Makenzie v Republic (Miscellaneous Criminal Application 178 of 2019) [2024] KEHC 5053 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5053 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION 178 OF 2019

JRA WANANDA, J

MAY 15, 2024

BETWEEN

ELIAS NYONGESA MAKENZIE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Application herein seeks setting aside of a life imprisonment sentence and therefore, re-sentencing.

2. The background to the matter is that the Applicant was charged in Eldoret Chief Magistrates Court Criminal Case No. 610 of 2011 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on 4/02/2011, at Sosiani Village, Sosiani Location in Uasin Gishu District, he defiled a 7 years old girl. He was convicted and sentenced to serve life imprisonment.

3. Aggrieved by the sentence and conviction, the Appellant lodged an appeal, namely, Eldoret High Court Criminal Appeal No. 201 of 2011 against both conviction and sentence. In the Judgment delivered on 30/10/2014 by G.W. Ngenye-Macharia J (as she then was), the Appeal was dismissed in its entirety and the conviction and life imprisonment sentence affirmed.

4. Undeterred, the Petitioner lodged a second appeal against both conviction and sentence at the Court of Appeal, namely, Eldoret Criminal Appeal No. 90 of 2016. This, too, was dismissed in its entirety in the Judgment delivered on 31/05/2018.

5. The Applicant has now returned to this Court with the present Application, the Notice of Motion dated 31/07/2019 seeking re-sentencing. He had another Application, namely, Eldoret High Court Criminal Petition No. 9 of 2018 but which he has now moved to withdraw.

6. The Applicant filed his undated written Submissions on an unspecified date and the Respondent (State), through Senior Prosecution Counsel Emma Okok, filed hers on 8/12/2023.

Applicant's Submissions

7. The Petitioner reiterated the matters stated in his Application and also submitted that this Court has the discretion in sentencing, that the Court should treat him as a first offender and find that he is a young man whose life is greatly affected by the imprisonment and that while in prison he has taken full advantage of the rehabilitative programmes offered as is evident in the attached documents. He added that the essential rationale for sentencing is rehabilitation, that he is now 38 years and he was convicted at the age of 27 years, that he is remorseful and humbly requests for another chance in life since before being incarcerated, he had a young family. He also cited several authorities.

Respondent's Submissions

8. Learned Counsel for the State submitted that life imprisonment is the minimum sentence provided for by law for an accused person who has been charged with defiling a child below the age of 11 years. She however conceded that recent jurisprudence reveals a trend whereby Courts are now moving away from imposing the minimum mandatory sentences prescribed under the *Sexual Offences Act* on the ground that the same are unconstitutional. She added that in the case of *Philip Mueke Maingi & 5 Others vs the Director of Public Prosecutions and the Attorney General* (High Court of Kenya at Machakos Petition No. E071 of2021, faced with the same question, the Court gave the following orders:

    i. To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

    ii. Taking cue from the decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

    iii. Save for the foregoing, the other reliefs are declined since this Court cannot grant a blanket order for resentencing in the manner sought.

9. Counsel submitted that from the foregoing, it is evident that each case should be determined on its own merits during resentence hearing, that looking at the circumstances of this case, the complainant was 7 years old at the time of the time of the incident, that the Applicant was their shamba boy and took advantage of the fact that the complainant's mother was away and defiled the complainant, that the Applicant was an adult and abused the trust bestowed upon him by the society and instead of protecting the complainant, turned out to be her tormentor and that the incident caused the complainant psychological trauma and distress. She urged that retribution and deterrence are some of the objectives of sentencing, that taking into account the evidence adduced by the prosecution and the circumstances of the case, the life imprisonment meted out on the Applicant was a sufficient and deterrent sentence and urged the Court not to interfere with the same.

Determination

10. The issue that arises for determination is "whether this Court should review the sentence of life imprisonment".

11. Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* under which the Applicant was charged provides as follows:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement."
>
> 8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

12. It is therefore evident that the life imprisonment sentence imposed on the Applicant was meted out as the mandatory and only sentence available under Section 8(2) above. In regard thereto, one cannot discuss the issue of mandatory sentences in Kenya without mentioning the now famous Supreme Court case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (commonly referred to as Muruatetu 1). In *Muruatetu*, the Supreme Court declared mandatory minimum and maximum sentences unconstitutional for the reason that they deprive the Courts of their constitutional mandate of exercising discretion in determining the sentences to be imposed upon convicts in criminal cases.

13. It had been interpreted by many that Muruatetu was authority to the effect that, just like in cases of murder, those who were convicted of sexual offences and whose sentences were imposed on the basis that the trial Courts had no discretion but to impose the stipulated mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

14. However, in *Francis Kariuki Muruatetu & Another vs Republic: Katiba Institute & 5 Others* (Amicus Curiae) (2021) Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as Muruatetu 2), the Supreme Court subsequently clarified that its directions given in *Muruatetu (1)* regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also *Juma Abdalla v Republic*, Court of Appeal Criminal Appeal No. 44 of 2018 (2022) KECA 1054 (KLR) (7 October 2022).

15. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained to impose the stipulated sentences if the circumstances do not demand it. For the above proposition, I refer to the Court of Appeal decision in *Joshua Gichuki Mwangi Mwangi v R*, Criminal Appeal No. 84 of 2015, Nyeri in which the Court quoted its earlier decision in *Dismas Wafula Kilwake v Republic* [2019] eKLR and stated as follows:

> "..... Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences

is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing ....."

16. Further, there is also emerging jurisprudence questioning the constitutionality of life imprisonment. In the case of *Julius Kitsao Manyeso vs Republic* – Criminal Appeal No. 12 of 2021, the Court of Appeal expressed itself as follows;

> " We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi vs Rep* [2019] eKLR and *Jared Koita Injiri vs Republic* Kisumu Crim. App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos.66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

17. In the said case of *Julius Kitsao Manyeso* (supra), after finding that the life sentence imposed upon the Appellant was unconstitutional, the Court of Appeal went to state as follows:

> " The appellant also did not say anything in mitigation after conviction by the trial court, which he attributes to his young age at the time. We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

18. As aforesaid, the Court of Appeal in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided under the *Sexual Offences Act* and held that Section 8 of the *Sexual Offences Act* ought to be interpreted in a manner that does not take away the discretion of the Court in sentencing. It is therefore now trite law that a mandatory minimum sentence is unconstitutional and an appellate Court or revisionary Court is entitled to interfere with it.

19. The upshot of the foregoing is that the higher Courts having now released Courts from the yoke of being confined to imposing mandatory minimum and maximum sentences without discretion and

the higher Courts having also now outlawed the imposing of the life sentence, I find that this Court has the mandate to interfere, in appropriate cases, with sentences imposed in that manner. As such, this Court would have jurisdiction to resentence where an offender was convicted and sentence to a compulsory minimum sentence.

20. However, in this case, there is another angle. It is not in doubt that the Applicant was convicted and sentenced by the Magistrate's Court. He appealed to this High Court against both conviction and sentence and thereafter to the Court of Appeal where conviction and the life sentence was affirmed. In delivering its Judgment delivered on 31/05/2018, this is what the Court of Appeal stated:

> " 20. ..... On sentence, the appellant was sentenced to life imprisonment which was the sentence provided under Section 8(2) of the *Sexual Offences Act*. The Appellant has not raised any issue before us regarding the legality of this sentence. Accordingly, we find no substance in this Appeal and do dismiss it in its entirety"

21. From the foregoing, it is evident that in its Judgment, the Court of Appeal dealt with the issue of life sentence imposed on the Applicant, considered the circumstances and still confirmed the sentence. What the Applicant is therefore inviting this Court to do is to interfere with the sentence already affirmed by the Court of Appeal, a higher Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of the Court of Appeal. As the Applicant exercised his right of appeal to the Court of Appeal on the issue of sentence and upon which the Court of Appeal pronounced itself, this Court is now functus officio. This Court cannot once again entertain an Application for revision of sentence with respect to the same matter. Consequently, I reach the conclusion that the Applicant cannot, in the circumstances of this case, benefit from the Muruatetu decision.

22. On this point, I cite the decision of Justice (Prof.) Joel Ngugi (as he then was) in *John Kagunda Kariuki vs Republic* [2019] eKLR where he held as follows:

> " 8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision in Dismas Wafula Kilwake does not operate retroactively. This was a decision given in the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences .....
>
> 9. To reiterate, only prisoners who had been sentenced to death pursuant to mandatory provisions of the law are entitled to new sentence hearings. For all others, they are entitled to urge the new decisional law in their appeals in a bid to get lower sentences and no more. They cannot bring new applications for re-sentencing.
>
> 10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence

imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....".

23. Further, in the case of *Kenya Hotel Properties Limited vs. Attorney General & 5 Others* (2020) eKLR, the Court of Appeal expressed itself as hereunder:

> "Despite several declarations of finality made by various Judges of the High Court and benches of this Court, the matter appears to have an uncanny capacity for reincarnation. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the *Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of the *Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere. We think the Supreme Court in the S.K MACHARIA case captured the essence of the need for courts to respect and stay within jurisdictional tethers and constraints..."

24. I am persuaded by the reasoning in the above cases. The upshot of the foregoing is that this Court lacks the jurisdiction to entertain the present Application.

25. In the premises, the Application is dismissed.

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

WANANDA J. R. ANURO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered in the Presence of:

Ms Limo for the State

Applicant in person