Chemjor v Republic (Criminal Petition 67 of 2021)
[2024] KEHC 10931 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10931 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 67 OF 2021

RN NYAKUNDI, J

SEPTEMBER 20, 2024

BETWEEN

VINCENT CHEMJOR ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that on the 23rd of November, 2007 at Kasisit Trading Centre Kabartonjo Division, in Baringo District of Rift Valley Province jointly with another murdered Harun Kimotol. He also faced 2 other counts of murder. That on the same date at the same place he jointly with another murdered Francis Kandie and Charles Chepkitony.

2. The applicant pleaded not guilty, was tried, convicted and sentenced to serve life imprisonment. He subsequently appealed against sentence and conviction in the Court of Appeal in Appeal No. 50 of 2017 which was dismissed.

3. He has filed the present application seeking review of his sentence pursuant to the decision in the Muruatetu case. He filed mitigation circumstances, which he urged the court to consider in imposing a lenient sentence.

4. The Appellant submitted that he is remorseful and greatly repentant for the loss incurred by the victim's family and the society at large. That the 16 years he has served in custody has served the purpose of sentencing as it has given him an opportunity to transform his entire life.

5. In stating the circumstances of the offence, he stated that the commission of the offence was brought about by the misuse of alcohol. He stated that he was drunk when the area chief attacked him and a fight ensued that led to the deceased deaths.

6. The applicant stated that at the time of commission of the crime, he was barely a very young man who had just married and blessed with three kids. He left a very young family without the presence of fatherly love. He had the desire to acquire life necessities and advance his family's lineage.

7. He submitted that the court should appreciate his total behavioral change and gains already made on rehabilitation during the period spent in the correctional facility. He is disciplined, hardworking and God-fearing man. He has never had any discipline issue with the prison authorities. He persuaded the court to consider the achievements undergone in custody and the fact that he has become a role model to many.

8. On sentencing, he urged the court to consider the case of Francis Karioko Muruatetu & another v Republic (2017) eKLR, which spoke to the mandatory nature of the death sentence in murder cases. He prayed that the court considers the objectives of sentencing in totality together with the provisions of Section 333(2) of the Criminal Procedure Code.

9. That he is before this court for sentencing only upon mitigation and not conviction.

Analysis and determination

10. I have considered the application and the mitigation submissions by the applicant. The issue manifest for determination is whether the sentence review is merited, noting that the Court of Appeal already pronounced itself on appeal.

11. The starting point would be Article 50 (2) (p) of *the constitution* which provides as follows:

> Every accused person has the right to a fair trial, which includes the right—
>
> p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

12. Article 50(6) takes it a notch higher and speaks in the following terms:

> (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
>
> a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
>
> b. New and compelling evidence has become available.

13. The foregoing provisions are instructive in matters brought before the high court for a new trial. I am of the considered view that the application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

14. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and he has equally availed new compelling evidence, which is the decision delivered in the Muruatetu case declaring mandatory sentences unconstitutional. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).

15. The petitioner has relied on a number of decisions to support of this quest. Significant among them is the Supreme Court decision of Muruatetu. The Muruatetu case was a petition before the Supreme

Court challenging the death penalty as a violation of human rights. After considering the petition, the Supreme Court agreed with the petitioners that the death penalty violated their human rights.

9. The court stated at paragraph 45;

> "[45] To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless"

10. The Supreme Court further stated that section 204 violates the right to fair trial in the following words;

> "[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse."

16. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner's counsel offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

17. The offence of murder attracts a death penalty but that was not imposed in the case. I am of the considered view that life imprisonment is such indeterminate sentence that deprives one off humane treatment and courts are now embracing sentences that will achieve the objectives of sentencing. The Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR)

> " 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.

18. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

19. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused's balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system.

20. Having said so, 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.

21. 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.

22. From the advent of Francis Muruatetu's landmark decision by the Supreme Court of Kenya in 2017, there is so much confusion on imposition of mandatory minimum sentences under the Sexual Offence Act. It is time jurisprudence on this area of law is settled. One only has to draw an example from life imprisonment sentence which is either imposed by trial courts or comes as a commutation of death penalty by the executive exercising its prerogative writ of mercy under Art. 133 of *the Constitution*. The punitive nature of the sentence has in recent times gained momentum in the various decisions emerging from the superior courts in Kenya. There is an irrefutable presumption that such a sentence is really to be served by the prisoner for the rest of his/her natural life. A survey of case law in the recent past demonstrates a departure by the courts of imposing life imprisonment and instead terminable periods appear to be the norm dependent on the circumstances of each individual case. This is the question which the Petitioner raised before this court arising out of the death sentence in respect of the offence and which now he petitions this court to have it reviewed within the confines of rehabilitation, aggravating and mitigating factors.

23. An approach to this issue will take the formulation of the above factors, the seriousness of the offence, the possibility of reform of the petitioner, the accountability of his actions, the likely future contribution to society are all elements of importance in determining the appropriate verdict. Whichever the settled jurisprudence, the Kenyan society may take in promoting the rule of law as a constitutional democracy one cannot ignore the aspect of cruelness and degrading treatment and punishment of a life sentence. What has emerged here from the various decisions of the superior court is whether the judge made law takes precedence from that of the legislature in legislating for appropriate sentences for the offence. That indeed is a moot question for now as courts continue to exercise discretion in handing down sentences individualized within the framework of substantial and compelling circumstances. The inference I draw from this Petition is that the grievances raised by the Petitioner finds favor with this court pursuant to the principles in Bernard Kimani Gacheru V Republic [2002] eKLR to review the initial life sentence and have it substituted to a terminable custodial sentence of 25 years' imprisonment

24. The Petition therefore succeeds and in considering the provisions of section 333(2) of the CPC the sentence shall run from the date of conviction at the trial court i.e. 15th July, 2015.

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

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R. NYAKUNDI

JUDGE