MK v Republic (Miscellaneous Application 14 of 2020)
[2023] KEHC 4012 (KLR) (2 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

MISCELLANEOUS APPLICATION 14 OF 2020

RB NGETICH, J

MAY 2, 2023

BETWEEN

MK ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before court for determination is application dated August 19, 2020 filed by the MK the applicant herein seeking sentence re-hearing. The applicant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* in Kabarnet CMC Criminal Case No 276 of 2021. He denied the charge. The case proceeded for hearing and at the close of hearing the applicant was convicted and sentenced to life imprisonment.

2. Being dissatisfied with the judgment of the court, the applicant lodged an appeal at the Eldoret High Court criminal appeal No 116 of 2012 which upheld the decision of the trial court and his subsequent appeal to the Court of Appeal has never been heard hence his application for sentence re-hearing.

3. Through the instant application, the applicant seeks a review of the sentence imposed against him by the High Court citing provisions of article 165(3)(b) of the *Constitution* of Kenya 2010.

4. He further relies on the Supreme Court decision in the case of *Francis Karioko Muruatetu & another* [2017] eKLR which declared mandatory sentences unconstitutional and argued that the Court of Appeal in *Benard Mulwa Musyoka v Republic* criminal appeal No 25 of 2016 affirmed that the supreme court did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts and stated that the recent law developments have clearly shown that courts can divert from the mandatory minimum sentences enshrined in the *Sexual offences Act*.

5. The parties filed written submissions which they opted to fully rely on in support of their positions.

Submissions By The Applicant

6. The applicant cited the case of *Eliud Waweru Wambui v Republic* [2019] eKLR where the court rallied the call for legislative amendments to the *Sexual Offences Act* by opining that:-

> "We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize sexual conduct with children of a younger age than 16 years. We think that it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3ALL ER 402, do not engage in, and often sexual activity with their eyes fully open. They may not have attained the age of maturity but they may have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put in that case (page 421);
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> "If the law imposes on the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and lack of realism in area where the law must be sensitive to human development and social change.
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> In England for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then, the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archibald Criminal Pleading, Evidence and Practice, [2002] p1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation. For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive.

7. The applicant submitted that this court has the jurisdiction and powers and discretion to exercise its power and, in this case, alter the sentence imposed by the trial court and affirmed by the higher court and urged this court to re-evaluate the evidence and make an independent finding on both conviction and sentence as there is sufficient reason to interfere with the sentence meted to the appellant.

8. The applicant further cited the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR pages 63, it was held that:-

> ".....by dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced ....."Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.....it must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

9. The applicant submitted that in the event the court imposes a custodial sentence, the period spent in custody pending trial should be considered as per section 333(2) of the CPC and the principles set in the above case.

10. The applicant states that while in correctional facility, he has fully embraced the rehabilitative programs being offered; that he reformed and is ready to serve the nation productively and urged court to find that the period already served is sufficient; that he is a first offender, remorseful and pleads for another chance in life.

11. Further, that honourable court has power to impose an appropriate sentence by the use of its discretionary powers and it is in that vein that he humbly implores upon this honourable court to pass a lenient sentence that will enable him re-unite with the family, community and the free world at large.

12. The respondent filed written submissions on May 24, 2021 arguing that since the applicant's right to appeal on both conviction and sentence before the High Court are already spent, the only recourse available to him is to appeal to the Court of Appeal.

13. The respondent submitted that this court is *functus officio* because it had rendered itself on this matter and relied on the cases of *Kiwala v Uganda* [1967] EA 758 and *Republic v Sironga and Minde* [1918] 7 KLR 148 where the court held that once a court has rendered its verdict, it becomes *functus officio* and cannot revise its own orders and urged this court to down its tools for want of jurisdiction and dismiss the application.

Analysis and Determination

14. What I wish to consider is whether this court's jurisdiction has jurisdiction to review sentence imposed by trial court and upheld by High Court.The applicant argues that article 165(3)(b) of the *Constitution* empowers this court to hear and determine this application for sentence review whereas the respondent on the other hand contends that this court is functus officio and therefore bereft of jurisdiction.

15. It is not disputed that the applicant had his appeal heard and determined by this court. It is on this fact that the jurisdiction of this court is being questioned by the respondent. The applicant having appealed to this court and his appeal determined, did not pursue further appeal to the Court of Appeal.

16. The Supreme Court considered the issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and stated as follows:

> " ...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:
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> (i) the judgment, ruling, or order, is obtained, by fraud or deceit;
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> (ii) the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent;
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> (iii) the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;

(iv) the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."

17. From the foregoing, for a party to successfully move a court to review its own decision or that of a court with coordinate jurisdiction, the party is required to demonstrate that conditions set out in paragrah 16 exist.

18. The applicant has not demonstrated that any of the grounds set by the Supreme Court has been established in this case. No exceptional circumstances have been demonstrated by the applicant to warrant exercise of discretion by this court to review his sentence.

19. In respect to applicability of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR(commonly known as Muruatetu 1) ,the Supreme Court clarified in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR (commonly known as Muruatetu) as follows:-

> "[10] It has been argued in justifying this state of affairs, that, by paragraph 48 of the judgment in this matter, or indeed the spirit of the judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, in that paragraph, we stated categorically that;
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> "[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the *Constitution*; an absolute right.
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> Reading this paragraph and the judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.
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> (11) The ratio decidendi in the decision was summarized as follows;
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> > 69. Consequently, we find that section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
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> We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

20. In view of the above directions by supreme court in Muruatetu 2, the mandatory minimum sentences provided under section 8 of the *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of incest. I therefore decline to review sentence imposed by the trial court and upheld by this court.

Final Orders:-

21.

1. I decline to review sentence imposed by trial court and upheld by this court.
2. Applicant is at liberty to seek review in the Court of Appeal.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 2ND DAY OF MAY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Sitienei - Court Assistant.

Ms. Ratemo for State.

Mr. Chebii for Accused.

Accused present.