Macharia v Republic (Criminal Miscellaneous Application E001 of 2023) [2024] KEHC 5092 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5092 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E001 OF 2023

PN GICHOHI, J

MAY 14, 2024

BETWEEN

SAMUEL MACHARIA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Samuel Macharia(hereafter referred to as the Applicant) was convicted for the offence of Attempted Defilement contrary to Section 9 (1) as read with Section (2) of the *Sexual Offence Act* and sentenced to 10 years imprisonment in Nakuru Chief Magistrate's Court S.O No. 31 of 2020.

2. He has now come before this Court seeking re-sentence on the ground that the sentence was based on minimum mandatory sentence provided for under the Act and that his mitigation was not considered by the trial court thus violating his rights to fair trial.

3. Citing the Supreme Court decision in Francis Karioko Muruatetu & another v Republic Petition No. 15 of 2015 , he urged the Court to pass an appropriate sentence. He further relied on several cases including the case of *Philip Mueke Maingi and others v Republic [2022]*eKLR to seek resentence and effectively reduction of the sentence.

4. In his submissions filed on 19th June 2023, the Applicant revisited the evidence before the trial court attacking the merit of the case leading to the conviction. He submitted that several witnesses did not testify and urged the Court to consider that he was a boy child who was a victim of circumstances. Lastly, he termed the sentence as harsh and therefore urged the Court to set aside or reduce the sentence.

5. In response, the Respondent filed on 16/01/2024 its submissions dated 27/11/2023. It was submitted that there is no known statute declaring the said sentence unconstitutional. That what has been declared unconstitutional is the mandatory nature of the sentences but where the court deems fit, mandatory sentences are still available and can be issued by the trial court.

6. Further, it was submitted that according to the evidence before the trail court, the Applicant had already made the complainant lie on the bed and undressed her. That as per the words of the trial court, the Applicant's actions indicated that he was already past preparation stage and would have actualised his intention had his wife not arrived on time. In the circumstances, it was submitted that these were aggravating factors to the offence.

7. Lastly, it was submitted that the Applicant did not demonstrate how his right to fair trial was violated. In conclusion, this Court was urged not to interfere with the sentence.

Determination

8. This Court has heard the parties and the case law cited by the Applicant. To start with, this is not a petition of appeal and an attack on merits or demerits of the evidence leading to conviction cannot be advanced in this petition for resentencing.

9. What is discerned here is that the Applicant is aggrieved by sentence on the basis that his mitigation was not considered and that the sentence was grounded on mandatory minimum sentence.

10. The Court however has looked at the lower court file. In his mitigation, the Applicant he had told the court:-

> "I pray if found guilty, I be sentenced leniently. I pray time spent in custody be considered."

11. In sentencing, the trial court stated:-

> "I have considered the offence committed, mitigation by the accused and the contents of the presentence report. The offence in question is quite rampant in this court's area of jurisdiction.
>
> The age of the subject, circumstances surrounding the incident. Contents of the medical report duly noted. In summary, the mitigation and aggravating factors have been considered.
>
> This being a sexual offence against a child, custodial sentence will be most appropriate. I hereby sentence the accused to serve imprisonment for a term of 10 years. The sentence would run from 20/2/2020 when the accused was first arraigned in court."

12. On mandatory sentence, Supreme Court in Francis Karioko *Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015* which concluded that the mandatory death sentence prescribed for the offence of murder unconstitutional.

13. Referring to that decision, the Court of Appeal in *Dismas Wafula Kilwake v Republic [2019]* eKLR held:-

> "In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing."

14. That means that the courts can go below the mandatory minimum sentence even in sexual offences. There is nothing to how that the Applicant's rights to fair trial were violated by the said court.

15. The trial court's record reveals that the Applicant did mitigate. The court considered that mitigation and that that the Applicant was a first offender. The court also considered the age of the subject, the circumstances under which the offence was committed, the aggravating factors of this offence before finding that a custodial sentence was appropriate.

16. There is nothing to show that the trial court's hands were tied by the mandatory minimum sentence. There was no reference to the minimum sentence provided for under the Act. In the circumstances therefore, the sentence mete on the Applicant is considered as discretionary.

17. For the appellate court to interfere with the sentence, it has to bear in mind the Court of Appeal decision in *Bernard Kimani Gacheru vs Republic [2002]* eKLRt where it held:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

18. In this case, there is nothing to show that the sentence was manifestly excessive or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. There is no reason to interfere with the sentence.

19. It is apparent compliance with Section 333 (2) of the *Civil Procedure Code*, the trial Court directed that the sentence would run from 20/02/2020 when the Applicant herein was first arraigned in court.

20. The Applicant was arrested on 19/02/2020, placed in custody and arraigned in court for plea on 20/02/2020. The sentence ought to run from the date of arrest.

21. In the circumstances:-

    1. The application for resentence is dismissed for lack of merit.

    2. The sentence is affirmed and will run from the date of arrest being 19/02/2020.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Samuel Macharia -Applicant

Mr. Kihara for Respondent

Ruto- Court Assistant