Ilagosa v Republic (Miscellaneous Criminal Application 16 of 2019)
[2024] KEHC 12905 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12905 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION 16 OF 2019

RN NYAKUNDI, J

OCTOBER 16, 2024

IN THE MATTER OF SENTENCE REVIEW UNDER SECTION 39(2) OF THE SEXUAL OFFENCES ACT NO 3 0F 2006 AND IN RELIANCE TO ARTICLE 1(1), 2(4), 19(3), 27, 28, 47 & 165(3) OF THE CONSTITUTION OF KENYA 2010 AND SECTION 261 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

JAVAN ASILIGWA ILAGOSA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant herein was charged and convicted on three counts of having unlawful carnal knowledge of three minors against the order of nature in CM's Court at Eldoret in Criminal Case No 672 of 2008. The offences were committed on diverse dates between 13th December, 2007 and 12th March, 2008. On 27th June, 2008, he was sentenced to 22 years' imprisonment.

2. The Applicant appealed to the High Court at Eldoret in Criminal Appeal No 44 of 2008 against the conviction and sentence, which appeal succeeded narrowly on that point to the extent that the Appellant would serve the sentence of 21 years on all the three counts or the remainder of the term thereof.

3. What is pending before me for determination is a Notice of Motion Application dated February 01, 2019, where the Applicant is seeking the following orders:

    a. Spent.

    b. Spent.

c. That may this Honourable Court be pleased to admit the Applicant on probation or under CSO.

d. That may the Honourable Court the Hon Court make any further or other orders as claimed just appropriate to admit the Applicant on application for order.

4. The Application is supported by the annexed affidavit dated February 01, 2019 sworn by Javan AsiligwA ILAGOSA, the Applicant herein where he avers as follows:

a. That I was charged and convicted of unnatural act contrary to *Sexual Offences Act* No 3 of 2006 and sentenced to 22 years' imprisonment on 27th June, 2008 by the Hon Court at Eldoret.

b. That I am now remorseful, rehabilitated and regret for the offence I committed.

c. That I have served more than a third of my sentence in prison and as such reformed and ready to be reintegrated back to the society.

d. That I am an old man aged 72 years and vulnerable as the harsh prison condition and my health is not favourable.

e. That may the Honourable court be pleased to allow my mitigation under the above cited section 39(2) and the other relevant constitutional provisions.

f. That may the Hon Court be pleased to admit me on probation and or allow me to serve the remaining part of the sentence outside the prison.

Analysis and Determination

5. In deciding this application, I have perused and considered the judgment in CM's Court at Eldoret in Criminal Case No 672 of 2008 and High Court at Eldoret in Criminal Appeal No 44 of 2008 which relate to the same case. I have also considered the application and the mitigation by the applicant. The issue manifest for determination is:

Whether the sentence review is merited

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

7. It bears repeating that, the High Court has the mandate under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the *Constitution* ,A further leapfrog development; under article 50(2)(p) of the *Constitution*:

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(2) 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

8. In *Philip Mueke Maingi & others v Rep*, Petition No E17 of 2021 specifically outlawed mandatory minimum sentence. It stated;

> There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.

9. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga v Republic* [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the *Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

10. In *Michael Kathewa Laichena & another v Republic* [2018] eKLR Majanja J. stated: "by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence".

11. Further, the Court of Appeal sitting in Malindi in *Manyeso v Republic* Criminal Appeal No 12 of 2021 [2023] KECA 827 (KLR) held that mandatory life sentences are unconstitutional and are "an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. The said decision is supported by the case of *Vinter and others v UK*, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.

12. Article 50(6) of the *Constitution* of Kenya 2010 states that; 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 entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.

13. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v 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."

14. Also in the case of *Francis Karioko Muruatetu & another v Republic* (*supra*) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

15. A glimpse of the Applicant's application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of the *Constitution* 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

16. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision 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.

17. The foregoing provisions are instructive in matters brought before the high court for a new trial. 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.

18. 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 the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the Muruatetu case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).

19. 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 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.

20. 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...".

21. From the foregoing authorities, it is evident that mandatory sentences are unlawful. 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. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

22. I take cognizant note that this Honourable Court in its Judgement stated as follows:

> Section 162 (a) of the Penal Code provides that any person who has carnal knowledge of any person against the order of nature is guilty of a felony punishable by 14 years' imprisonment. However, under the provision in section 162 (I), if the offence was committed "without the consent of the person who was carnally known" the offender is liable to 21 years' imprisonment. The learned trial magistrate correctly found that the victims were minors. From the evidence, they were aged 14 years. They were thus incapable of giving legal consent to be carnally known. The Appellant was thus liable to imprisonment for 21 years. The trial magistrate upon hearing mitigation of the Appellant said as follows: - "I have considered the mitigating factors. Accused person is remorseful. He fends for himself. But section 162 (a) (ii) ties my hands and places the sentences at a minimum of 21 years. I can see he is old. For above reasons, accused is sentenced to imprisonment for 22 years with hard labour in count 1."
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> The Appellant received similar sentences in counts 2 and 3. The learned trial magistrate correctly stated the law at section 162 (a). I am at a loss why he departed from 21 years to 22 years. The sentence of 22 years was clearly unlawful. Section 162 (a) (I) couched in mandatory terms. So long as no consent was obtained the offender shall be sentenced to 21 years' imprisonment.
>
> The Appellant says he is old, that he is remorseful, that he needs to fend for his Children and assist his wife to protect his property. Some of those matters were taken in mitigation. But it is not lost on me that the three minors were vulnerable persons who will carry the scars of this offence for life. The age and medical situation of the Appellant fades in comparison to the gravity of the offences and the ages of the minors. Furthermore, the law is in black and white: the sentence of 21 years is mandatory.
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> Granted those circumstances, I will set aside the sentence of 22 years and replace it with the lawful sentence of 21 years. The appeal thus succeeds narrowly on that point to the extent that the Appellant shall serve the sentence of 21 years on all the three counts or the remainder of the term thereof.

23. Additionally, in the *Muruatetu Case*, the Supreme Court proffered the following guidelines for consideration in respect of a sentence re-hearing:

(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.

24. I take note that the Petitioner in his mitigation submission stated as follows:

a. That I am now remorseful, rehabilitated and regret for the offence I committed.

b. That I have served more than a third of my sentence in prison and as such reformed and ready to be reintegrated back to the society.

c. That I am an old man aged 72 years and vulnerable as the harsh prison condition and my health is not favourable.

d. That may the Honourable court be pleased to allow my mitigation under the above cited section 39(2) and the other relevant constitutional provisions.

e. That may the Hon Court be pleased to admit me on probation and or allow me to serve the remaining part of the sentence outside the prison.

25. By dint of the judgment delivered by this court as presided by Hon. Kimondo J, this court delivered its judgment, which considered the applicant's case at length. I therefore see no reason to consider the same, which is hereby dismissed under the provisions of Section 382 of the *Criminal Procedure Code*.

DATED SIGNED AND DELIVERED AT ELDORET THIS 16TH OCTOBER, 2024

In the Presence of

Mr. Mark Mugun for the State

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R. NYAKUNDI

JUDGE