Machira v Republic (Miscellaneous Criminal Application E180 of 2021) [2023] KEHC 2042 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION E180 OF 2021

GL NZIOKA, J

MARCH 1, 2023

BETWEEN

LAWRENCE NYABOKE MACHIRA .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The applicant filed a chamber summons application on November 16, 2021, seeking for review of his sentence meted out against him in vide Criminal Case No 1092 of 2014 at the Chief Magistrate's Court at Naivasha and that the court takes into account the time he spent in custody.
2. He relies on his supporting affidavit in which he states as here below reproduced: -
   a. That, I was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006 in criminal case number 1454 of 2012 of the CM's court at Naivasha and sentenced to serve a life sentence.
   b. That, my first appeal in HCCRA No 99 of 2013 at Nakuru High Court was dismissed.
   c. That I have no pending appeal.
   d. That, the High Court has competent jurisdiction to hear and determine this application under Article 165(3)(b) of *the Constitution of Kenya 2010*.
   e. That, I have arrested, charged, convicted and sentenced to serve life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006.

f. That, under the provisions of *the Constitution of Kenya 2010* and *Practice and Procedure Rules 2010* this court has power to hear and determine infringements of fundamental rights and award remedies

g. That, my first appeal to the High Court was dismissed in its entirety vide HCCRA 29 of 2013 at Nakuru was dismissed by Hon. Justice M. J. Anyara Emukule on 8th Day of November 2013.

h. That, I did appeal to the Court of Appeal at Nakuru vide Court of Appeal No 202 of 2013 at Nakuru and my appeal was also dismissed on 12th day of July 2019 hence my application

i. That I am a convict hence a pauper who cannot incur any costs for preparation of this application thus pray that such cost be waived.

3. On September 9, 2022, the applicant filed mitigating factors that: -

a. That, the Honourable court has got the discretion on sentencing following the decision in *Dismas Wafula Kilweka v Republic* Petition number 15 and 16 of 2015.

b. That the High Court of Kenya at Machakos in constitutional petition number 17 of 2021 termed mandatory minimum sentences in *Sexual Offences Act* No 3 of 2006 unconstitutional and ordered those sentenced under the minimum sentences to apply to the High Court for rehearing.

c. That, the honourable court be pleased to find that I was convicted as a first offender.

d. That, the honourable court be pleased to find that I am a young man whose life is greatly affected by the imprisonment.

e. That, the honourable court acknowledge the fact that while in prison I have taken full advantage of the rehabilitative programmes offered in the correctional facility as it is evident in the attached documents together with a prison report.

4. Further, the applicant filed submissions and stated that he filed a re-sentencing application under the provisions of Article 50 (2) (p) and (q) of *the Constitution* seeking leniency. That mandatory minimum sentences are unconstitutional and a threat to the doctrine of separation of powers and the independence on the judiciary. That in the Supreme Court case of *Kaplan H. Rawal & 2 Others v Judicial Service Commission & 3 Others* [2016] eKLR Justice J. B. Ojwang (as he then was) stated that judicial function was the underpinning of the new constitutional dispensation. He also placed reliance on the case of *Wilfred Manthi Musyoka v Machakos County Assembly & 4 Others* [2018] eKLR.

5. He submitted that sentencing is an exclusive judicial function and that where legislation mandates to the judiciary a punishment for a person convicted for a particular crime, it infringes on the doctrine of separation of powers as it purports to exercise judicial function. That, courts should find legislation mandating to impose a particular sentence unconstitutional and cited the case of *Liyanage v The Queen* [1967] A.C 259 where the Privy Council invalidated a Ceylonese law that provided for a minimum sentence of ten (10) years for particular offenders as it infringed on the separation of powers by imposing legislative judgement. Reliance was also placed on the cases of *S v Mchunu and Another* (AR24/11) (2012) Zakzphc 56 Kwa Zulu; *S v Toms* 1990 (2) SA 802 (A) AT 806 (L) – 807(b); *S v Mofokeng* 1999 (1) SACR 502 (w) AT 506 (d); and S v Jasen 1999 (2) SACR 368 at 373 (g) – (h) where the courts held that sentencing was at the discretion of the trial court.

6. The applicant cited the cases of *Dismas Wafula Kilwake v Republic* [2018] eKLR; *Evans Wanjala Wanyonyi* HCCR Appeal No 174 of 2015; *Paul Ngei v Republic* [2019] eKLR; *Sammy Wanderi*

Kugotha v Republic [2021] eKLR; *Guyo Jarso Guyo v Republic* (2018) Petition 6 of 2018; *Paul Odhaimbo Mbola v Republic* [2020] eKLR; and *Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the AG* where the courts held that the mandatory minimum sentences were unconstitutionally and the courts resentenced the appellants.

7. He urged the court to take into consideration the time he spent in custody from the date of his arrest in line with section 333 (2) of the *Criminal Procedure Code* and as held in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

8. The Applicant argues that the essential rationale for sentencing is rehabilitation as held by the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* (2017) eKLR. Further, paragraph 4.1 of the *Sentencing Guidelines Policy 2015* states that the core objective of sentencing is reformation and rehabilitation. That, while in prison he fully embraced the rehabilitative programmes on offer and attained a recommendation letter from Naivasha Chaplaincy office; a Baptism certificate; and Grade III test certificate in tailoring. That, he is armed with skills to earn a living and is ready to be productive in nation building.

9. On sentence, he submitted that he was convicted when he was 53 years old and is now 62 years old. He is a first offender, remorseful for the offence; and made attempts to reconcile with the complainant and her family. That, he is willing to relocate to Kisii and start a family as his wife has left his home. He seeks for leniency and prays application be allowed.

10. The Respondent did not file any response to the application despite being given an opportunity to do so. Be that as it may, I have considered the application and find that, since the applicant has filed an appeal over the same subject matter, which was heard vide High Court criminal case No 99 of 2013 at Nakuru and determined, this court is functus officio.

11. In that regard I reiterated what this court stated in the case of; *Lucy Wangari Muhia v Republic* [2022] e KLR , as follows:

> " 15 Functus officio is a latin expression that translates to; "having performed his or her office." According to Ulpian, after a judge has delivered his judgment, he immediately ceases to be the judge:
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> "hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit, amplius corrigere sententiam suam non posset; semel enim male vel bene officio functus est." (see Alexandr Koptev, "Digestae Justinian" The Latin Library at Book 42, Title 1, Note 55, online:
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> The gist of Ulpian's words is: "[A] judge who has given judgment, either in a greater or a smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all." (see Translation in Daniel Malan Pretorius, "The Origins of the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law" (2005) 122:4 SALJ 832 at 836).
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> 16 The law of functus officio thus dictates that, decision-makers; judges, administrative officials, or arbitrators, cannot as a general rule re-open their decisions to correct a mistake. There is no opportunity for them to; "do better next time" in the same case because there will be no next time. They must get it right the first time, for that will be their only time.

17 This is contrary to the Lyrics to the song; “Mistake” from the popular children’s cartoon Shimmer and Shine enlighten:

“When we make a big mistake.

Don’t fret, let’s celebrate

Cause we’ll get another try (Oh yeah)

We’ll do better next time”.

12. In the given circumstances, the application herein for review of sentence is not tenable and it is dismissed for lack of merit and/or struck out for want of jurisdiction.

13. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 1ST DAY OF MARCH 2023.

GRACE L. NZIOKA

JUDGE

In presence of:

Applicant in person in court virtually

Atika for the Respondent

Ms Ogutu : Court Assistant