Mwinzi v Republic (Miscellaneous Criminal Application E012 of 2023)
[2023] KEHC 22598 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2023

JN ONYIEGO, J

SEPTEMBER 22, 2023

BETWEEN

KYALO MWINZI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. What is before this court is an application filed in court on May 31, 2023in which the applicant prays that this honourable court does consider resentencing him. Secondly, that this court do consider remission on the period served and further, the court be guided inter alia by similar findings to wit that of Mativo J. (as he was then) in Constitutional Petition No. 97 of 2021 *Edwin Wachira & 9 others* (consolidated) at Mombasa.

2. The applicant's case as can be discerned from the pleadings is that he was convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to life imprisonment. That the applicant being dissatisfied by the conviction and sentence of the trial court, proffered an appeal before this court and a judgment was delivered on July 22, 2016 upholding the conviction and sentence of the trial court. The applicant deposed that he has since been rehabilitated while in custody and therefore, the remaining part of the sentence as shall be preferred by this court be served under probation in the community.

3. The application was canvassed by way of oral submissions wherein the applicant relied on his application as filed thus surging this court to allow the prayers sought. Mr. Kihara for the respondent urged this court to dismiss the same for want of merit. That this court is functus officio as it had although differently constituted pronounced itself via a judgment delivered onJuly 22, 2016 dismissing the applicant's appeal.

4. I have considered the application before me and the oral submissions by both parties. In my view, the main issue for determination is whether the application has merit.

5. The applicant basically has invoked the resentencing jurisdiction of this court as was laid down by the Supreme Court in *Francis Kariuki Muruatetu & another v Republic* Petition No. 15 and 16 of 2015 wherein the Learned Judges held that section 204 of the *Penal code* was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing. The court while remitting the matter to the high court for re- hearing on sentence held that: -

> " The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing..."

6. Further, the applicant hinged his application on the basis that minimum mandatory sentences, prima facie, do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence. That ascourt is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.

7. Of importance to note is the fact that the applicant argued that he has been in custody from the year 2014 to date and has sought that the remaining part of sentence be served under probation.

8. In regards to whether the remaining part of the sentence could be served under probation, this court is alive to the provisions of section 4(1) and (2) of the *Probation of Offenders Act*, cap 64 Laws of Kenya which provides as follows:

   (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

      (a) convict the offender and make a probation order; or

      (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit

   (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings. health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

9. It is arguable whether in light of the foregoing, a sexual offender qualifies to be considered for probation. Odunga J. (as he was then) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) argued that:

> " ....If they do, then the proponents of minimum mandatory sentences may find it difficult to justify such sentences on the ground that sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences. It is however my view that such reasoning may be taken to mean that there is lack of faith in the judicial system to mete appropriate sentences, a proposition that is dangerous in a system that believes in the rule of law. The fact that a trial court may err in imposition of sentences ought not to be a reason for taking away judicial discretion and handing it over to the legislature. The judicial system provides for appellate process where parties are dissatisfied with decisions of the lower court. To remove from the Courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing "sensible sentences" in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision.

10. My understanding of the reasoning of Odunga J (as he was then) is that sentencing is a matter within the discretion of the trial court. See *S v Mchunu and another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court].

11. The applicant was sentenced on June 9, 2015which was before the Muruatetu's decision and when the courts would not exercise discretion while sentencing in mandatory sentences.

12. This court having independently reviewed the record herein, it came out clearly that the applicant had been charged and found guilty of committing incest with his own daughter. Upon appeal, this court, although differently constituted, reached a determination that the prosecution proved its case to the required standard and thereby upholding the conviction and sentence by the trial court.

13. Considering that this court has already pronounced itself on the issue of conviction and sentence, it has become functus officio. To revise sentence herein will amount to sitting as an appellate court on my colleague's decision yet we are courts of concurrent jurisdiction. The applicant should have appealed to the court of appeal. It is worth noting that Mwaratetu (II)did clarify that *Muruatetu (I)* was only applicable to murder trials only and not all other cases. Therefore, the applicant cannot benefit from *Muruatetu (I)*. Accordingly, I do not find merit on the application hence dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 22ND DAY OF SEPTEMBER 2023.

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J.N. ONYIEGO

JUDGE