CC) the court said;

    Discretion play a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factor relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature

to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision maker is possessed of expertise relevant to the decision to be made."

20. In this respect the rule of law as a component of Art. 10 of *the Constitution* is an ideal of fair and just governance which embraces both form and substance. It imposes standards of equality and due process. Once we perceive this canons of governance the imposition of life penalty rather than its non imposition for the Sexual Offences under section 8(1) as read with Section 8(3) of the Act would require special justification. Firstly, the Judges/Magistrate's discretion is completely limited and they are not allowed to set any punishments which are below the prescribed mandatory minimum provided in the Act. Being a retributive punishment one has to ask the question whether or not such sentences have actually helped in deterring offenders from committing defilement offences in Kenya.

21. From the brief discussion I am of the considered view that there is support in the law and new emerging jurisprudence to exercise review jurisdiction in favour of the applicant by setting aside the life imprisonment sentence by having substituted with a terminable term of 25 years imprisonment with effect from the date of arrest in consonant with section 333 (2) of the *CPC*

22. Orders accordingly.

**DATED AND SIGNED AT LODWAR THIS 2ND DAY OF FEBRUARY, 2024**

**In the presence of;**

Yusuf for the state

Appellant present

**.....**

**R. NYAKUNDI**

**JUDGE**