Githiri v Republic (Criminal Appeal 222 of 2011)
[2023] KEHC 20675 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL 222 OF 2011

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

GEOFREY WAMAI GITHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant herein together with another was charged before the trial court for the offence of attempted robbery with violence contrary to section 297(2) of the *Penal Code*. The record indicates that he was convicted of the offence on 27.10.2021 and sentenced on the same day. The records further shows that he filed an appeal on 10.11.2011 and wherein he challenged both conviction and sentence. However it appears that the trial court's file was never brought to the High Court despite numerous reminders from the Deputy Registrar the last one being the letter dated 22.02.2022. The appeal was admitted for hearing on 10.05.2022.

2. The court gave directions that the appeal be canvassed by way of written submissions. The appellant proceeded to file amended grounds of appeal together with his written submissions. In the amended grounds of appeal, he indicated that he was appealing against the sentence only and to the effect that the same was harsh, the same did not take into consideration the mitigating circumstances, the same was predetermined, the same was inconsistent with article 25 and 50 of the *Constitution*, that the trial court erred in law and fact in failing to consider the appellant's dignity and that the trial court erred in law and fact when it failed to apply section 216 and 329 of the *Criminal Procedure Code*. He thus prayed this court to exercise its inherent discretion and substitute the mandatory death sentence and that the court do consider the appellant's mitigating circumstances. The appellant further filed written submissions and wherein he basically submitted in support of the grounds of appeal and basically his submissions was that the sentence was harsh and excessive and was passed by the trial court without considering the mitigating circumstances. He proceeded to present his mitigations in the said submissions.

3. The respondent in opposition to the appeal submitted that the sentence was legal as the law provided for mandatory death sentence and which section has not been declared unconstitutional. Further that the appellant was granted a chance to mitigate but indicated that he left the same to the court. The respondent as thus prayed that the sentence ought not to be disturbed.

4. I have considered the appeal herein and the submissions by the parties. The appellant has appealed against the sentence meted to him by the trial court and basically on the grounds that the same was excessive and that the court did not consider the mitigation by the appellant. The question therefore is whether the sentence imposed by the trial court was excessive.

5. It is trite that excessiveness of a sentence is a ground upon which an appellate court can interfere with a sentence imposed by the trial court. (See the holding of the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR).

6. In the instant case, the appellant was charged with the offence of attempted robbery with violence contrary to section 297(2) of the *Penal code*. The said section provides for the mandatory minimum sentence. The trial court meted the said sentence and it is therefore clear that the same was not excessive.

7. I am aware of the jurisprudence in relation to mandatory minimum sentences as was pronounced by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR – (Muruatetu-1) to the effect that mandatory minimum sentences are unconstitutional. The said reasoning was earlier applied to other offences which provided for mandatory death sentence for instance defilement and robbery with violence and whereby convicted persons would apply for resentencing while applying the said ratio and which this court would have applied and reconsider the sentence imposed by the trial court. However the Supreme Court has, however, clarified the applicability of its decision to offences other than murder in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Muruatetu - 2) by stating that its earlier decision (Muruatetu 1) did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute and that for any section to be declared unconstitutional, it must be challenged before the competent court (High Court).

8. Section 297(2) having not been declared unconstitutional the appellant cannot argue that the sentence was excessive or rather illegal.

9. The appellant submitted that the trial court did not consider his mitigation and failed to apply section 216 and 329 of the *Criminal Procedure Code* (which sections requires court to take into account the mitigation before passing the sentence). However, it is clear that the appellant was granted the opportunity to mitigate but he didn't say anything but "left it to court." Further the trial court having sentenced the accused at the time when the law provided for mandatory minimum sentence, the mitigation would have been of no consequence on the sentence.

10. Considering all the above, I find the only option available is to apply for re-sentencing hearing when the court can consider the same in line with the guidelines as set out by the Supreme Court.

11. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the State