Munyilu v Director of Public Prosecution (Criminal Petition E012 of 2022) [2024] KEHC 3817 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL PETITION E012 OF 2022

FR OLEL, J

APRIL 11, 2024

BETWEEN

DANIEL MUTINDA MUNYILU ..... APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

RULING

A. Introduction

1. The petitioner was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006 by Senior Resident Magistrate (Hon T Odera) in Mavoko CMCR (SOA) No 12 of 2013 and was sentenced to serve 20 years imprisonment. He appealed against the said conviction and sentence vide Machakos HCCR Appeal No 07 of 2015, which appeal was dismissed.

2. The applicant did file this application/petition under provision of Article 22, 23, 27(1),(2), 52(2)(q), and 165 of the *Constitution* of Kenya and seeks that this Honorable court be pleased to re consider the mandatory minimum sentence passed and be pleased to resentence him to a lenient sentence, premised on rehabilitate sentence rather than retributive punishment. The application was lodged purely on the basis on the legality of the mandatory nature of sentencing in line with the court of Appeal decision in *Evans Wanjala Wanyonyi v Republic*; *Cristorpher Ochieng v Republic* (2018) eKLR, Kisumu CR Appeal No 202 of 2011 & *Jared Koita Injiri v Republic*, Kisumu CR Appeal No 93 of 2014. where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.

3. The Applicant further submitted that in the Philip Mueke petition, Justice G.V. Odunga had also declared mandatory minimum sentence to be unconstitutional and further found that the High court was at liberty to order for resentencing in appropriate cases. The petitioner further submitted that he has spent 10 years in custody and during this period he had been able to appreciate the consequences

of his action and vowed never to repeat the same mistake or to be of wayward misconduct again. Further he had learnt life skills and undergone spiritual self-nourishment through different courses taken while in prison, which would serve him well if released. Reliance was also placed in Antony Mwema Mutisya, Machakos Misc Cr App No 60 of 2017, where Justice G.V. Odunga emphasized on need for rehabilitative sentence and need for the court to call for pre-sentencing report and victim impact statement before resentencing.

4. The state opposed this petition and Mr Magare from the ODPP did state that though re sentencing was allowed, the court had to consider each case on its own merit and particularly look at the facts of the case before undertaking the said re sentencing exercise.

C. Analysis of Law

5. Nature and scope of resentencing Jurisdiction.

6. It bears repeating that, the High Court has the mandate under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the *Constitution*. A further leapfrog development; under Article 50(2)(p) of the *Constitution* 2010:

> 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

7. In Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 Others, Application No 2 of 2011, the supreme court did pronounce itself that:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court 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..."

8. The Court of Appeal in the case of *William Okungu Kittiny v R* (2018) eKLR stated:

> " 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".

9. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal grounds. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.

10. A similar position was taken by the High Court, in *Stephen Kimathi Mutunga v Republic* (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the *Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

11. Finally In *Michael Kathewa Laichena & another v Republic* (2018) eKLR Majanja J. stated:

> " 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".

C. Sentencing

12. The appellant was sentenced to 20 years imprisonment as provided for under section 8(1) as read with section 8(3) of the *Sexual Offences Act* on 25th September 2014, for defiling a fourteen (14) year old girl, which incident occurred on 18th September 2013. The sentence as provided under the *Sexual Offences Act* No 3 of 2006 was mandatory and the court did not have the discretion to vary the same. The applicant relied on the petition of *Philip Mueke & 5 others* and other citations, *Evans Wanjala Wanyonyi v Republic*; *Cristorpher Ochieng v Republic* (2018) eKLR, Kisumu CR Appeal No 202 of 2011 & *Jared Koita Injiri v Republic*, Kisumu CR Appeal No 93 of 2014, which held that mandatory sentence was unlawful, to convince this court that jurisprudence regarding mandatory sentencing had changed and thus prayed for a more balanced and fairer sentence.

13. The petitioner further prayed for remorse and submitted that he had learnt from his incarceration and was remorseful for the harm occasioned to the victim. He was of the opinion that the time served was adequate and he should be allowed to reintegrate back into the community as he had suffered adequate punishment for the offence committed.

14. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Mahareshtra* at paragraph 70-71 where the court held the following on sentencing:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

15. Also see also *Francis Karioko Muruatetu & another v Republic* (*supra*) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

D. Determination

16. In the circumstances of this case, the court does not have enough material before it to make an appropriate decision on re sentencing. The crime was committed in September 2013 and it would be

appropriate to have a social inquiry report in the file, which can guide the court on the appropriate re sentencing parameters or otherwise. I do therefore exercise my discretion and allow the applicants' application for resentencing but direct that he be referred back to Mavoko law court for re sentencing.

17. The Chief Magistrate-Mavoko shall take fresh evidence of the applicant's mitigation and call for a fresh social inquiry report from the probation department before re sentencing the applicant.

18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF APRIL 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 11th day of April, 2024.

In the presence of;

Petitioner present from Machakos prison

Ms Otulo for Respondent

Sam Court Assistant