Gakonyi v Republic (Criminal Revision E123 of 2022)
[2023] KEHC 680 (KLR) (5 January 2023) (Ruling)

Neutral citation: [2023] KEHC 680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL REVISION E123 OF 2022

GL NZIOKA, J

JANUARY 5, 2023

BETWEEN

SIMON MWAMGI GAKONYI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Sexual Offence No. E03 of 2020, with the offence of defilement contrary to section 8 (1)(2) of the *Sexual Offences Act* (herein "the Act"). He was further charged with an alternative offence of committing an indecent act with a child contrary to section 11 (1) of the Act. The particulars of each charge are as per the charge sheet.

2. He pleaded not guilty and the case proceeded to full hearing. The prosecution called four (4) witnesses and at the close of the prosecution case, the court ruled that the applicant had a case to answer and placed him on his defence. He did not call any witnesses during the trial.

3. At the conclusion of the case the trial court acquitted him on the main count but convicted him on the alternative charge of committing an indecent act with a child and sentenced him to serve a term of eight (8) years imprisonment.

4. By a notice of motion application made pursuant to article 50 (2) (p) (q) of the *Constitution* of Kenya and filed in court on August 25, 2022, the applicant is seeking for review of sentence, so that the sentence is reduced or the court grant any other relief it may deem appropriate.

5. The application is supported by the applicant's affidavit in which he avers as herein below reproduced: -

    a. That, he was charged with the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* in S.O. No. E003/2020 at Naivasha Senior

Resident Magistrate's Court and sentenced to serve eight (8) years imprisonment from the date he was remanded May 14, 2020.

b. That he pleaded not guilty to the charges.

c. That he was remorseful of the offence and his incarceration.

d. That in regard to order (1) and (2) of the High Court judgement in Petition No. E017 of 2021, in which the mandatory minimum sentence was declared unconstitutional. I seek for sentence review only.

e. The court is seized of competent jurisdiction to hear and determine this application under article 165 (3) (b) of the *Constitution* of Kenya to hear and determine this matter.

6. He further relies on a document filed under the heading of:

"Memorandum of Sentence Review" in which he states: -

a. That, I am a first offender.

b. That, I have no pending appeal.

c. That, I am remorseful of my offence and have learnt to be a law abiding citizen and rehabilitated well enough.

d. That, I am from a poor but humble family background.

e. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.

f. That, I am not appealing against sentence and conviction but applying for a review of sentence.

7. The applicant further filed submissions on the October 14, 2022in which he reiterates mitigation that, he is a first offender, a young man of 35 years, married with two children. Further he has four siblings who are orphan under the care of their elderly grandmother. Further, he is the sole breadwinner of his family and siblings.

8. That, he has a backbone problem arising from a previous accident and requires therapy every two months. Further, he has since become a law-abiding citizen, and more over he has obtained knowledge, skill and expertise while in Prison that will be useful to the Society, if released.

9. He submits that, despite the mitigation he offered, the trial court stated that, it was bound by minimum mandatory sentence. He cited the case of, *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* Machakos High Court Petition No E017 of 2021 where the court held that the minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent they deny the trial court discretion to determine the appropriate sentence to impose.

10. He also cited the case of; *Edward Gikundi Ndege v Republic* (2021) eKLR where the appellant's sentence was reduced to five (5) years. He argues that, the courts frown on mandatory sentence as it places limitations on judicial discretion. He relied on the decisions of; *S v Toms* 1990 (2) SA 802 (A) and *S v Jansen* 1999 (2) SACR 368 (C), *S v Jansen* 1999 (2) SACR 368 (C) at 373 (g) – (b), and *S v Malgas* 2001 (2) SA 1222 sca 1235.

11. The application was opposed vide submissions filed by the Respondent dated October 11, 2022, wherein it is submitted that, the trial court considered the circumstances of the offence and applicant's mitigation before passing the sentence and used its discretion fully.

12. Further, the applicant does not deserve a lighter sentence as he was charged with the offence of; sexual and gender-based violence offence targeting a child, which is primary consideration in sentencing.

13. That the Supreme Court of Kenya in Petition 15 of 2015 *Francis Karioko Muruatetu and another v Republic* recognized the objectives of sentencing as per the Judiciary Sentencing Guidelines which include deterrence. That in the present case, a deterrent sentence is appropriate, therefore the eight (8) year imprisonment is sufficient.

14. I have considered the application in the light of the material before court and I note that, the law that guides the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein "the Code"), which states as follows:

> " The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

15. However, the section should be read together with section 364 of the Code which provision states as follow: -

> " (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
>
> (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
>
> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

16. Therefore, it is clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

17. As such it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna v Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).

18. Further, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & another v Republic* [2017] eKLR, *Republic v Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors v Muhavi Bi Mond Jani & another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.

19. In the instant matter, the applicant was charged convicted and sentenced of the offence of committing an indecent act with a child contrary to section 11(1) of the Act. Upon considering the applicant was a first offender and his mitigation, the learned trial magistrate stated as follows:

> " The accused has been in custody since 2020. The accused is then sentenced to serve 8 years imprisonment.
>
> Right of Appeal in 14 days"

20. However, it suffices to note that, the minimum sentence for the offence the applicant was charged with and convicted of under section 11 (1) of the Act is not less than ten (10) years. Therefore, the sentence of eight (8) years is not lawful. In exercise of the power given to this court under section 362 and 364 of the *Criminal Procedure Code*, I set aside the eight (8) years and substitute it with ten (10) years.

21. However, I note that, although the trial court indicated, the applicant was in custody since 2020, the court did not expressly indicate whether the period the applicant was in custody was part of the eight (8) years or not. The provisions of section 333 (2) of the *Criminal Procedure Code*, require that the trial court be explicit.

22. Therefore, I direct that the period of ten (10) years takes effect from October 26, 2020, when the applicant was arraigned in court. Therefore, the revision succeeds to that extent only.

23. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF JANUARY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr. Michuki for the Respondent

Ms Ogutu: Court Assistant