K v Republic (Criminal Petition E009 of 2024)
[2024] KEHC 12981 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E009 OF 2024

RN NYAKUNDI, J

OCTOBER 25, 2024

RULING

IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS UNDER ARTICLE 22(1)(A), 23(1) OF THE CONSTITUTION OF KENYA

AND

IN THE ALLEGED CONTRAVENTION OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOM AS UNDER ARTICLE 27, 28, 29 AND 48 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

AMK ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner herein was charged, convicted and sentenced to serve 40 years' imprisonment for the offence of Defilement contrary section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No.3 of 2006 at CM's Court at Eldoret in Sexual Offences Case No. 41 of 2020.

2. The Applicant being aggrieved filed an appeal to have the conviction quashed and the sentence set aside at the High Court in Eldoret in Criminal Appeal No. E093 of 2022, which appeal was dismissed in its entirety by Hon. Muhonji on 7th November 2023.

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

   a. That the Petitioner is seeking for sentence review in accordance to Article 50(2)(p) (q of *the Constitution* of Kenya 2010 and section 362 & 364 of CPC.

   b. Spent

   c. That the applicant will be seeking a declaration by the court that his application has merits and qualifies to heard.

   d. That the applicant's petition be allowed, sentence set aside and be substituted to lesser term of sentence and/or other orders that the court may deem fit.

4. The Application is based on the mitigating grounds on the face of the Petition among others:

   a. That the Petitioner is a first offender and thus beg for leniency.

   b. That the Petitioner is remorseful, repentant and reformed since he has learnt incarceration in prison to take responsibility of his own actions.

   c. That the sentence meted upon the Petitioner was too harsh considering his mitigating factors and circumstances.

   d. That more grounds to be adduced at the hearing there-of and determination of this application.

5. The Application is supported by the annexed Affidavit dated 3rd January 2024 sworn by AMK the Petitioner herein where he avers as follows:

   a. That I was charged with the offence of defilement c/sec 8(1)(2) of the SOA No.3 of 2006 and sentenced to 40 years' imprisonment.

   b. That I appealed to the high court of Eldoret and the same was dismissed by Hon. Muhonji on 7th Nov 2023.

   c. That the sentence meted upon me is harsh and excessive against my mitigation.

   d. That I am now approaching this Honourable court to kindly review my 40 years' sentence to a lesser and more lenient sentence.

   e. That I have no other application in the court of appeal, hence this application.

   f. That I will abide by the laws and rules for non-custodial sentences.

   g. That this Honourable court has competent, unlimited jurisdiction to hear and determine this application under the provisions of Article 165(3)(b) of *the Constitution* of Kenya 2010.

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

   i. That I do beg that I be accorded to benefit with the provision of Article 50(2)(q) of *the Constitution* of Kenya 2010.

Analysis and Determination

6. In deciding this application, I have perused and considered the judgment in Sexual Offences Case No. 41 of 2020 at Eldoret CM's Court and High Court at Eldoret in High Court Appeal No. E093 of 2022 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

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. 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*:

> 50(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

9. In Philip Mueke Maingi & Others Vs 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.

10. 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.

11. 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".

12. 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.

13. 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.

14. 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."

15. 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.

16. 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

17. 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.

18. 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.

19. 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).

20. 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.

21. 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.

22. 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...".

23. From the foregoing authorities, it is evident that mandatory sentences are unlawful. They result 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.

24. 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.

25. 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.

26. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

27. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

28. I have considered the application and all the information available, there are no compelling or substantial circumstances to enable this court exercise discretion under Article 50 (2) (p) & (q) as read with 6(A) &(B) of *the constitution*. The custodial sentence of 40 years was affirmed by this court before Mohochi J on Appeal from the decision of the trial court. By dint of this decision, this court's jurisdiction is moot. The Applicants application to review the sentence is not maintainable save for the provisions of Section 333(2) of the CPC for a credit period of 2 years and 8 months spent in remand custody to be appropriated as a credit to the overall sentence of 40 years imprisonment.

29. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 25TH OCTOBER, 2024

R. NYAKUNDI

JUDGE