J W K v Republic (Criminal Petition E007 of 2021)
[2024] KEHC 4953 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E007 OF 2021

JRA WANANDA, J

MAY 15, 2024

BETWEEN

J W K ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Application before Court is the Petitioner's undated Notice of Motion filed on 7/01/2021 and which seeks that this Court reviews the prison sentence imposed upon him by the trial Court.

2. The background of the matter is that the Petitioner was charged in Eldoret Magistrate's Court Criminal Case No. 2254 of 2011 with two counts of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 9/06/2011, at [particulars withheld] in Eldoret West, within the then Rift Valley Province, he defiled his two daughters, aged 11 and 10 years, respectively. By the Judgment delivered on 16/03/2012, he was convicted and subsequently sentenced to serve 25 years in prison on each count, to run concurrently.

3. The Petitioner has stated that he filed an Appeal, namely, Eldoret High Court Criminal Appeal No. 58 of 2021 but which he withdrew. He stated further that he is a first offender and begs for leniency, that he is remorseful, repentant and reformed, and that he is an old man with deteriorating health conditions He relied on the now famous case of *Francis Karoki Muruatetu & Another*.

4. In his written Submissions, the Petitioner introduced a new ground, namely, that before his conviction and sentence, he had been remanded in custody for almost 1 year but that upon sentence, such period was not included. He therefore prayed that the Court addresses that omission by invoking Section 333(2) of the *Criminal Procedure Code*.

5. The State (Respondent) did not file a formal Response to the Application but Prosecution Counsel, Ms. Okok opted to make oral submissions. In her address, made in the Kiswahili language, she

submitted that the Petitioner has relied on the case of *Muruatetu* yet upon being convicted, he was allowed mitigation which he did. She added that Section 20(1) of the *Sexual Offences Act* stipulates a sentence of life imprisonment for incest but the Petitioner was sentenced to 25 years imprisonment, that as the father of the two children, he breached the trust they had on him and that the sentence was fair, valid and lawful.

6. The issue for determination is "whether the Court should review with the sentence imposed by the trial Court".

7. Section 20(1) of the *Sexual Offences Act* under which the Petitioner was charged and convicted for defiling the two minors provides as follows:

> " Any male person who commits an indecent act or an act which caused penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.
>
> Provided that if it is alleged in the information or charge and proved that the female person is under the age of eighteen years the accused person should be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person".

8. In view of the foregoing, it is evident that although the Petitioner has cited the *Muruatetu decision (Francis Karioko Muruatetu & Another v Republic* [2017] eKLR), that decision is not applicable to his situation. This is because *Muruatetu* was to the effect that the minimum-maximum sentencing provisions in cases of murder are unconstitutional insofar as they infringe on the inherent right of accused persons to mitigate as envisaged under, among other provisions of the law, Article 50 of the *Constitution*. The Muruatetu logic seems to have now been tacitly extended to cases of sexual offences and also robbery with violence which are similarly constrained by similar maximum-minimum sentencing provisions.

9. In this case, and as correctly observed by Prosecution Counsel, Ms Okok, although Section 20(1) of the *Sexual Offences Act* stipulates a sentence of up to life imprisonment for incest, the Petitioner was sentenced to the lesser penalty of 20 years imprisonment. The Petitioner was also given the opportunity to mitigate which he did. There is therefore no issue of the trial Court having meted out any mandatory minimum sentence or the Petitioner having been denied the opportunity to mitigate as was the case in *Muruatetu*.

10. Amongst the provisions of law cited by the Petitioner, the only one that may possibly be capable of supporting the instant Application is Section 362 and 364 of the *Criminal Procedure Code* on the revisionary powers of the High Court to call for the proceedings of a subordinate court and review orders made therein. That jurisdiction is supervisory and emanates from Article 165(6) and (7) of the *Constitution* which is premised in the following terms:

> " 6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred

to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

11. Section 362 of the *Criminal Procedure Code*, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
>
> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

12. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

13. The revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR as follows:

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

14. The operative phrase used by Odunga J above is therefore "to correct manifest irregularities or illegalities".

15. On his part, Nyakundi J, in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles that should guide a Court in exercising its reversionary jurisdiction as follows:

a) Where the decision is grossly erroneous;

b) Where there is no compliance with the provisions of the law;

c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

d) Where the material evidence on the parties is not considered; and

e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

16. In this case, and as already stated, although Section 20(1) of the *Sexual Offences Act* stipulates a maximum sentence of life imprisonment for incest, the Petitioner was sentenced to the lesser penalty of 20 years imprisonment after hearing the Petitioner's mitigation. The sentence imposed was therefore clearly within the powers of the trial Magistrate and was accordingly, lawful.

17. Regarding the invocation of reversionary powers of the High Court, in the same case of *Joseph Nduvi Mbuvi v Republic* (*supra*), Odunga J stated further as follows:

> " 14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. ....."

18. It is therefore clear that the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions. In this case, it has not been demonstrated in any way or even alleged that there were any manifest "irregularities" or "illegalities" or even "arbitrariness" or any "glaring acts or omissions" which this High Court should remedy. The "correctness, legality or propriety" of the sentence has also not been questioned. It has also not been denied that the offence was despicable and an extremely serious one that must be severely punished. This portion of the Application is therefore founded on the basis of sympathy and nothing else and must fail.

19. On the issue of whether, in meting out sentence, the trial Court considered the period spent by the Petitioner in remand custody, I note that the trial Magistrate did not mention whether he took the same into consideration as required by law. In regard thereto, Section 333(2) of the *Criminal Procedure Code* provides as follows:

> " (2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

20. On the above provision, the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, stated as follows:

> " By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

21. The *Judiciary Sentencing Policy Guidelines [2014]* also provides guidance as follows:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court

must take into account the period in which the offender was held in custody during the trial."

22. From the record before me, I gather that the Petitioner was arraigned on 23/06/2011 when he took plea and there is no evidence that he applied for bail at any time during the trial. He was then sentenced on 26/03/2012. The total period that the Petitioner spent in custody between arraignment and sentencing is therefore about 9 months. This period ought to be therefore factored in relation to the 25 years prison sentence imposed.

Final Order

23. In the end, I make the following final Orders:

    i. I decline to revise or review the sentence of 25 years imprisonment.

    ii. The period that the Petitioner spent in custody between the date of arraignment and the date of sentencing shall be subtracted in the computation of the sentence of 25 years imprisonment.

    iii. For avoidance of doubt therefore, the sentence or prison term to be served by the Petitioner shall be computed as from the date of arraignment, namely, 23/06/2011.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms Limo State Counsel

Petitioner/Applicant in person