Wati v Director of Public Prosecution (Criminal Miscellaneous Application E055 of 2022) [2023] KEHC 17298 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17298 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL MISCELLANEOUS APPLICATION E055 OF 2022

HM NYAGA, J

MAY 11, 2023

BETWEEN

JOHN BUSAURE WATI ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

RULING

1. The Applicant, John Busaure Wati through an undated application moved this Court for sentence rehearing.

2. The facts as contained in the application indicate that the Applicant was charged, convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Nakuru CM Court Criminal Case No 12 of 2012. Thereafter, he lodged an appeal at Nakuru High Court against both sentence and conviction through Criminal Appeal No 156 of 2015 but it was dismissed. Dissatisfied with the decision of this court, the Applicant further lodged an Appeal before the Court of Appeal vide Criminal Appeal No 40 of 2017 however he withdrew the same.

3. The Applicant now seeks a review of the sentence imposed by the CM Court. He argues that this Court is bound by the decision of the Supreme Court of *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR under Article 163(7) of the *Constitution* and has jurisdiction to hear resentencing and mete out the appropriate sentence in line with Article 165 of the Constitution.

4. He further averred that the court in Petition No. E017 of 2021 *Philip Mueke Maingi & others vs Republic*, held that those convicted of the 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.

5. The Applicant contended that this court in resentencing will be discharging its constitutional obligation pursuant to Article 20(3), (a) and (b) of the *Constitution*.

6. The Respondent left the matter to the court's discretion.

7. The Applicant told this court that he has filled his submissions but the same are not on record. Nevertheless, I will proceed to determine the matter at hand.

Analysis & Determination

8. The only issue that arises for determination is whether the Applicant's plea for resentencing is merited.

9. In this case the applicant was charged under section 8(1) as read with section 8(2) of the Sexual Offences Act. The said provisions states:

> " 8.
>
> 1 A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2 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."

10. The Applicant was, not sentenced to serve life imprisonment but was sentenced to 20 years' imprisonment on June 3, 2015. He appealed against both conviction and sentence and Maureen A Odero L J on April 28, 2017 dismissed his entire Appeal.

11. 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."

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. Odunga J(as he then was), in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;

> " Taking cue from the decision in Francis Karioko Muruatetu directed that 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 case of *Fappyton Mutuku Ngui vs Republic* [2019] eKLR the court directed the trial court to rehear the Applicant's sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

17. The court in *Hashon Bundi Gitonga vs Republic* [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

18. In *Samuel Achieng Alego vs Republic* [2018] eKLR the court stated as follows;

> " It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

19. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the Sexual Offences Act takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

20. The Applicant further argued that this court has jurisdiction to determine this Application under Article 165 of the *Constitution*.

21. The High Court power of revision is set out in Article 165 which provides: -

> "6 The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
>
> 7 For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

22. It is clear therefore that this court under the above article has supervisory jurisdiction over subordinate courts and not courts of concurrent jurisdiction or those higher than itself.

23. In the instant case, the sentence the Applicant wishes to have reviewed was upheld by this court.

24. I have also noted that the applicant had filed a similar application vide Misc Application No E005 of 2020. On September 20, 2021, the court found that it had no jurisdiction to revise the earlier decision by Justice M Odero. It advised the applicant to move the Court of Appeal. By then the applicant had already withdrawn his appeal in the Court of Appeal vide the order issued September 17, 2020. No further directions were given by the Court of Appeal as regards re-sentencing.

25. It is my opinion that in entertaining this application, which is similar to the one filed in Misc E005 of 2021, the court is addressing a matter that has been addressed by 2 courts of concurrent jurisdiction.

26. In light of the decision by Hon Justice Ngugi, as mentioned above, I am of the opinion that this court is functus officio as that will be akin to sitting on appeal over a decision of a court of concurrent jurisdiction.

27. In the case of *Joseph Maburu alias Ayub vs Republic* [2019] eKLR, where the learned Judge stated that: -

> " Sentencing is a judicial exercise. Once a Judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one. Black's Law Dictionary Tenth (10th) Edition describes defines sentence as: The Judgement that a court formally pronounces after finding a criminal Defendant guilty; the punishment imposed on a criminal wrongdoer. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality."

28. In the case of *Raila Odinga & 2 Others –vs- Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR the Court stated that: -

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the

court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

29. In view of the foregoing, if the Applicant is still keen on having his sentence reviewed, he should do so before the Court of Appeal.

30. Though I have sympathy for the applicant, this court cannot clothe itself with a jurisdiction that it does not possess, even if it is for convenience's sake.

31. As I conclude this ruling I am duty bound to state that it is a high time that there was uniformity on how this kind of applications are to be handled. While some courts have held views that are similar to mine, there are others that have proceeded to re-sentence the applicants appearing before them.

32. Applicants must also be given clear guidelines on which court to go to, depending on where their cases/appeals had reached. The current state of affairs will lead to conflicting decisions, hence erode the confidence of the court in the eyes of the public.

33. In conclusion I find that this court lacks the jurisdiction to entertain the present application and it is struck out.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MAY, 2023.

H M NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Applicant present