Githinji v Director of Public Prosecution (Criminal Miscellaneous Application E104 of 2023) [2024] KEHC 6715 (KLR) (6 June 2024) (Resentence)

Neutral citation: [2024] KEHC 6715 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E104 OF 2023

HM NYAGA, J

JUNE 6, 2024

BETWEEN

JOEL IRUNGU GITHINJI ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

RESENTENCE

1. The Applicant, Joel Irungu Githinji through an undated application moved this Court for sentence rehearing.

2. The facts as contained in the application indicate that the Applicant was charged, convicted and sentenced to life imprisonment for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Nakuru CM Court Criminal Case No. 599 of 2006. Thereafter, he lodged an appeal at Nakuru High Court through Criminal Appeal No. 30 of 2008 but it was dismissed.

3. The Applicant now seeks a review of the sentence imposed by the CM Court. He argues that this Court under Article 165(3) (b) of *the Constitution* has jurisdiction to hear and determine this matter and that the Court of Appeal at Nyeri in *Mwangi vs Republic, Criminal Appeal No. 84 Of 2015*[2022] KECA 1106(KLR)(23 SEPTEMBER 2022)(Judgement) declared that court discretion in sentencing should not be fettered by mandatory minimum sentencing provisions and that by imposing minimum mandatory sentences in *Sexual Offences Act* goes against Article 160 and 159(2)(a) and (c) of *the Constitution*.

4. The Respondent did not file any response to the application.

5. The matter was canvassed through written submissions.

Applicant's Submissions

6. The Applicant submitted that the our jurisdiction appreciates the importance of judges and magistrates exercising their discretion in sentencing depending on the circumstances of the case and any internal and external factor that they may deem fit to consider while sentencing. In support of this proposition, he relied on the following cases;

    a. Dismas Wafula Kilwake vs R [2018] eKLR,

    b. Evans Wanjala Wanyonyi, HCCR Appeal No. 174 Of 2015

    c. Paul Ngei vs Republic [2019] eKLR,

    d. Sammy Wanderi Kugotha vs Republic [2021] eKLR.

    e. Philip Mueke *Maingi & 5 others vs Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR)

    f. Guyo Jarson Guyo vs. Republic, Petition No. 6 of 2018, (2018) eKLR

    g. Paul Odhiambo Mbola v Republic [2020] eKLR

7. On sentencing, the Applicant submitted that he is remorseful and was a first time offender. He submitted that he has reconciled with the complainant and he is now a law abiding citizen. He urged this court to consider that at the time of arrest he was only 22 years old and now he is 39 years old, is unmarried and an orphan. He prayed that this court gives him a second chance for him to go, mend his ways and find a family. He stated that while in custody he embraced rehabilitative programs and some of the achievements attained include Certificate in carpentry and joinery grades iii, ii and I, Certificate in football coaching and Certificate in beads.

8. He posited that with the above knowledge, experience and information acquired he is ready to be productive in building our nation. He prayed that this court do order that he serves the remainder of the sentence that it will impose under probation or community service order.

9. He further submitted that this court should take into account the time spent under Section 333(2) of the Criminal Procedure Code. To buttress his submissions, he relied on the case of Ahamad Abolfathi Mohammed & another vs Republic [2018] eKLR.

Respondent's submissions

10. The Respondent submitted that life sentence is the sentence provided under Section 8(2) of the Sexual offence Act ,however, recent jurisprudence from this court and Court of Appeal reveal a trend whereby courts are now moving away from imposing the minimum mandatory sentences provided under *Sexual offences Act*. To this end, the respondent cited the case of Philip Mueke *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

11. The respondent argued that each case should be determined on its own merit during resentence rehearing. The respondent posited that in the instant case the Applicant lured an eleven years old girl into his house and defiled her. That he took advantage of a vulnerable person and abused the trust bestowed upon him by the society as an adult by failing to protect the complainant and resultantly, his actions caused psychological torture to the complainant and scarred her for life.

12. The respondent argued that taking into account the prosecution's evidence, age of the complainant and circumstances of the case, the sentence of life imprisonment meted against the applicant was sufficient and deterrent and urged this court not to interfere with it.

13. Citing the case of Evans Nyamari Ayako Vs Republic Kisumu Criminal Appeal Number 22 of 2018, the Respondent urged this court to translate the said sentence of life imprisonment to 30 years imprisonment.

Analysis & Determination

14. The only issue that arises for determination is whether the Applicant's plea for resentencing is merited.

15. In this case the applicant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The said provisions states:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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."

16. The Applicant was sentenced to serve life imprisonment.

17. The issue of mandatory sentences was addressed in Francis Karioko Muruatetu & others vs Republic (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

> " 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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of *the Constitution*; an absolute right."

18. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

> " 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.
>
> ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

iv. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code as well as those of the victim before deciding on the suitable sentence.

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –

a. Age of the offender

b. Being a first offender

c. Whether the offender pleaded guilty.

d. Character and record of the offender

e. Commission of the offence in respect of gender based violence.

f. The manner in which the offence was committed on the victim.

g. The physical and psychological effect of the offence on the victim's family.

h. Remorsefulness of the offender.

i. Possibility of reform and social adaptation of the offender.

j. Any other factor the court considers relevant.

k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu."

19. In light of the fact that there is no pending appeal before any court in regards to this matter and of the directions under paragraph (iii), (vi) & (viii) this court is clothed with jurisdiction to determine this application.

20. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

21. For instance, in Jared Koita Injiri vs Republic [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that;

> " if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> " The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

22. The Court of Appeal in Dismas Wafula Kilwake vs R (supra), held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

23. Odunga J (as he then was), in Philip Mueke Maingi & 5 others vs Director of Public Prosecutions & another (supra) held as follows;

> " Taking cue from the decision in Francis Karioko Muruatetu directed that 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."

24. In the case of Fappyton Mutuku Ngui vs Republic [2019] eKLR the court directed the trial court to rehear the Applicant's sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

25. The court in Hashon Bundi Gitonga vs Republic [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

26. In Samuel Achieng Alego vs Republic [2018] eKLR the court stated as follows;

> " It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of *the Constitution* as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances

as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

27. The Court of Appeal in the case of Julius Kitsao *Manyeso vs Republic Criminal Appeal N0. 12 of 2021*, the court was of the view that:

> " We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v 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."

28. In substituting to 40 years' imprisonment for the appellant who had been previously charged with the offence of defilement of a child aged 41/2 years, the Court of Appeal had this to say: -

> "...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"

29. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the *Sexual Offences Act* takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

30. In this case the trial magistrate stated that she had considered the accused was a first offender but proceeded to sentence him as per section 8(2) of the *Sexual Offences Act* which provides for the mandatory sentence of life imprisonment.

31. The mitigation by the Appellant was not clearly recorded, however, the trial magistrate captured in her ruling that the Appellant had nothing to say in mitigation.

32. The Appellate court while considering the Applicant's appeal, upheld the trial's court sentence and opined that:-

> " The learned trial magistrate was right in imposing the life sentence which is the only sentence available under section 8(2) of the *Sexual offences Act*. It is a mandatory sentence and this court has no discretion to interfere with the same"

33. In making this application, the applicant ought not to be seen as appealing against the decision of the learned Judge on appeal. This court cannot purport to sit on such an appeal.

34. What is clear is that after the Muruatetu case, the directions given by the Supreme Court of Kenya were that applicants such as the present one could approach this Court for re-sentencing. This court can only entertain a re-sentencing application and not any other.

35. In the matter before me, the trial court imposed the mandatory sentence of life imprisonment. This was confirmed on appeal.

36. In Evans Nyamari Ayako vs Republic (Supra) the Court of Appeal construed life imprisonment to mean a maximum of 30 years imprisonment. What the said court did was to discourage the imposition of indeterminate sentences.

37. In applying the principles set out in Muruatetu and the subsequent cases, there is an impression, and a wrong one in my view, that courts are going soft on heinous and aggravated offences. This is not the position. A court has the discretion, if it feels that the minimum or mandatory sentence is appropriate, to mete it out.

38. In the present case, the applicant defiled an eleven year old child. He should not expect any mercy from the court, even upon application of Muruatetu.

39. In the circumstances therefore, I hereby set aside the life imprisonment term and substitute the same with a term of twenty five (25) years' imprisonment, to run from the time the Appellant was first arraigned in court, on 10th November, 2006.

DATED, SIGNED AND DELIVERED AT NAKURU 6TH DAY OF JUNE, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

Nancy for state

Applicant present