Lorogoi v Republic (Criminal Miscellaneous Application E099 of 2023) [2024] KEHC 9975 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9975 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL MISCELLANEOUS APPLICATION E099 OF 2023

RN NYAKUNDI, J

AUGUST 8, 2024

BETWEEN

JAMES LOROGOI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *sexual offences Act* No. 3 of 2006. The particulars of which were that on 1st November, 2009 at Loyo Village in Turkana Central District within Rift Valley province, intentionally and unlawfully caused penetration of genital organs of C.A a girl aged 10 years. The applicant was thereafter tried, convicted and sentenced to Twenty-Seven (27) imprisonment.

2. The applicant appealed against sentence and conviction in Kitale High Court Appeal No. 28 of 2013 and the same was dismissed.

3. On 10th July, 2023, he filed an application for review of the sentence. In supporting the application, he stated that he was not bailed out and he is remorseful and repentant. He also stated that he lost his land when people were being relocated for development that took place in his region. He equally cited the provisions of Section 333(2) of the *C.P.C*.

4. The Officer-In-Charge at the Kitale Main Prison wrote a letter dated 4th February, 2020. The said letter confirms that the applicant has been engaged in various rehabilitative programs ranging from talent development which has enabled the applicant record his music album and various Biblical and theological studies up to Diploma level from a credible institution.

5. He provided copies of certificates which show that he had been trained in the aforementioned fields. In the light of the said qualifications, the Applicant believes that he was currently well equipped to get back to the society

Analysis and determination

The Applicant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

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

8(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."

6. I am of the considered view that he who breaches the trust bestowed upon him, also imposes upon himself a huge task of rebuilding such trust. Even though the Applicant appears to have reformed whilst in prison, it ought to be remembered that when he committed the offence, he broke the trust and responsibility that was bestowed on him by the community. When the offence is committed against a vulnerable member of the society, such as minors, the offender must appreciate that that calls for much greater effort on his part, to regain the trust of the society.

7. I take note that the applicant has so far served a total of 14 years remand period inclusive. It is evident that through the trainings undertaken by the applicant, he did not allow hopelessness and despair to overwhelm him. With the help and guidance of the Prison authorities, the Applicant has earned some skills which could prove useful to him, whenever he may regain his freedom from prison.

8. However, the most significant question I ask myself is whether or not the Applicant has made out a case to warrant the review of the sentence.

9. I have considered The *Sentencing Policy Guidelines*, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

10. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. In such circumstances the court will ordinarily check the legality or propriety or appropriateness of the sentence.

11. The punishment prescribed by the law for the offence of defilement of a child below 11 years is life imprisonment. However, with the advent of the "*Muruatetu case*" mandatory sentences have been outlawed.

In the "*Muruatetu Case*", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

" (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-adaption of the offender;

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

12. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view and the trend in our current legal system, the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the 'standard' by taking into account a non-exhaustive "check list of aggravating and mitigating factors" which are already largely taken into account by sentencing courts. On Appeal or review of sentence the principles in *Shadrack Kipkoech Kogoe -vs R* Eldoret Criminal Appeal No 253 of 2003 the Court of Appeal stated that " 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 principles 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 IKLR 206)" Section 333(2) of the *Criminal Procedure Code* Provides that:

" (2) Subject to the provision 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 there where the person sentenced under subsection (1) has, prior to such sentence, been heled in custody, the sentence shall take account of the period spent in custody.

13. . When I take all these factors into consideration, it is my considered view that when the trial court sentenced the applicant to 27 years, all these factors were considered and I shall therefore not interfere with the sentence save for giving credit to the Applicant for the period spent in pre-trial detention pending trial and determination of his case.

In the upshot, the application is hereby dismissed. The applicant ought to serve the sentence to completion.

14. Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 8TH DAY OF AUGUST, 2024

.....

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Kakoi for the State