Karakacha v Republic (Miscellaneous Criminal Application 153 of 2018) [2024] KEHC 12907 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION 153 OF 2018

RN NYAKUNDI, J

OCTOBER 25, 2024

IN THE MATTER OF SENTENCE REVIEW UNDER ARTICLE 1(1), 2(4), 19(3), 27, 28, 29 AND 47 OF THE CONSTITUTION OF KENYA AND

SECTION 39(2) OF THE SEXUAL OFFENCES ACT NO 3. OF 2006 AND SECTION 261 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

GIDEON CLAIN KARAKACHA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant was charged and convicted for the offence of Defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006 and he was also in the alternative charged with the offence of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act* in Criminal Case No 306 of 2012 at Eldoret CM's Court. He was found guilty of the offence of Defilement, was convicted of each of the 27 counts laid and was sentenced to fifteen (15) years imprisonment on each count and the terms were to run concurrently.

2. The Applicant appealed to the High Court in respect of Criminal Appeal No 4 of 2014 in which the Court accordingly confirmed the Applicant's conviction and sentence and dismissed the appeal on its entirety.

3. What is pending before me for determination is a Notice of Motion Application dated November 01, 2018 in which the Applicant is seeking the following orders:

    a. That the Application be merited

b. That the Honourable Court invoke the provisions laid out above and grant him relief in carrying out the sentence.

4. The application is based on the grounds on the face of it among others:

a. That the Applicant was convicted and sentenced to serve 15 years' imprisonment for the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act* No 3 of 2006.

b. That the Appellant has served part of the sentence successfully and pray that the remaining part be committed to probation.

5. The application is supported by the annexed affidavit sworn by Gideon Claine Karakacha dated 1st November 2018, in which he avers as follows:

a. That I was sentenced to serve 15 years' imprisonment in case no 4306 of 2012.

b. That, I had earlier appealed to the High Court in respect of Criminal Appeal no 04 of 2014 but the same was dismissed.

c. That, I have served 5 years of the sentence in prison and I wish to serve the remaining sentence on non-custodial basis/conditional pardon.

d. That, I plead with the Honourable Court to invoke the provisions of section 39(2) of the *Sexual Offences Act* and remit my sentence that I may taste the fruits of section 39(2) of the *Sexual Offences Act*.

e. That I am a first offender and wish to have a second chance in my life so that I utilize my skills acquired in prison attached herein.

f. That, may this Honourable Court be pleased to interfere with the remaining part of the sentence and allow me to serve on probation.

Analysis and Determination

6. In deciding this application, I have perused and considered the judgment in High Court at Eldoret in High Court in respect of Criminal Appeal No 4 of 2014 which relate to the same case. I have also considered the application and the mitigation submissions by the applicant. The issue manifest for determination is:

Whether the sentence review is merited.

7. 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.

8. 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

9. 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.

10. 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.

11. 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).

12. 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 applicant 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. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

13. 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...".

14. In the premises, what is required of the Court is to consider what would have been an appropriate sentence in the circumstances. The approach suggested at Paragraph 23.9 of the *Judiciary Sentencing Guidelines*, which are guidelines formulated to ensure objectivity and uniformity in sentencing, is that:

> " The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/ transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point

of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.

15. 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.

16. 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.

17. However, this Court in its Judgement stated that: [39] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* was based on sound evidence, and that the sentence of 15 years imposed by the lower court is not only lawful but was also deserved. I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

18. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. It is thus my opinion that this Honourable Court while rendering its judgement considered this. Having given due consideration to the mitigation, and after taking into account the period which the Petitioner spent in custody prior to his conviction, I am inclined to interfere with the decision of this Honourable Court. Consequently, the application before me is devoid of merit and the same is dismissed.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 25TH DAY OF OCTOBER 2024.

In the presence of

Mr. Mark Mugun for the State

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R. NYAKUNDI

JUDGE