



**Hussein v Republic (Miscellaneous Criminal Appeal E002 of 2020)
[2024] KEHC 3228 (KLR) (4 April 2024) (Resentence)**

Neutral citation: [2024] KEHC 3228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E002 OF 2020
RN NYAKUNDI, J
APRIL 4, 2024**

BETWEEN

ANTHONY EKAI HUSSEIN APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for resentencing in criminal case
No. 292 of 2015 before Hon. JM Wekesa dated 3/8/2017)*

RESENTENCE

1. The applicant’s application received on 12th December, 2023 is seeking sentence review. The applicants was charged with the offence of gang defilement contrary to section 8(1) as read with section 9(1) of the *penal code*. The particulars of the offence were that on 6th August, 2015 at Nadut village in Turkana west sub-county within Turkana County while in association with others not before court, intentionally caused his penis to penetrate the vagina of Amina Omar a child aged 14 years. At the end of the trial, the appellant was convicted and sentenced to suffer death.
2. The appellant dissatisfied with the sentence and conviction, filed an appeal in this court; Lodwar High Court Appeal No. E007 of 2018, which appeal was dismissed and the sentence was upheld. The applicant is now approaching this court vide the instant application and he seeks review of the reviewed sentence of 15 years that he is currently serving on grounds that the time he spent in custody was not considered. He equally stated that the main reason he seeks for a resentencing is that he is sick and he has been in and out of hospital. That he has spent a substantial amount of his sentence in custody and as such he should be considered for a non-custodial sentence.



Analysis And Determination

3. I have considered the application and the grounds relied upon by the applicant. It is my considered opinion that the issue which I need to decide on is whether the instant application is merited.
4. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
 - a) Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
 - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
 - c) Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 - d) Protection of the community: - where the offender is likely to pose a threat to the community.
 - e) Offender's responsibility to third parties: - where there are people depending on the offender.
 - f) Children in conflict with the law: - non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
5. In the case of *Francis Karioko Muruatetu & Another v Republic*, Criminal Petition No. 15 OF 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”
6. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;
 - (a) 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-adaption of the offender;
 - (h) any other factor that the Court considers relevant.”
7. In sum, the Applicant does not wish to complete the sentence imposed on him. He wishes to be freed and would prefer it if the Court considered for a non-custodial sentence. In order to decide whether



- any of those are appropriate, the Court has to consider the seriousness of the offence. In this case, it was gang defilement contrary to section 8(1) as read with section 9(1) of the penal code.
8. The sentence prescribed in Section 10 of the Sexual Offences Act No. 3 of 2006 upon conviction is imprisonment for a term not less than fifteen (15) years but which may be enhanced to imprisonment for life.
 9. The aggravating factors weigh heavy; The Complainant was forcefully taken away from her home to Bush's house and defiled in turns. The complainant recognized their voices clearly. That the Applicant herein who was left to enjoy his turn felt pity for the complainant after he was done with her and he asked her to leave. He reportedly escorted her safely to her home.
 10. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The only time that this court can review a sentence imposed upon by a court is where such sentence was imposed by a subordinate court (as per section 362 of the Criminal Procedure Code).
 11. In Samuel Kamau Macharia & Another –v- KCB & 2 Others App. No. 2/2011, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter when it holds the opinion that it is without jurisdiction.
 12. The issue consideration given the decision in Lodwar criminal Appeal No.E007 of 2018, in which the appeal was dismissed is for the applicant to bring himself within the framework of Art. 50 (6) (a) & (b) of the constitution . The illuminating principles in Tom Martins Kibisu v R 2014eKLR are as relevant to this application before this court. Thus:
 - a. “Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of the 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 of opportunity for such a new trial is subject to two conditions. (emphasis mine) First, a person must have exhausted 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 time of 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”.
 13. There is no nexus from the facts of this application and the provisions of Art. 50 (6) (a) & (b) of the constitution for this court to give full considerations and remedies under the sentencing scheme as developed in the Kenyan criminal legal system. The burden of proof shifts to the Applicant to demonstrate existence of new and compelling evidence within the province of the constitutional



imperatives of Art. 50 (6) & (b). plainly speaking the impugned sentence falls within the guidelines in the case of *S v RO and Another* [2000](2)SACR.248 in which the court expressed itself as follows:

Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interest of society with different nuance, prevention, retribution and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions”

14. In coming to an appropriate sentence, there is no cogent evidence as to the health or deterioration of his condition to raise the bar to a level of substantial and exceptional circumstances to earn the mercy of this court for a non-custodial sentence.
15. It is therefore my considered opinion that the sentence imposed on the Applicant was reasonable given the circumstances of the case. The Applicant can only benefit from the provisions of section 333(2) of the *CPC*. The sentence then shall run from 7th August, 2015, when he was arrested. To that minimal extent the committal warrant to prison be amended to reflect the credit period spend in remand custody.
16. It is without doubt and a painful reality that this application on other factors lacks merit under the review jurisdiction. It is therefore dismissed on those other grounds in its entirety.
17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY APRIL, 2024.

In the presence of;

Mr. Onkoba for the state

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R. NYAKUNDI

JUDGE

