Yator v Republic (Criminal Petition 3 of 2023)
[2024] KEHC 8084 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8084 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL PETITION 3 OF 2023

JRA WANANDA, J

JULY 5, 2024

BETWEEN

ELPHAS KOECH YATOR ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged in Iten SRM Criminal Case No. E012 of 2022 with the offence of attempted rape contrary to Section 4 of the *Sexual Offences Act*. The particulars were that on 9/03/2022, at Chirchir Village in Keiyo South sub-county within Elgeyo Marakwet County, he intentionally and unlawfully attempted to cause his genital organ (penis) to penetrate the genital organ (vagina) of IR without her consent. The Petitioner also faced the alternative charge of committing an indecent act with an adult contrary to Section 11(1) of the same Act but which charge was later withdrawn.

2. The Petitioner was convicted on his own plea of guilty and was on 18/03/2022 sentenced to serve 10 years imprisonment.

3. The Petitioner has now approached this Court with the undated Notice of Motion filed on 1/02/2023. The Notice has no specific prayer and simply cites general provisions of *the Constitution*, namely, Article 23(1) and 165 of *the Constitution*. However, in the Supporting Affidavit and in his Submissions, the Petitioner pleads with this Court "to provide a lenient and light sentence/probation rather than the imposed one". He then states that he is "remorseful, a first offender and reformed hence qualified to be reintegrated back to the society". In the Affidavit, he also states that the sentence imposed was excessive, that he pleaded guilty to the charge because of the confusion and the unfamiliar environment that he found himself in, and that he pleaded guilty without an understanding of the consequences of his actions due to lack of legal representation.

4. There was no response by the State to the Application.

Determination

5. The sole issue for determination in this matter is "whether the Petitioner is entitled to review of his sentence".

6. In this case, as aforesaid, the Petitioner was arraigned on 10/03/2022. The record indicates that the proceedings were conducted and interpreted in English/Kiswahili. The Petitioner then took plea and pleaded guilty to the charge. The facts of the case were then read out to him and which he confirmed to be correct. He was then given an opportunity to mitigate, which he did. The Petitioner was then remanded in custody to await submission of a Pre-sentence period. On 17/03/2022 when the matter came up in Court, the trial Magistrate confirmed that the Pre-sentence Report had been submitted and which she had read. It is after all these processes that eventually the trial Magistrate read out the sentence.

7. From the foregoing, it is clear that the process of plea-taking all the way to the reading out of the sentence was properly conducted. In any case, the Petitioner himself has not identified any single flaw or shortfall in the process.

8. Regarding sentence, Section 4 of the *Sexual Offences Act* provides as follows:

> "Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life."

9. It is therefore evident that for a conviction for the offence of attempted rape, the sentence is between 5 years and life imprisonment. In this case, the trial Magistrate imposed the sentence of 10 years. The sentence was therefore lawful insofar as it was within the stipulated limits.

10. Nevertheless, I also need to consider other factors that should ordinarily be also taken into account when determining an appropriate sentence.

11. Regarding sentence, Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (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;

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

12. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced itself as follows;

> " With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to ....."

13. In this case, the facts on record are that the complainant, a training athlete, was in her routine morning practice when the Petitioner, who was seated across the road crossed over to her side and stopped her. He grabbed and pulled the complainant violently into the bushes, threw he down and threatened to kill her if she resisted. He commanded her to co-operate and allow the Petitioner to have sex with her and then forcefully tried to remove the complainant's undergarments. Fortunately, the complainant managed to kick the Appellant and when he fell down, she escaped while loudly screaming thus attracting the attention of passersby. With this turn of events, the Appellant started fleeing but was pursued and captured by the members of the public and presented to the police. The complainant suffered substantial injuries as a result of the attack.

14. The above account demonstrates the harrowing and violent experience that the Petitioner took the complainant through. It was no doubt a traumatizing experience that the complainant will have to live with. Although he pleaded guilty and therefore saved the Court precious time, and although he may have been a first offender, the Petitioner and his ilk cannot surely seek the Court's sympathy after committing such horrific offences. In any case, the Court stated that in arriving at the sentence of 10 years imprisonment, it had considered the Petitioner's mitigation. In my view, the sentence is commensurate and proportionate to the crime committed and the manner in which it was committed.

Final Order

14. In the circumstances, I decline the Application and dismiss it.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 5TH DAY OF JULY 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Onjoro h/b for Mr. Kirui for the State

Petitioner (Present virtually from Eldoret Main Prison)

Court Assistant: Brian Kimathi