Kiptoo v Republic (Criminal Petition 59 of 2020)
[2024] KEHC 13001 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13001 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 59 OF 2020

RN NYAKUNDI, J

OCTOBER 25, 2024

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SENTENCE REVIEW UNDER SECTION 39(2) OF THE SEXUAL OFFENCES ACT AND 333(2), 362, 364(1) AND 365 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA IN RELIANCE TO ARTICLE 27(1)(2)(4), 28, 48 AND 50(1)(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER JURISDICTION POWERS AND DISCRETION AS UNDER ARTICLE 20(1), 23(1), 25(C), 165(3)(A)(B) & (D) AND 258(1) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

ALEX KIPCHIRCHIR KIPTOO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. The Petitioner herein was charged and convicted of the offence of defilement of a girl contrary to section 8(3) of the *Sexual Offences Act* No. 3 of 2006 where he was sentenced to serve thirty (30) years imprisonment. Being aggrieved, he appealed to the High Court in High Court Criminal Appeal No 51 of 2012 at Eldoret High Court against his conviction and sentence which appeal was heard and dismissed by the High Court (C. Kariuki J).

2. The Petitioner lodged an appeal to the Court of Appeal at Eldoret vide C.O.A No. 89 of 2016 whereby the court found no substance in the appeal against conviction and dismissed the same and allowed the appeal against sentence to the extent of setting aside the sentence of thirty (30) years and substituting thereto a sentence of twenty years hence the Petitioner has no pending appeal.

3. What is pending before me for determination is an undated Notice of Motion Application where the Petitioner is seeking the following orders:

    a. That I am seeking orders to be heard for review of sentence.

    b. Spent

    c. That the petitioner has been in prison for a long period of time.

    d. Spent

4. The Application is premised on the grounds on the face of it among others;

    a. The Petitioner knows of his own knowledge that he was convicted and sentenced to 30 years' imprisonment for the offence of Defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006.

    b. That the Petitioner has been in prison for a period of 9 years including time spent at remand custody hence has served a third of the sentence.

    c. That the Petitioner is remorseful, repentant and reformed and he has learnt the incarceration in prison.

    d. That the Petitioner has undergone various trainings while in prison whereby he has graduated with both certificates and diploma in Theology and vocational training in Building and Construction.

    e. That this Honourable Court has unlimited original jurisdiction powers and discretion as contemplated in article 22(1), 23 and 165(3) a, b and 258(1) of *the Constitution* of Kenya 2010 to handle matters of this nature.

    f. That the sentence meted upon him is too harsh considering the fact that he was a first offender and that he has a young family who are dependent on him.

    g. The Petitioner is also seeking;

        a. The orders for review of sentence as under section 39(2) of the *Sexual Offences Act* No. 3 of 2006 and Section 362, 364(1) & 365 of the CPC Cap 75 Laws of Kenya and in light of Muruatetu among other enabling laws.

        b. That may this Honourable Court be pleased to consider the sentencing Policy Guidelines 2016 published by the Kenya Judiciary and invoke the provisions of Article 165(3) a, b, d & 258(1) of *the Constitution* of Kenya 2010 and reduce the Petitioner's sentence to non-custodial community service order and/or such other orders as it will deem fit.

        c. That this Honourable Court be pleased to consider the sentencing policy 2016 that was published by the Kenya Judiciary and establish the mitigation factors that would lessen the custodial sentence.

5. The Application is supported by the undated annexed affidavit of Alex Kipchirchir Kiptoo, the Petitioner herein, in which he avers as follows:

   a. That I was charged with the offence of Defilement contrary to Section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006.

   b. That immediately after conviction and sentence I appealed to the High Court Eldoret where by my appeal was dismissed.

   c. That, I now petition my sentence to the High Court at Eldoret.

   d. That, I am remorseful, repentant, reformed and rehabilitated, as I have learned hard lessons while in custody and now beg for leniency.

   e. That, during my time in prison, I have been able to go through various Theological and Social programmes and I have graduated with various Certificates and Diplomas in the same, which intend to tender at hearing there-of.

   f. That it is my humble prayer that I be granted a fair opportunity to argue my petition.

Analysis and Determination

6. In deciding this application, I have perused and considered the judgment in Court of Appeal at Eldoret vide C.O.A No. 89 of 2016 and High Court at Eldoret in High Court Criminal Appeal No 51 of 2012 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 Petitioner'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 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. The offence of defilement contrary to the provisions of Section 8(3) of the *Sexual Offences Act* attracts imprisonment of not less than 20 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.
>
> a. However, the Court of Appeal in its Judgement stated that: [26] The appellant was charged under section 8(3) of the *Sexual Offences Act* that provides that:"A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction for a term of not less than 20 years." [27] Therefore, a minimum sentence of twenty (20) years has been provided by the legislature taking into account that the victim of the offence is a child of between the ages of twelve and fifteen years. Although in sentencing a magistrate would have discretion to impose a sentence beyond the minimum of twenty years that discretion would need to be exercised judicially. In this case, the reasons that were given by the trial magistrate for imposing the sentence of thirty years was precisely the same reasons for the legislature setting the minimum sentence for the offence as twenty years' imprisonment. In the absence of any other aggravating circumstances, the trial magistrate was not justified in exercising his discretion to sentence the appellant to a term of imprisonment that was way beyond the minimum of twenty years provided in the statute. [28] The upshot of the above is that we find no substance in the appeal against conviction and dismiss the same; we allow the appeal against sentence to the extent of setting aside the sentence of thirty years and substituting thereto a sentence of twenty years.

18. Therefore, in sentencing, the gravity of the offence and the consequences of t he offence on the victim are relevant factors. It is thus my opinion that the Court of Appeal 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 not to interfere with the decision of the Court of Appeal. Consequently, the application before me is devoid of merit and the same is dismissed.

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

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mugun for the State