Malonza v Republic (Criminal Revision Application 058 of 2019)
[2023] KEHC 2093 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL REVISION APPLICATION 058 OF 2019

F WANGARI, J

FEBRUARY 16, 2023

BETWEEN

MWENDWA MALONZA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The applicant herein was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9 (2) of the *Sexual Offences Act*[1]. He was also charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty to both counts and the matter proceeded for full hearing. The applicant was subsequently convicted of the main charge and sentenced to 10 years imprisonment.

2. Aggrieved by the sentence, the applicant filed a 'Petition of Appeal' (undated), against the sentence. However, on the date of hearing of the appeal, the applicant clarified that his intention was a revision against the sentence and not an appeal. The court directed that the proceedings before it be deemed to be an application for revision of the sentence.

3. Under the impression that the matter was coming up for an appeal, Limo J of Kitui High Court, directed that the appeal be canvassed by way of written submissions. the submissions were not filed. Under the new developments, both parties submitted orally. The applicant relied on his filed petition, while the state just 'left it to the court' to decide.

[1] Act No 3 of 2006

Enabling provisions for revision

4. Article 165 (6) of the *Constitution* states;

> 'The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court'.

5. Under section 362 of the *Criminal Procedure Code*, on the scope of revision in criminal trial provides as hereunder;

> 'That 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 subordinate court'.

6. Section 364 of the *CPC* provides that;

> "(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 –
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order."

7. Section 362 and 364 of the *Criminal Procedure Code* as stated above can only revise the decision made by the magistrates Court. This court must satisfy itself that there was an illegality, error, irregularity or impugned proceedings, sentence or order of the trial court.

Issues for Determination

a. Whether there was an error, illegality, impropriety of the sentence

b. Whether the application is founded on section 333 (2) of the *CPC*

8. On the first issue, the sentence passed by the trial court in this case, was in accordance with the law. There was no error or an illegality in the sentence.

9. On the second issue, the sentence was in accordance with section 9 (2) of the *SOA* which provides;

> 'A person who commits an offence of attempted defilement with a child is liable to an imprisonment term of not less than ten years'

10. The above provision prescribes a mandatory minimum sentence of 20 years' imprisonment. In *Maingi & 5 others v DPP & ano*[2], Odunga J in holding that the mandatory minimum sentences in SOA are unconstitutional stated as hereunder;

> 'To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution."

[2] Maingi & 5 others v Director of Public Prosecutions & ano (Petition E017 of 2021) KEHC 13118 (KLR) (17 May 2022)

11. Also in *Joshua Gichuki Mwangi v Republic*[3], in allowing the appeal by substituting the mandatory sentence of 20 years for the offence of defilement under section 8 (1) as read with subsection (3) of the *Sexual Offences Act*, the Court of Appeal found that by the imposition of the mandatory sentences by the legislature was in conflict with the principles of separation of powers by arrogating itself judicial powers. Further, it was found that the elimination of judicial discretion by compelling judges to mete out sentences that may be grossly disproportionate, was impermissible.

12. In the light of the above, the trial court was therefore not bound to give a mandatory sentence of 10 years. I am however persuaded to re-examine the sentence. Section 333 (2) of the CPC states;

> "Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include 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 into account of the period spent in custody."

13. I have considered the grounds of the application. The appellant takes full responsibility of his actions and he is remorseful. He has been in custody since the time of his arrest. He has learnt his lesson. I therefore exercise my discretion and reduce the imprisonment term to that of 5 years. The period starts to count from the date of arrest, that is 16/7/2017. The appellant has already served his sentence, and he be released from custody upon receipt of the court orders.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Pauline Mwaniki for State

Appellant present

Court Assistant - Guyo

[3] Nyeri CA Criminal Appeal no 84 of 2015, Joshua Gichuki Mwangi v Republic