Rono v Republic (Miscellaneous Criminal Application 37 of 2019)
[2023] KEHC 2514 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2514 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

MISCELLANEOUS CRIMINAL APPLICATION 37 OF 2019

F GIKONYO, J

MARCH 23, 2023

BETWEEN

BENARD ARAP RONO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Revision from Original Conviction and Sentence in Narok CMCR No. 227 of 2010 and Nakuru HCCRA 204 of 2011)

JUDGMENT

Sentence review

1. Before me is an undated application received in court on August 27, 2019.
2. The application is seeking sentence review pursuant to Articles 22(1),23(1), 25,26(1),27,28,29,50(2)(q), 159, 160(1), and 165(3) of the *Constitution*, section 39 of the *SOA*, and section 333(2) of the *CPC.*
3. The applicant averred that he has not exhausted all appeals.
4. The applicant further averred that the life sentence is too harsh and excessive in nature, thus, the court should impose appropriate sentence.
5. According to the applicant, he was not accorded a fair trial in sentencing from the trial court to the last Court of Appeal, which is a contravention of article 50(2)(q) of the *Constitution*.
6. He relied on the case of *Guyo Jarso Guyo Vs Rep* (Petition No 6 Of 2018 at Maralal High Court) and *Francis Karioko Muruatetu Vs Rep* (Supreme Court Petition No 15 of 2015) in urging the point that mandatory life sentence is excessive in the circumstances and too harsh thus seeking appropriate sentence.

Brief background

7. The applicant herein was charged with an offence of defilement contrary to section 8(1) as read with 8(2) of the *SOA* in Narok CMCR No 227 of 2010.

8. The particulars of the charge were that on February 12, 2012 in the Ngaram area of Narok south district the applicant unlawfully and intentionally caused his penis to penetrate the vagina of SC a girl aged two years. In the alternative, the applicant was charged with the offence o indecent act contrary to section 11(1) of the *SOA*.

9. On August 12, 2011, Hon CA Nyakundi (RM) convicted the applicant and sentenced him to twenty (20) years imprisonment.

10. The applicant was dissatisfied with the decision of the trial court and filed an appeal in Nakuru HCCRA 204 of 2011. This court sitting as appellate court (Wendoh J) confirmed the conviction but set aside the sentence of 20 years imprisonment for being illegal. In lieu thereof, the appellate court sentenced him to life imprisonment.

Directions of the Court.

11. The application was canvassed by way of written submissions.

Applicant's Submission

12. The applicant submitted that the Supreme Court in the judgment delivered on July 6, 2021 declared mandatory sentences to be unconstitutional.

13. The applicant submitted that this court has jurisdiction to hear and determine an application for redress on denial, violation of rights, infringement, and threat.

14. The applicant submitted that he is remorseful of the offence committed and that he has rehabilitated and acquired skills, knowledge, and experience in prison.

15. The applicant submitted that he was arrested, tried, and convicted when he was a minor. That he was arrested when he was 16 years and was in custody for 2 years.

16. The applicant submitted that this court should take into account the time spent in prison when undergoing trial in accordance with section 333(2) and sub-section 38 of the *CPC*.

17. The applicant has relied on the following authorities;

    i. *Philemon Koech Vs Republic* [2021] eKLR

    ii. *Samson Tobiko Sasile Vs Republic* [2021] eKLR

    iii. *Ahamad Abolfathi Mohamed* Criminal Appeal No 135 of 2016

Respondent's Submission

18. The respondent opposed the application.

19. The respondent submitted that the high court was within its power to enhance the sentence passed. Section 354(a)(ii) of the *CPC* grants the court power without altering the finding to increase the sentence.

20. The respondent submitted that the trial court in passing a sentence of twenty years committed an error. Section 8(2) of the *SOA* provides that anyone who defiles a child aged 11 years and below shall be sentenced to life in prison. The trial court in its judgment passed a sentence not known in law. When the high court enhanced the sentence on December 17, 2013, the Supreme Court had not yet rendered itself on *Francis Muruatetu* case.

21. The respondent submitted that the high court has inherent jurisdiction to intervene where the trial court had passed an illegal sentence as was the case in this matter.

22. The respondent submitted that during the appeal the appellate court is required to warn the appellant or bring to his attention at the earliest time possible that a lesser sentence could be enhanced. However, this is not necessary when the trial court had passed an illegal sentence.

23. The respondent submitted that the court did not err in enhancing the illegal sentence that had been passed by the trial court.

24. The respondent submitted that the applicant herein ought to have pursued his remedy at the court of appeal pursuant to section 361 of the *CPC* rather than filing the current miscellaneous application framed as a constitutional petition, the applicant is abusing the criminal process.

25. The respondent submitted that this court lacks the jurisdiction to interfere with a sentence meted out by a court of concurrent jurisdiction

26. The respondent submitted that the sentence that was passed by the high court in its appellate jurisdiction was proper in law and ought not to be interfered with. The aggravating circumstances outweigh the mitigation of the applicant herein. The sentence passed by the high court was within the judiciary sentencing guidelines.

27. The respondent submitted that the aggravating factors were as follows;

    i. The age of the victim- the child was 3 years. The applicant was well known to the victim and he abused the trust of an innocent toddler.

    ii. The heinous act caused injuries to the private parts of the child as captured in the medical report.

    iii. Despite the applicant's protest that he was below 18 years, he was subjected to an age assessment which confirmed that he was 18 years thus an adult.

    iv. The psychological and physical trauma that the victim underwent at the hands of the applicant.

28. In the end, the respondent submitted that the sentence meted on the applicant is merited and ought not to be interfered with. The respondent prayed that the application be dismissed in its entirety.

29. The respondent has relied on the following authorities;

    i. *Natse Vs Republic* [Criminal Appeal No 41 Of 2018] [2022] KECA 417 (KLR).

    ii. *Stanley Nkunja V Republic* [2013] eKLR Criminal Appeal No 280 Of 2012

    iii. Article 165(60 of the *Constitution*

    iv. *Joshua Gichuki Mwangi Vs Republic* Criminal Appeal No 84 Of 2015 (Unreported)

    v. *Republic V Elijah Munee Ndundu and other* [1978]

    vi. *Sammy Abiyo Jiilo V Republic* [2021] eKLR

vii. *Athanus Lijodi V Republic* [2021] eKLR

Analysis and Determination

30. I have considered the application herein and the rival parties' written submissions. The court should determine, whether:

    i. It has Jurisdiction to adjudicate upon this application; and

    ii. The sentence of life imprisonment imposed upon the applicant should be reviewed.

Nature and Scope of Re-sentencing

31. Re-sentencing is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentences only; it does not consider conviction. Thus, the court ordinarily check the legality or propriety, or appropriateness of the sentence in contestation. The major nuances will therefore be, inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.

32. This scope of re-sentencing is necessary in determining whether the court has jurisdiction to conduct a re-sentencing/ review.

Of Jurisdiction

33. Jurisdiction is the judicial power given by the *Constitution* or legislation or both, to the court to adjudicate upon a dispute (The Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others*, Application No 2 of 2011,) Jurisdiction of the court is therefore, sine qua non adjudication of the case before it- which makes jurisdiction a matter of great preliminary importance (Nyarangi, JA in The *Owners of Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page14)

34. In this case, the Applicant filed appeal number HCCRA No 204 of 2011 which was heard, dismissed, and sentence enhanced. The applicant did not indicate whether he filed an appeal to the Court of Appeal. The Applicant has filed the application herein before me for review.

35. The prosecution counsel argued that the applicant herein ought to have pursued his remedy at the Court of Appeal pursuant to section 361 of the *CPC* rather than filing the current miscellaneous application framed as a constitutional petition- and accuses the applicant of abusing the criminal process.

36. Does this court have jurisdiction to hear the application?

37. I do note that jurisprudence on unconstitutionality of mandatory sentences did not start with Muruatetu decisional law. As far as I can recollect, it gained root following the case of *Mutiso Godfrey Ngotho Mutiso v Republic* [2010] eKLR - but took a temporary recoil after the Mwaura decision *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR. It was then resurrected and boomerang back in the Muruatetu decisional law. And, thereafter, the principle that mandatory sentences are inconsistent with the *Constitution* for taking away the discretion of the court in sentencing is in vogue being applied across board by all courts in all instances where discretion of the court in sentencing has been impeded

by legislation. See the observation of the Court of Appeal in the case of *William Okungu Kittiny -v- R* (2018) eKLR which is to the point, that:

> " The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".

38. The Supreme Court subsequently issued directions in, that the Muruatetu decision was not authority to declare all mandatory or mandatory minimum sentences unconstitutional. And that, any person aggrieved by mandatory or mandatory minimum sentence in respect of offences other than murder should challenge such law in a constitutional petition filed in that respect.

39. Some observers hold the view that the kind of hemming in application of such a principle of general application as in the Muruatetu case may be in vain. Notably, nothing in the guidelines prevents parties from making exact similar arguments in petitions challenging mandatory sentences in other offences. And, the result in a properly argued case has been similar to the one stated in the Muruatetu case. No wonder, the effectiveness or the kind of restraint in application of this principle in other offences rang loud in the Mutiso decision.

40. Other commentators posit that Muruatetu decision especially the subsequent guidelines brought about misinterpretation and confusion of the purport and utility of precedent especially because the decision was made by the precedent-setting court- the Supreme Court. Structural problems also persist; which court will do re-sentencing?

41. These stand-points and arguments are useful- they constitute a necessary critique of the decisions of courts of law as part of furthering or deepening jurisprudence on this subject in tandem with the constitutional command in article 259- to develop the law when interpreting or applying the *Constitution*.

42. But, despite these varied comments on, Muruatetu decision has one virtue-that a person affected may file a constitutional petition and argue that any law that takes away the discretion of the court in sentencing is inconsistent with the *Constitution*.

43. Accordingly, this court has jurisdiction to adjudicate upon sentence re-hearing or re-sentencing or review which is made on the basis of the unconstitutionality of mandatory sentence.

Alleged Violation

44. The application has invoked the jurisdiction of the High Court in Article 165 (3) and 23 of the *Constitution* to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. He must therefore prove the alleged violation of a right or fundamental freedom enshrined in the Bill of Rights.

45. The applicant claimed violation of article 50(2)(p) of the *Constitution* which provides: -

> 50(2) "Every accused person has the right to a fair trial, which includes the right—
>
> (q) if convicted to, or apply for review by, a higher court as prescribed by law"

46. The most potent argument is that mandatory sentences deprived courts of the discretion to impose an appropriate sentence. As discretion in sentencing pertains to a fair trial, persons who suffer this deprivation may claim violation of the right to appropriate or less severe sentence- a principle embodied in the *Constitution* including article 50(2)(p) of the *Constitution*. Therefore, Section 8(2) of the *SOA* to the extent that it provides for only a single and mandatory sentence of life, thereby, taking away the discretion of the court in sentencing, is inconsistent with the *Constitution*. The section provides: -

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

47. However, the *Constitution* provided the courts with new tools- read-in and read-out techniques- in construing existing law with such modifications, exceptions, adaptations, and alterations in order to bring it in conformity with the *Constitution*. Accordingly, unless it is totally irreconcilable, there is, no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 8(2) of the *SOA* for being inconsistent with the *Constitution*. In light thereof, I interpret the section to prescribe life sentence as the maximum sentence. These techniques were specially designed to avoid paralysis and confusion in the application of law which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning them to the *Constitution*.

48. Having stated that, the purport of re-sentencing is to provide an effective remedy to such injustice arising from a violation of right or fundamental freedom as was aptly explained by Majanja J in *Michael Kathewa Laichena & Another -v- Republic* (2018) eKLR that:

> " ...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".

49. I should however, add that the authority of the court in articles 165(3) and 23 of the *Constitution* inter alia, to uphold and enforce the Bill of rights, also formally and actually gives the court power of consistently structuring, developing, and deploying progressive jurisprudence on rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of the *Constitution*, that: -

> "In applying a provision of the Bill of Rights, a court shall—develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

Sentence

50. Applying the test, does the sentence herein violate rights of the applicant?

51. In this case, there appears to be no reference of, or fetter upon the discretion by the judge, by the mandatory aspect of the sentence. The applicant has not cited any.

52. In any case, and as I have found no fetter upon discretion of the court by the mandatory aspect of the sentence, the kind of arguments presented by the applicant in this case should be for the Court of Appeal to evaluate.

53. I find no reason to interfere with the sentence of life imposed on the applicant. His application for re-sentencing/review is completely devoid of merit and is hereby dismissed.

54. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF MARCH, 2023

F. GIKONYO M.

JUDGE

In the presence of:

Applicant

Ms. Mwaniki for DPP

Mr. Kasaso - CA