Wangari v Republic (Criminal Revision E203 of 2022)
[2023] KEHC 1960 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1960 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL REVISION E203 OF 2022

LN MUGAMBI, J

MARCH 10, 2023

BETWEEN

JOSEPH KINYAJUI WANGARI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(A Revision from original conviction and sentence of the Chief Magistrate Court at Thika (Hon. C.A. OTIENO- AMONDI, PM) dated 15th June, 2017 in Criminal Case (S.O) No. 7136 of 2015.)

RULING

1. The applicant Joseph Kinyajui Wangari was convicted and sentenced in the Chief Magistrate's Court at Thika in Criminal Case Number 7136 of 2015. He was sentenced to serve ten (10) years imprisonment for the offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* Number 3 of 2006.

2. The Presiding Judge called for the original file on August 3, 2022 to facilitate consideration of Revision. This file was thus listed for revision before me during the High Court service week exercise.

3. The applicant was not present but the State through Mr. Gacharia briefly informed the court as follows:

> "...We could not trace him. He is requesting the court to invoke section 333 (2) of the *Criminal Procedure Code*. If the lower court file is available, the court can proceed and consider the request..."

4. Under Section 362 of the *Criminal Procedure Code*, the High Court is granted supervisory powers over the lower court. In exercising the said powers: -

> "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."

5. Section 364(1) provides for orders that the High Court may pass in its exercise of revisionary powers. Those orders include the powers conferred to the High Court as a court of appeal by sections 354, 357, and 358 where there is a conviction, in particular, the High Court may reduce or enhance a sentence meted on a convict.

6. The above statutory provisions are anchored on Article 165(6) and 165(7) of the *Constitution*.

7. The principles guiding alteration of a sentence were laid down in the landmark decision of *Ogolla v R* (1954) EACA 270 where it was held: -

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. To us, we would add, third criterion namely; the sentence is manifestly excessive in view of the circumstances of the case (R. v Shermosky (1912) 28TLR 263."

8. In the instant case, the applicant was convicted for an offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* Number 3 of 2006.

9. The particulars of the offence were that on the 16th day of September, 2015 at Wataalam area of Ruiru within Kiambu County unlawfully and intentionally caused his penis to penetrate the vagina of Diana Wambui Kiganya.

10. The punishment provided for rape under Section 3(3) of the *Sexual Offences Act* upon conviction of this offence is as follows: -

> "(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

11. At the time of sentencing on June 15, 2017; the sentencing went down as follows:

> "...Accused in mitigation:
>
> I am a final year student at JKUAT. I have not completed my HELB loan. I ask for non-custodial sentence. I am a first offender.
>
> Court:
>
> Having considered the accused person's mitigation and noting that section 3(3) of the *Sexual Offences Act* provides a minimum sentence, I therefore sentence the accused to ten years imprisonment. Right of Appeal 14 days."

12. At the time the Court passed what it described as the minimum sentence under the *Sexual Offences Act* for the offence which he had been committed of. This underscores the fact that the court was constrained by the minimum statutory limit on sentence.

13. However, since the Court of Appeal sitting in Nyeri in a judgment delivered in Nyeri on October 7, 2022 in Criminal Appeal Number 84 of 2015 *Joshua Gichuhi Mwangi v Republic* it has now been

clarified that the Court retains it full discretion in sentencing and its hands are not chained by the statutory minimum provisions. It explained:

> " ...Circumstances and facts of cases are as diverse as the various cases and merely charging under a particular provision of laws does not homogenize them and justify a general sentence. This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution..."

14. The Court of Appeal has restored judicial discretion in sentencing but it must be applied judiciously. As long there are clear reasons for a particular sentence, the court can now impose a shorter sentence than the minimum sentence or any other type of punishment it considers appropriate. The court must however justify the sentence it passes.

15. In sentencing the applicant, the trial court appears to have largely been guided by the fact that the offence charged attracted a statutory minimum sentence. That is how it expressly justified the duration of sentence it gave, that is 10 years imprisonment by stating thus:

> " ...Section 3(3) of the *Sexual Offences Act* provides a minimum sentence. I therefore sentence the accused person to 10 years imprisonment..."

16. As already pointed out, the issue of statutory minimum sentence in the offences under *Sexual Offences Act* is no longer tenable in view of the recent Court of Appeal decision yet it is the predominant factor that the trial Court applied in determining the length of sentence it passed on the Applicant.

17. This sentence was in addition to remand period because the Applicant was in custody almost the entire duration of his trial. I have also noted that except for a very short stint, the convict had been largely in custody. He was arrested and arraigned in Court for plea on December 15, 2015 and remained in custody until his bond was reviewed and was released on alternative cash bail of Kshs 50,000/- on September 12, 2016. Only a month later, October 12, 2016, the mother who had paid the money to secure his release applied to have the money back stating that she had borrowed it and that it was an uphill task getting the Applicant to appear in court. However, by then, the record does not show that there had been any instance of absconding by the applicant unless probably a threat to abscond made to the depositor. Nevertheless, the court instantly allowed the refund of cash bail and the Applicant was ordered to remain in custody. Consequently. Apart from a duration of one month that the applicant was briefly out on bail, he had been in custody from 15/12/15 to the date of sentence on June 15, 2017. This was approximately two years in remand. That duration pursuant to Section 333(2) of the *Criminal Procedure Code* ought to have been taken into account and used to discount the duration of any possible sentence that the court would have meted on him.

18. The Court in passing sentence said it had considered the duration he had been in remand but it is apparent that its hands were tied to the minimum sentence requirement for it could not have factored that duration to give him a lesser sentence than the prescribed statutory minimum. The Court of Appeal has now corrected this and said that nothing fetters the Court's discretion to impose any appropriate sentence in the circumstances. The imposition of a blanket minimum sentence may thus have prejudiced the convict at the time.

19. Further, looking at his mitigation, the convict was a young man who was in his final year of study at JKUAT University. The prosecution confirmed he was a 1st offender and the Applicant told the Court

as much in his mitigation. The circumstances of the rape were such that it was committed against a young female friend that had trusted him and honoured an invitation to his house only for him to turn against her and forcefully had sex with her. There is no doubt that this was a serious crime that deserved appropriate punishment.

20. I have however considered that he has been serving sentence from June 15, 2017 which is the date the sentence was passed which is a sizeable portion of the said sentence. Prior to that, he was also in remand during the trial that lasted almost two years, from December 15, 2015 to June 15, 2017.

21. His mitigation showed that he was 1st offender. He was a young man who was in his final year of study at the University but with the sentence, it is certain he could not continue and finish his studies. Those personal circumstances are also relevant as I consider this sentence review.

22. Having regard to the foregoing reasons, I find that this is a suitable case for revision of sentence.

23. The Applicant needs to catch up with life before his youthful years are all consumed in incarceration.

24. I hereby set aside the sentence of ten years imprisonment and substitute the same with the period already served.

25. The applicant is thus set free unless otherwise lawfully held.

RULING DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

L.N. MUGAMBI

JUDGE

In the presence of:-

Coram: (ON-LINE)

Before L.N. Mugambi, Judge

Court Assistant: Brian

Applicant: absent

Respondent: M/s Kabutha for DPP

COURT

Ruling be transmitted digitally to ODPP-Kiambu and to Kiambu Law Courts by Deputy Registrar to facilitate transmission to the relevant Prison where the applicant is presently serving the sentence for compliance.

L.N. MUGAMBI

JUDGE