Shibeka v Republic (Criminal Petition E064 of 2021)
[2023] KEHC 18486 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E064 OF 2021

RN NYAKUNDI, J

JUNE 5, 2023

BETWEEN

BONIFACE MUSONYE SHIBEKA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The petitioner was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The trial court found the petitioner guilty and sentenced him to 20 years' imprisonment and being aggrieved with the conviction and sentence he filed appeal no, 96 of 2017 which he stated had not been heard until now. He then opted to file the present application for sentence review.

2. The petition is based on the grounds set out therein in terms of mitigation. The petitioner contends that he is a first-time offender and that he is remorseful and repentant for his action. Further, that he spent a substantial time in remand and that he his aging and therefore prays to be re-integrated in society so as to serve as a role model. He relied on the case of *Francis Karioko Muruatetu & Another vs Republic* HC Petition 15 of 2015 and Articles 28(1) 159(2) a,b and 3 (a) b & d), 23(1) 25, 50 (2) (q) (r) 159(2) a &b 165(3) 165 (3) a b & d and 258 (1) of the *Constitution* of Kenya to support his petition. The petitioner filed written submissions to support his petition reiterating the mitigation grounds as set out in the petition. He urged the court that his petition be allowed as prayed.

Analysis & Determination

3. Upon considering the petition and submissions, the following issue emerges for determination;

Whether the petitioner's sentence should be reviewed

4. The petitioner urged the court to consider the time spent in remand under section 333(2) of the Criminal Procedure code.

5. Further, in line with the directions of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) commonly referred to as Muruatetu 2, the apex court directed that the decision of Muruatetu and the guidelines apply only in respect to sentences of murder under sections 203 and 204 of the *Penal Code* and therefore, the same cannot be applied in the present case. Notwithstanding the Supreme Court Instruction note on applicability of the principle of unconstitutionality and mandatory sentences it does not imply no reference can be made by the trial courts in determining appropriate sentences. The court in its quest to develop the test to be applied when sentencing those who would otherwise have faced a mandatory death sentence gave the following guidelines on resentencing which are not exclusive to murder convicts.

    a. Age of the offender

    b. Being a first offender

    c. Whether the offender pleaded guilty

    d. Character and record of the offender

    e. Commission of the offence in response to gender-based violence

    f. Remorsefulness of the offender

    g. The possibility of reform and social-re-adaptation of the offender

    h. Any other factor that the court considers relevant.

6. The procedural issues that arise as a result of the new discretion now vested in the courts gives an opportunity to the accused persons or convicts to put forward mitigation before any verdict on sentence can be imposed. In recent times the principle on minimum mandatory sentences in respect of offences under the *Sexual Offences Act* has been reinstated by the superior courts as can be seen by the following cases: "*Eliud Waweru Wambui vs Republic* (2019) eKLR. "We need to add as we dispose of the appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a young age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lores in *Gillick vs West Norfolk and Wisbench Area Health Authority* (1985) 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well 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 it in that case (at P421). (Similarly in the case of *Dismas Wafula Kilwakw vs Republic* (2019) EKLR the court emphasised as follows: " Here at home ina a judgement rendered on December 14, 2017 in Francis Karioko Muratetu & another v Republic S C Pet No 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the Sexual Offence Act. We cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. In principles, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an

appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences, Act, which do exactly the same thing"

7. Weighing in on the issue the Constitutional Court of South Africa in *State v Makwanyane* Case No CCT /3/94 pronounced itself as follows: " Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the state to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused. Due regard must be paid to the personal circumstances and subjective factors that might have influenced the accuse persons conduct, and these factors must then be weighed with the main objectives of punishment, which have been held to be deterrence, prevention, reformation on retribution. In this process any relevant considerations should receive the most scrupulous case and reasoned attention, and the death sentence should only be imposed in the most exceptional cases, where there is no reasonable prospect of reformation and the objects of punishment would not be properly achieved by any other sentence."

8. In my view the trending jurisprudence leans towards non imposition of mandatory minimum sentences unless special circumstances so demand of the court to exercise discretion to that effect. The rationale for this consideration is to individualise the circumstances of each case and offender. Courts are only able to exercise sound judgement in sentencing without restrictions from the legislature. As much as minimum sentences are necessary for uniformity and consistency in overall it is presumed that cases bear the same characteristics. I consider the fairness of sentencing process to be more important than the trial itself hence the need to entitle the court to retain residual judicial discretion to impose an appropriate sentence.

9. Meanwhile, according to the applicant is aggrieved that the trial court failed to appreciate the mitigatory factors and other personal antecedents rendering the sentence harsh and punitive. From the record, overwhelming evidence exist that Section 333(2) of the *CPC* was never taken into account by the trial court in making a determination of the custodial sentence. As a result, the custodial sentence be and is hereby reviewed to give credit to the Applicant for the period spent in remand custody. To that extent the committal warrant be amended in consonant with Section 333(2) of the CPC on the sentence commencement date being from the date of arrest of the Applicant.

10 It is so ordered

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

R NYAKUNDI

JUDGE