Gitahi v Republic (Miscellaneous Criminal Application E167 of 2021) [2023] KEHC 18532 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E167 OF 2021

RN NYAKUNDI, J

JUNE 5, 2023

BETWEEN

BENSON GITAHI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

1. The applicant approached this court vide a Notice of Motion dated August 19, 2021 seeking that the one and a half years spent in custody be accounted for in his sentence. Further, that the court be pleased to admit him to a non-custodial sentence for the remaining period of his sentence.

2. The applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. Upon considering the evidence presented before the court and the testimonies of the witnesses, the trial magistrate convicted him of the offence and sentenced him to 20 years' imprisonment.

Analysis & Determination

3. As the applicant seeks a sentence review, the issue for determination that arises is;

Whether the sentence of the applicant should be reviewed

4. The only ground for review of the sentence of the accused is premised on the time spent in custody before sentencing. Section 333(2) of the *Criminal Procedure Code* provides:-

> " Subject to the provisions of Section 38 of the *Penal Code*, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

5. I have perused the record of the court and the applicant was out on bond during the hearing of the case in the trial court from October 2012. Judgement was delivered on April 10, 2019 whereupon he was remanded in custody until May 6, 2019 when he was sentenced. It follows that he spent close to a month in custody and therefore the one and a half years he asks to be considered were not part of his remand during the trial.

6. The current jurisprudence is that mandatory sentences are unconstitutional in regards to sexual offences. In Mombasa High Court Constitutional Petition No 97 of 2021 – *Edwin Wachira and 9 others v Republic* Hon. Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

> For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

7. At the time of sentencing, the courts were bound by mandatory sentences regardless of the circumstances of the case. I have considered the record from the trial court and from the facts of the case, the applicant was in a relationship with the accused despite her being fifteen years old at the time. Further, they had been in the relationship for four years from her testimony and he was 33 years old at the time. For them to have been in a four-year relationship implies that the relationship began when she was eleven years old. It is my considered view that an adult in his late twenties was not ignorant when engaging in a relationship with an eleven-year-old.

8. Based on the trending transformative jurisprudence on the structured interpretation on mandatory minimum sentences in Kenya trial courts are now guided by a purposive approach ordained with inherent powers of discretion to render sanctions against a convict on a case to case fulcrum. Drawing inspiration from comparative jurisprudence in *S v Toms* 1990 (2) SA 802 (A). This dicta has found its way in our legal system thus

> "the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Courts normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered

an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

9. Similarly here at home following the landmark decision in *Francis Karioko Muruatetu & another v Republic* SC Pet No 16 of 2015 the court of Appeal in *Jared Koita Injiri vs Republic* [2019] eKLR expressed itself as follows:

> "In this case the appellant was sentenced to life imprisonment on the basis of mandatory sentence stipulated by section 8(1) of the Sexual Offence Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. 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 tht the appellant committed a heinous crim and occasioned sever trauma and suffering to a young girl. His action 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. (See also in *Christopher Ochieng v Republic* [2018] eKLR),

10. A great deal of discussion has gone on before the High Court and Court of Appeal on the proposition framed in consonant with mandatory minimum sentences in our statute and expanding the scope and ambit of the discretion conferred under Article 50 (1) of the *Constitution*. The power conferred is of a character to be exercised within the parameters of the *Constitution* as provided for under Article 10 on principles of national values and principle governance. The hallmark of a prudent exercise of judicial discretion is informed of the fact that judges are endowed with wisdom, knowledge, set skills on adjudication of disputes and that by their long training and experience they are ideally suited to do justice to a matter consistent with their oath of office. In essence the ends of justice would be better served by trusting these courts to act objectively in passing various sentences demanded of the unique circumstances of each case.

11. Thus considering the observations made in the above authorities there is one proposition formulated that mandatory minimum sentences which subject judicial discretion to a restraint by and large lean towards unconstitutionality. That is it for now. I consider carefully the question laid down by the applicant in the context of Section 333(2) of the *Criminal Procedure Code* on the inquiry as to whether the period spent in remand custody was credited by the court in the final verdict on sentence.

12. I find a great deal of substance on this issue. Again it must be realised this provision narrows down for the courts to aptly incorporate the spirit of this section while formulating a particular sentence on imprisonment dependent on the facts and circumstance of each case. It is settled legal position crystallised by the court and guidelines in Article 50 (2) (p) (q) 6 (a) & (b) of the *Constitution*. The law presumes that trial courts will find it prudent to revisit section 333(2) of the code and be duty bound to impose appropriate credits in favour of the convict upon proof of having spent in remand custody pending trial or conclusion of his or her case. I consider this provision to be part of the fair procedure in sentencing.

13. Therefore, this court holds the view that the period in remand custody which was never factored in any of the decisions by the courts be considered as a peculiar circumstance to grant relief limited to that duration. As a consequence, the committal warrant be reviewed /amended for the custodial sentence commencement date being the June 15, 2012.

14. For those reasons the application on review of sentence partially succeeds in favour of the Applicant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5TH JUNE 2023.

....

R. NYAKUNDI

JUDGE