Atot v Republic (Miscellaneous Criminal Application E023 of 2021)
[2024] KEHC 10842 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2021

JRA WANANDA, J

SEPTEMBER 20, 2024

BETWEEN

SAMUEL ESINYEN ATOT ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Application before Court is the undated Chamber Summons filed on 19/01/2021 seeking review of the sentence of death imposed on the Applicant upon conviction for the offence of robbery with violence. The basis of the Application is stated to be the oft-cited Supreme Court decision in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (commonly referred to as Muruatetu) which, although it had only dealt with the offence of murder, had been interpreted to have declared mandatory minimum sentences in all offences to be unconstitutional.

2. The Petitioner has also made some passing reference to the proviso to Section 333(2) of the *Criminal Procedure Code* which requires that the period spent in custody during a criminal trial, before sentencing, be taken into account when computing sentence. The Applicant has however not given specific details for this ground.

3. The background of the matter is that the Applicant and 2 other co-accused persons were charged in Eldoret Chief Magistrate's Court Criminal Case No. 4391 of 2005 with two counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. Read together, the particulars of the offences were that on 6/06/2005 at Elgon View estate in Uasin Gishu District of the Rift Valley Province, they jointly with others before Court, while armed with dangerous weapons, namely, pistol, panga and a knife robbed the respective complainants of several items and, at or immediately after the time of such robbery, used actual violence on the complainants.

4. The Petitioner and his co-accused all pleaded not guilty and the matter then proceeded to trial after which the learned trial Magistrate convicted the Applicant but acquitted his 2 co-accused. The Applicant was then sentenced to death, the Magistrate noting that the same was the mandatory and thus, the one and only sentence available upon conviction for the offence of robbery with violence.

5. Aggrieved with the said decision, the Applicant instituted an Appeal to this High Court, namely, Eldoret High Court Criminal Appeal No. 70 of 2007 against both conviction and sentence. By the Judgment delivered on 19/01/2012 by Hon. Lady Justice A. Mshila, the appeal on conviction was dismissed but on sentence, following the Muruatetu decision, the Judge commuted the death sentence to life imprisonment.

6. In the present Application, the Petitioner has now therefore returned to this Court seeking further review of his sentence and he is again citing the same Muruatetu decision. No specific ground for invoking Muruatetu has however been cited and it appears that the Applicant is simply appealing to the Court's sympathy.

7. Although given time to do so, the State (Respondent) did not file any Response to the Application.

Determination

8. Since as aforesaid, the death sentence imposed upon the Applicant has already been commuted to one of life sentence by the Judgment of Mshila J, the only issue that can now arise for determination herein is "whether this Court should review the life sentence commuted by this Court on appeal, for the offence of robbery with violence."

9. The offence or robbery is defined under Section 295 of the *Penal Code* as follows;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

10. Section 296(2) of the *Code* then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows;

> (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

11. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "robbery with violence" as per the provisions of Section 296(2) of the *Penal Code* is indeed the death sentence. It is evident that the trial Magistrate imposed such death sentence on the basis that the same was the only sentence available upon conviction for the offence of robbery with violence, thus a mandatory sentence. It is on this basis that the death sentence was commuted to life sentence pursuant to the guidelines given in Muruatetu.

12. It might therefore be justifiably said that what the Applicant is inviting this Court to do is to interfere with the sentence already dealt with by this very Court when it determined the Appeal, an action which is untenable in law. This is so because a High Court Judge cannot sit on appeal over a decision of another Judge of equal jurisdiction. This Court having already pronounced itself on the same issue

of sentence, it may be argued that this Court is now functus officio and that the issue of sentence is now also Res Judicata.

13. The above was echoed by Kiarie Waeru Kiarie J in the case of *Joseph Maburu alias Ayub v Republic* [2019] eKLR, in which he stated the following:

> " Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

14. I also cite the decision of Hon. Lady Justice L. Njuguna in the case of *Boniface Gitonga Mwenda v Republic* [2021] eKLR, where she held as follows:

> " However, as I have noted, the Petitioner herein appealed the trial court's decision to this court. The court in dismissing the appeal against the sentence held that the trial court's sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (See Section 362-364 of the *Criminal Procedure Code*).
>
> Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail."

15. I however observe that there is emerging jurisprudence questioning the constitutionality of life imprisonment. For instance, in the case of Julius Kitsao *Manyeso v Republic* – Criminal Appeal No. 12 of 2021, the Court of Appeal expressed itself as follows;

> " 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 v 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.

16. The above Court of Appeal decision was delivered long after the Applicant's Appeal had already been determined by Mshila J. The same could not therefore have been taken into account during the hearing and determination of his Appeal. In the circumstances, and in the interest of justice, I do not think that it will be fair to shut out the Applicant from benefiting from a consideration of the legality of the life sentence on the ground that this Court is functus officio.

17. The upshot of the foregoing is that the Court of Appeal having also now advised against imposition of life sentence, I find that this Court has the mandate to again review the sentence herein.

18. In the said case of *Julius Kitsao Manyeso* (*supra*), after finding that the life sentence imposed upon the Appellant was unconstitutional, the Court of Appeal stated as follows:

> " The appellant also did not say anything in mitigation after conviction by the trial court, which he attributes to his young age at the time. 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."

19. Regarding sentence, Majanja J, quoting *Muruatetu* 1, 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;
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> (a) age of the offender;
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> (b) being a first offender;
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> (c) whether the offender pleaded guilty;
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> (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.

20. Applying the above reasoning to the facts of this case, I have considered the mitigation of the Petitioner and also the circumstances of the case. The objectives of sentencing, specifically deterrence, remain pertinent when the Court is imposing a sentence. While it is not in question that considering the gravity of the offence, the Applicant indeed deserved a stiff deterrent sentence, I believe that he should also be given the opportunity for rehabilitation. It is therefore upon this Court to impose a sentence that is proportionate to the offence committed.

21. Having been sentenced in the year 2007, the Applicant is now serving his 17th year in prison, that indeed is a long time. I however also note, as a mitigating factor, although the Petitioner and his co-Accused were armed with dangerous weapons, including a pistol, they never used it to cause much more harm to their victims. I note that in the case of *Paul Ouma Otieno alias Collera and Another v Republic* (*supra*), as aforesaid, the Court of Appeal set aside a sentence of death on a conviction for the charge of robbery with violence and substituted it with one of 20 years imprisonment. This is despite the Court observing that the Appellants were armed with guns.

22. In the circumstances, and having taken into account all the factors mentioned hereinabove, I am of the view that the sentence of life ought to be reviewed. I am also of the view that the Applicant has now suffered substantial retribution for his actions.

23. Regarding the proviso to Section 333(2) of the *Criminal Procedure Code* which requires that the period spent in custody during a criminal trial, before sentencing, be taken into account when computing sentence, the Petitioner has not stated the dates and periods applicable. Further, considering the age of the trial Court file, the same was also not traced in good time and was therefore also not supplied for my perusal and verification. In the circumstances I am unable to determine this limb of the Application.

Final Orders

24. In the premises, the Applicant's undated Chamber Summons but filed herein on 19/02/2021 partially succeeds. Accordingly, I issue the following orders:

i. The sentence of life imprisonment earlier commuted from the death sentence, is hereby set aside and substituted with a sentence of 20 years imprisonment.

ii. The sentence shall run from the date of the sentence of the trial Court, which according to the Applicant (see his Amended Grounds of Appeal) was 22/07/2007.

iii In the event that the Applicant has now fully served the said prison term of 20 years now imposed herein, then he shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Applicant present virtually from Naivasha Maximum Prison

Okaka for the State

Court Assistant: Brian Kimathi