**Wasike v Republic (Criminal Revision E005 of 2023)**
**[2024] KEHC 6608 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6608 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL REVISION E005 OF 2023**

**RN NYAKUNDI, J**

**JUNE 5, 2024**

**BETWEEN**

**FLORENCE NANGILA WASIKE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein is seeking for review of sentence in respect of original Criminal case No. 78 of 2010. She seeks leniency against sentence of 20 years imprisonment for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*.

2. The applicant was convicted to death in 2016, which sentence was later commuted to 20 years by the court of appeal in 2020.

3. The applicant has thus far served only 8 years of her sentence. She prays for a further reduction of her sentence and intends to use the skills she has acquired while in prison to integrate into society in the event that she is released.

   Her grounds for review include;
   That she is sick, suffering from High Blood Pressure, heart disease and problems with her legsShe is the sole breadwinner of her family and has left her children in the care of her very old mother.

   It is important to note that no progressive report has been filed or availed to ascertain her reformation and rehabilitation.

**Background**

4. The Applicant herein together with one Prince Mulando were charged and convicted with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in 2016.

5. The particulars of the offence were that on 08.12.2010 at around 4.00pm at Vilaha Village, within Western Province jointly murdered one Mary Imminza Simiti while the deceased was at home with her minor daughter. They pleaded not guilty. During trial 11 witnesses were called and the two accused gave sworn evidence but called no witnesses. They were both found guilty and sentenced to death.

6. The accused then appealed at the court of appeal stating that the trial court had relied on hearsay and circumstantial evidence, contradictory evidence and rejecting their defence without convincing reasons, relied on evidence that the court had held inadmissible and convicted them yet the case had not been proved beyond reasonable doubt.

7. The court of appeal agreed that although there were no eye witnesses, the body of the deceased was found approximately 50 metres from the appellant's house and that the appellant had been looking for the deceased and threatened to kill her, threw tantrums outside the house of the deceased and also smashed window glasses, blood stained clothes were found in her house under a bed with the blood of the deceased and finally she referred to the deceased as the 1st appellant's girlfriend meaning that she was not accepting that the 1st appellant had married the deceased as his fourth wife. The court of Appeal also looked at the blood analysis from the blood stained clothes recovered from the petitioner's house that was a match to the deceased. It seemed the applicant was unhappy with the relationship between the deceased and the 1st accused.

8. The court of appeal concluded that the evidence had indeed established that the applicant herein was the person or one of the persons who inflicted injuries that led to the death of the deceased and that she had the mens rea of causing death or grievous injury to the deceased.

9. The 1st appellant's conviction was quashed and the death sentence set aside and set free, while the applicant's appeal was dismissed against her conviction but her sentence was reduced/ substituted to 20 years from the date of the judgement and sentence in the high court.

10. The applicant has thus served 8 years of her 20 years' sentence.

Neither party filed submissions on this application.

**Determination**

11. . Article 50(2) of *the Constitution* gives the right to every accused person of a fair trial which includes: -

a. "If convicted, to appeal to, or to apply for review by, a higher court as prescribed by law."

Article 20(3) of *the Constitution* commands that: -

> In applying a provision of the Bill of Rights, a court shall—
>
> (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
>
> (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

From a cursory look at the application at hand I find that there is only one issue for determination:

**Whether the applicant should be released.**

12. Has the applicant placed such material before court to warrant review? Are the reasons advanced by the applicant herein sufficient to get the benefit of reduced sentence or non-custodial sentence?

On the issue of sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence.

13. The Court of Appeal in *Thomas Mwambu Wenyi Vs Republic (2017)* eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing: -

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

In *Francis Karioko Muruatetu & Another –Vs- R* (Supra) the Supreme Court stated the following guidelines as mitigating factors in a re-hearing sentence for the conviction of a murder charge: -

(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 response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender and

(h) any other factor that the court considers relevant.

14. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs

and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct.

Having said that, I shall now turn to case law and precedence. The Privy Council in Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes) (unreported, 2 April 2001) (Byron CJ) was of the view that:

> " In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review..."
>
> Further in the case R vs. Scott (2005) NSWCCA 152 Howie, Grove and Barr JJ stated:
>
> "There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender."

15. The principles guiding interference with sentencing by the appellate Court were properly set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> "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 states is shown to exist."

In Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court.

In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

Further in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, the Court pronounced itself on this issue as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors"

Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"

Section 333(2) of the *Criminal Procedure Code* provides that:

(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.

16. Section 382 of the *Criminal Procedure Code Act* provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

" Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

17. I consequently find that the appellate court gave the appropriate sentence in the circumstances of the case however I take cognisance of the fact that the Appellant herein has been behind bars for approximately 8 years.

18. I have considered the sentence in light of the facts and evidence before this court and find that the applicant has shown sufficient reasons under section 333(2) of the *Criminal Procedure Code* to have the period she spent in lawful custody in respect of the offence before the completion of a trial be taken into account in line with the 20 years imprisonment imposed by the court. In my view taking into account of a pre-trial detention is necessarily arithmetical for the period is known with certainty from the record of the trial court. in the result the amendment to the committal warrant be effected in consonant with Section 333(2) of the *CPC* by the Deputy Registrar of the High Court.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 5TH DAY OF JUNE 2024.**

In the Presence of

The Appellant

**.....**

**R. NYAKUNDI**

**JUDGE**