Njoroge v Republic (Criminal Appeal 037 of 2021) [2023] KEHC 17703 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17703 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 037 OF 2021

HM NYAGA, J

MAY 18, 2023

BETWEEN

JOHN NJOROGE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence by Hon. E.G Nderitu, Chief Magistrate, in Molo Sexual Offence No.110 of 2020 on 6th October 2020.)

JUDGMENT

1. The Appellant, John Njoroge, was charged with the offence of Defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on 12th August,2020 in Molo Sub-County within Nakuru County, he intentionally caused his penis to penetrate the Vagina of AWN a child aged 11 years.
2. He also faced an alternative count of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that on 12th August, 2020 in Molo Sub County within Nakuru County he intentionally touched the vagina of AWN a child aged 11 years.
3. The accused was convicted on the main count of defilement and sentenced to life imprisonment on 6th October,2020.
4. Being dissatisfied with the trial court's decision, he lodged an appeal against both conviction and sentence before this court. However, on 23rd March,2023 he withdrew his Appeal against conviction. He then told court to consider his appeal on sentence and to take account of time spent in custody.
5. The Appellant in his grounds of Appeal contended that the trial court pronounced excessive sentence.

6. The respondent on its part submitted that the Appellant was liable to life imprisonment but the trial court sentenced him to serve 20 years. The respondent urged the court to uphold the sentence of the trial court.

7. Sentencing is governed by the *Constitution*, the relevant legal provisions and the Judiciary *Sentencing Policy Guidelines 2016*.

8. The Sentencing Guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

> " Sentences are imposed to meet the following objectives:
>
> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
> 5. Community protection: To protect the community by incapacitating the offender.
> 6. Denunciation: To communicate the community's condemnation of the criminal conduct.

9. Under section 8(2) of the *Sexual Offences Act*, it is provided that where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. This, until recently, was seen as the 'mandatory' sentence imposed by the statute.

10. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others vs Republic* (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the *Penal Code* was unconstitutional. The Court took the view that:

> " 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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the *Constitution*; an absolute right."

11. The Supreme Court further stated that in considering the provisions of Section 329 of the Criminal Procedure Code gave guidance on sentencing as follows:

> " The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence."

12. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

13. For instance, in Jared Koita Injiri vs Republic [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that

> "if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> "The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

14. The Court of Appeal in *Dismas Wafula Kilwake vs R* [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

15. In *Philip Mueke Maingi & others vs Director of Public Prosecutions & another* (2022) eKLR the court was called upon to determine a petition by convicts charged with sexual offences and who had been sentenced to mandatory sentences. The case called for fresh jurisprudence following the 2 decisions of the Supreme Court. Justice V. Odunga (as he then was) held that;

> "In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

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*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

Taking cue from the decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

16. In the instance case the trial court in its ruling on sentence stated that: -

> "I have considered the fact that the accused is a first time offender, mitigation too considered, the nature of the offence, the age of the child, are all considered.it is sad that our children continue to be taken advantage of due to their age and vulnerability, deterrent action ought

to be taken to curb the likes of the accused person. He is hereby sentenced to serve 20 years' imprisonment"

17. The court considered the mitigation by the Appellant and I do not find any plausible reasons to interfere with the sentence. The same was reasonable under the circumstances.

18. The Applicant has also prayed that the period spent in custody should be taken to account pursuant to section 333(2) of the *Criminal Procedure Code*.

19. The state does not oppose the Application.

20. Section 333(2) of the *Criminal Procedure Code*, states as follows:

> (2)) "Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole 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 account of the period spent in custody".

21. It has been stated that in invoking section 333(2) of the Criminal Procedure Code, the court is not required to embark on an arithmetic journey to calculate time to be spent in custody.

22. In the case of *Bukenya vs Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29 January 2013) it was stated that;

> "Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement."

23. It is my understanding of the above decision that the court is only required to take account of the time spent in remand custody. This can be done by simply stating when the sentence will commence and the period to include the time spent in custody.

24. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR where the Court of Appeal held that:-

> "The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "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 is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether 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 19th June 2012."

25. The same court in Bethwel Wilson Kibor vs Republic [2009]eKLR expressed itself as follows:-

> "By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

26. The Judiciary *Sentencing Policy Guidelines* provide as follows:

> "The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

27. I have perused the trial court record and I note that the court meted the sentence against the Appellant without specifically stating the period which it was to commence. This means that the Appellant's term commenced on the day he was sentenced. This left out the period that he had spent in remand custody, prior to his conviction and sentencing.

28. In the case of *Osman Mohamed Balagha vs Republic* [2021] eKLR Aroni J. noted that;

> "It was not for the accused to remind the trial Court while sentencing to consider the time he spent in custody, the law obligates the court to consider the time the convict was incarcerated before conviction. From the record it appears that the trial court failed to consider the same."

29. I am therefore of the view that the trial court failed to comply with the mandatory provisions of the said section 333(2) of the *CPC*.

30. The trial court record shows that the Appellant was first arraigned in Court on August 14, 2020. He was in remand custody throughout the trial.

31. I therefore correct the error and order that the Appellant's sentence ought to have commenced from this date of August 14, 2020. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF MAY, 2023.

H. M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Appellant present