Gicheru v Republic (Miscellaneous Criminal Application E306 of 2022) [2024] KEHC 6904 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CRIMINAL APPLICATION E306 OF 2022

K KIMONDO, J

JUNE 11, 2024

BETWEEN

DAVID KAMAU GICHERU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant prays for resentencing. The history of the litigation is relevant and central to determination of this matter: On 10th February 2012, the applicant was convicted by the lower court in Nairobi Chief Magistrates Criminal Case No. 744 of 2010 for defilement of a girl of below 11 years contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act*. He was sentenced to life imprisonment.

2. He then filed a petition of appeal at the High Court being Nairobi Criminal Appeal 53 of 2012 challenging both the conviction and sentence. On 17th July 2014 Mbogholi Msagha J (as he then was) dismissed the entire appeal.

3. Undeterred, he lodged a second and final appeal to the Court of Appeal in Criminal Appeal No. 68 of 2015. It was equally dismissed on 19th May 2016.

4. The applicant has now returned to the High Court in this Miscellaneous Criminal Application seeking resentencing. The foundation of his plea is the landmark decision of the Supreme Court of Kenya in *Francis Karioko Muruatetu & another v Republic*, Petition No 15 of 2015 (consolidated with Petition 16 of 2015) [2017] eKLR, which held that the mandatory nature of the death sentence was unconstitutional. This opened a pathway for re-sentencing by the High Court.

5. He also relies on among others, *Philip Mueke Maingi & 5 others v Republic*, High Court Machakos Petition E017 of 2021 [2022] KEHC 13118 (KLR) and *Edwin Wachira & 9 others v Republic*, High

Court Mombasa Petition 97 of 2021 for the proposition that persons convicted for sexual offences may approach the High Court for mitigation and re-sentencing.

6. The petition is fervently opposed by the Director of Public Prosecutions (hereafter the DPP) through submissions dated 27th January 2023. The pith of the objection is that the High Court is no longer seized of jurisdiction in the matter.

7. During the hearing on 6th May 2024, the applicant informed me that he is now 44 years, has reformed in prison and undertaken various courses that have prepared him well to rejoin the society or to gain a fresh start in life. He added that the life sentence is draconian and unjust. The DPP on the other hand relied entirely on the submissions aforementioned and prayed for dismissal.

8. I take the following view of the matter. The entire application must fail in limine for the following main reasons. Firstly, and by dint of the principle of *stare decisis*, the High Court is bound by the decision and directions of the Supreme Court in Muruatetu's case [*supra*]. Article 163 (7) of the *Constitution* expressly provides that "all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court".

9. On 6th July 2021, the Supreme Court issued further directions on the Muruatetu Case [*supra*]. It is instructive that those directions were prompted by the disharmony and haphazard manner in which the lower and superior courts had proceeded with resentencing. I will cite *in extenso* paragraphs 9 to 11 of the directions-

> 9. In addition, there is no harmony in the revised sentences by the Courts. The sentences which have been imposed after re-sentencing hearing range from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.
>
> 10. It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, in that paragraph, we stated categorically that;
>
> "[48] Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right".
>
> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

11. The *ratio decidendi* in the decision was summarized as follows;

> "69. Consequently, we find that Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.

10. The Supreme Court in paragraph 14 of the directions was emphatic that-

> It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court. [underlining added]

11. Secondly, the decisions by the High Court in *Philip Mueke Maingi & 5 others v Republic* [*supra*] and *Edwin Wachira & 9 others v Republic* [*supra*] are very persuasive. To these I would add *Baragoi Rotiken v Republic*, High Court, Narok, Criminal Application E014 of 2021 [2022] eKLR. But they are all decisions by courts of concurrent jurisdiction and thus not binding.

12. Thirdly, there is no doubt that the applicant has exhausted his rights of appeal as detailed in the opening paragraphs of this ruling. But it bears repeating that his two appeals were on both conviction and the sentence.

13. It then follows that by dint of the binding directions by the Supreme Court; and, in the absence of a clear re-sentencing framework for minimum or mandatory sentences under the *Sexual Offences Act*, the High Court is not seized, at the moment, of jurisdiction to entertain the present proceedings. Jurisdiction is everything; and without it, a court must lay down its tools. *Motor Vessel Lilian "S" v Caltex oil* [1989] KLR 1.

14. The upshot is that the entire chamber summons is on a procedural and legal quicksand and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

Applicant.

Mr. Mutuma for the respondent instructed by the Office of the Director of Public Prosecutions.

Mr. Edwin Ombuna, Court Assistant.