Lisimba & 2 others v Republic (Miscellaneous Criminal Application 026, 030 & 033 of 2022 (Consolidated)) [2023] KEHC 818 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 818 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION 026, 030 & 033 OF 2022 (CONSOLIDATED)

PJO OTIENO, J

FEBRUARY 10, 2023

BETWEEN

ELVIS LISIMBA .... 1ST APPLICANT

ELIAN OKARI .... 2ND APPLICANT

EUGINE BARAZA .... 3RD APPLICANT

AND

REPUBLIC .... RESPONDENT

(The decision by Musyoka J. made in Kakamega High Court Criminal Appeal No. 2 of 2019)

RULING

1. The Applicants herein have sought from the Court orders that the Court follows the decision in Machakos HC Petition No E017 of 2021 and exercises its discretion to resentence them by revoking the mandatory sentences imposed by trial court which is termed unconstitutional.

Historical Background:

2. Three accused persons were on the 14.11.2018 arraigned before court and charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*, were tried, convicted and sentenced to serve different sentences. The first accused now 2nd Applicant pleaded guilty and was sentenced to serve two years custodial sentence while the other two, currently before the court in the subject application, were sentenced to serve a fifteen (15) year custodial sentence.

3. All the three were aggrieved by the convictions and sentence and challenged both in three separate appeals which were ultimately and determined by a judgment dated 18/5/2022 in HCCRA No 2 of 2019 (Consolidated with 60 and 61 both of 2019).

4. It is of note that the three appeals challenged not only conviction but also sentence. In the Judgment, the Court, in its rendition, said:-

> " Overall, I have found no material evidence upon which I can upset the findings of the trial court in this matter. Consequently, it is my holding that the appeals herein have no merit and they are hereby dismissed. The convictions are upheld and the sentences confirmed."

5. As said before, that decision was made on 18/5/2022. At the time that decision was made, there was also another decision by the High Court sitting in Machakos, barely 24 hours earlier, which had declared minimum-maximum sentences provided by the *Sexual Offences Act* to be unconstitutional for constricting the exercise of judicial discretion by the trial courts with a caviet however that the trial court may however impose such mandatory sentences provided the trial Court does not feel hamstrung to impose the prescribed sentence as the only one.

6. This court has every persuasion from the two decisions. It obviously takes the learning that judicial discretion as a bastion of decisional independence and its crucial role in administration of justice and support to democracy in particular cannot be gainsaid.

7. That stand is compelled by the fact that he decisions of the Supreme Court and Court of Appeal are binding upon it in full hence it must always pursue guidance from those decisions for resentencing. On those situations where a trial court has demonstrated abandonment of the right and obligation to uphold decisional independence by feeling constrained and chained to the words of the statute imposing a particular sentence, the Court must always remember the words of Supreme Court in *Francis Karioko Muruatetu v Republic* [2016] eKLR that sentencing is a judicial function resident in the Court and not a legislative function with the Parliament.

8. That liberty and independence of the Court to do justice by fair and even application of the law does not however anticipate a fallible and messy scenario disrespecting independence of individual Judges and the cardinal rule that a court of equal status or concurrent jurisdiction cannot review the decision of another.

9. The decision by Musyoka J. made in Kakamega High Court Criminal Appeal No 2 of 2019 was a decision of a first appellate court proceeding by way of a retrial. In its mandate, it was duty bound to re-appraise and re-examine the entire record at trial and to come to own conclusions.

10. When note is taken that the three appeals challenged both conviction and sentence, and with the courts conclusion at the penultimate paragraph of the Judgment that nothing had been presented to justify interference with the conviction and sentence of the trial Court, it must be respected that even the severity or propriety of the sentence was one of the issues before the Court. The Court considered that issue and rendered itself as it did, by upholding the same. In doing so the door for questioning that sentence before the High Court was thus closed. When the door to the High Court closed, another even bigger door was opened leading to the Court of Appeal.

11. Indeed, the decision in *Muruatetu's case* was ground shaking and remains so and the Judge cannot be assumed to have ignored its dictate as the final position of the law. Moreover, in their applications the applications cite the decision in *Philip Mweke Maingi*'s case (*supra*) in a manner suggestive that it binds all decision including decisions by the High Court. It does not for it was not and could not have been a review of the decisions by the High Court.

12. It is therefore the Court's finding that once the appeal on both conviction and sentence was determined by the High Court, there remained no liberty to seek a second bite by way of an application for re-sentencing. The Court finds that the jurisdiction of the High Court was exhausted on the 18/5/2022

and if the Applicant felt aggrieved thereby, the remedy is on appeal to the Court of Appeal and not the current applications.

13. The applications as consolidated are bereft of merits are hereby dismissed. Let the court files be closed.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Applicants in person

Ms. Chala for the Respondent

Court Assistant: Polycap