Wambilianga v Republic (Criminal Appeal E031 of 2021)
[2023] KEHC 22554 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22554 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E031 OF 2021

JRA WANANDA, J

SEPTEMBER 22, 2023

BETWEEN

JAMIN WAFULA WAMBILIANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Butere Senior Resident Magistrate's Court Criminal Case No 166 of 2010 with the offence of defilement of a girl contrary to Section 8(1) (presumably as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on 9/03/2010 in Butere District within Western Province, intentionally caused his penis to penetrate the vagina of ZK, a child aged 14 years. He was also charged with the alternative offence of committing an indecent act with the same child contrary to section 11(1) of the same Act.

2. After analyzing the evidence, the trial Court delivered its Judgment on 4/02/2011 whereof it found the Applicant guilty, convicted him and sentenced him to serve 20 years imprisonment.

Appeal to the High Court

3. After entry of the said Judgment, the Applicant filed an Appeal against both conviction and sentence, namely Kakamega High Court Civil Appeal No 18 of 2011. By the Judgment delivered on 21/06/2012 by Hon. Justice Kimaru (as he then was), the Appeal was dismissed in its entirety.

Current Application

4. On 9/06/2022, the Applicant filed the present Application by way of an undated Notice of Motion. In the interest of justice and by virtue of the provisions Article 159(2)(b) of the *Constitution* which require the Courts to administer justice "without undue regard to procedural technicalities", the issue

of Applicants, mainly confined in custody and acting in person, not dating their Applications is, as a matter of practice, normally excused by the High Court. I so excuse the same.

5. In the Application, the Applicant basically seeks the review of his sentence. He relies on the decision of Hon. G.V. Odunga (as he then was) delivered in *Maingi & 5 others v Director of Public Prosecutions & others* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) delivered on 17/05/2022.

6. Hon. Judge Odunga's said decision was itself based on the now famous Supreme Court decision in *Muruatetu 1* (otherwise formally described as *Francis Karioko Muruatetu & another v Republic* [2017] eKLR) and as interpreted and clarified in the subsequent *Muruateu 2* (otherwise formally described as *Francis Karioko Muruatetu & others v Republic and Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR).

7. The grounds raised by the Applicant are that the sentence meted out by the trial Magistrate was mandatory in nature hence unconstitutional, inhumane, discriminatory and denied the Magistrate his powers to exercise his discretion to award an appropriate sentence, his mitigation was not taken into consideration to enable the Magistrate to decide an appropriate sentence other than the one provided by law hence his right to a fair trial as envisaged under the *Constitution* were violated, he has served more than a half of the total prescribed sentence, he has undergone several rehabilitation programs in prison hence he is reformed and deserves a more lenient sentence as the present one is harsh and excessive, he is very remorseful for the offence committed and that by virtue of Article 165(2)(b) of the *Constitution*, this Court is vested with powers to hear and determine the present Application.

8. The Applicant also filed written Submissions majorly reiterating the grounds aforesaid. He however prayed that the Court be pleased to consider his age as a factor as he is 67 years (as at the time of filing the Application). He added that he has so far served 11 years.

Respondent's Submissions

9. In opposing the Appeal, Prosecution Counsel Mr Mwangi appearing for the State opted not to file written Submissions and instead made brief oral Submissions. He cited the case of *Juma Abdalla v Republic*, Court of Appeal Criminal Appeal No 44 of 2018 and argued that in that case, the Court of Appeal reiterated the Supreme Court's directions that the holding in *Muruatetu 1* aforesaid outlawing mandatory sentences only applied in murder cases and did not therefore apply to sexual offences.

Analysis and determination

10. As already stated, by the Judgment delivered on 4/02/2011 the trial Court found the Applicant guilty, convicted and sentenced him to serve 20 years imprisonment. As further already stated, the Applicant filed an Appeal against the decision in Kakamega High Court Civil Appeal No 18 of 2011 which Appeal was by the Judgment delivered on 21/06/2012 by Hon. Justice Kimaru (as he then was), dismissed both on conviction and sentence.

Issues for determination

11. In view of the foregoing, I find the issues that arise for determination in this Application to be the following;

    i. Whether the High Court having already dismissed the Applicant's Appeal on both conviction and sentence still has jurisdiction to determine the present Application seeking revision of the sentence.

ii. Whether the imposition of 20 years imprisonment allegedly in accordance with the stipulated mandatory minimum sentence was lawful.

12. I now proceed to analyse and answer the said issues.

i.Whether the High Court having already dismissed the Applicant's Appeal on both conviction and sentence still has jurisdiction to determine the present Application seeking revision of the sentence

13. Needless to repeat, the trial Court found the Appellant guilty and sentenced him to serve 20 years imprisonment. Being aggrieved with this decision, the Applicant filed an Appeal against both the conviction and sentence in Kakamega High Court Civil Appeal No 18 of 2011 which Appeal, by the Judgment delivered on 21/06/2012 by Hon. Justice Kimaru (as he then was), was dismissed thus upholding the both the conviction and sentence.

14. The present scenario therefore, technically, means that the Applicant is asking this Court to review the decision of a bench of concurrent jurisdiction. This Court cannot again resentence the Applicant since in doing so, it shall be reviewing a decision of a Court of concurrent jurisdiction.

15. The general jurisdiction of the High Court is provided for under Article 165 of the *Constitution* of Kenya 2010. Its supervisory jurisdiction in criminal matters is expounded under Section 362-364 of the *Criminal Procedure Code*. Under the said provisions, this Court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

16. This court Cannot and does not have the jurisdiction to review the decision of a Court of concurrent jurisdiction. Once this Court delivered its judgment on the appeal (though differently constituted), it became functus officio over the matter herein. One Judge cannot therefore sit to review a Judgment or decision of another Judge of concurrent jurisdiction. This is because superior Courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction. The Court which has jurisdiction to deal with an issue arising out of the decision of this Court is the Court of Appeal as it is the one with such jurisdiction under Article 164(3) of the *Constitution* and Section 379(1) of the *Criminal Procedure Code*. This is in appreciating the provisions of Article 50(2)(q) of the *Constitution* of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by "a higher court" as prescribed by the law.

17. The Court of Appeal in *Telkom Kenya Limited v John Ochanda* [2014] eKLR, stated as follows:

> " *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

18. Further, I cite the decision of L. Njuguna J in the case of *Boniface Gitonga Mwenda v Republic* [2021] eKLR where, faced with a similar situation, she held as follows;

> " However, as I have noted, the Petitioner herein appealed the trial court's decision to this court. The court in dismissing the appeal against the sentence held that the trial court's sentence was within the law. The first appellate court being a court of concurrent

jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn't have jurisdiction in that respect and as such, the prayer to that respect ought to fail."

19. In the circumstances, it is my considered view that this Court cannot review a decision of its own as that would be tantamount to sitting on appeal in its own decision. The Petitioner's recourse lay with the Court of Appeal, not to return to this same High Court to seek a relief which this very Court had already determined. My finding is that the issues concerning the sentence imposed upon the Petitioner were conclusively dealt with in the said Appeal. This Court does not therefore have jurisdiction over the present revision Application. The right forum would be the Court of Appeal since the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence.

20. It is trite that where a Court is bereft of jurisdiction, it should down its tools the moment it finds that it is without jurisdiction (see *The owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR). I so do.

21. In view of the foregoing, I find that this Court lacks the jurisdiction to entertain or determine the present Application.

ii.Whether imposition of 20 years imprisonment allegedly being in accordance with the stipulated mandatory minimum sentence was lawful.

22. Having held that this Court lacks the jurisdiction to entertain or determine the present Application, I have no reason to determine this second issue. However, I am aware of the school of thought that the High Court can still review its own decision is in exercise of the resentencing jurisdiction pursuant to *Muruatetu 1*.

23. I will therefore proceed to analyze and answer this second issue nevertheless, just in case I am wrong in my finding that this Court has no jurisdiction

24. Since the minor that the Applicant was convicted of defiling was aged 14 years, my starting point will be to set out the provisions of Section 8(3) of the *Sexual Offences Act* which provides as follows:

> " 8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

25. It is therefore logical to conclude that the Applicant was sentenced under Section 8(3) above. It is also true that the said provision stipulates the sentence of 20 years imprisonment to be the minimum mandatory sentence in cases where the defiled minor is between the age of 12 and 15 years. It is also true that the grounds of the decision in *Muruatetu 1* was basically that mandatory statutory sentences

in criminal matters unconstitutionally take away the trial Court's powers to exercise discretion in sentencing and consequently, the Court's mandate to hear and consider the mitigation made by convicts before sentencing. The question however is whether in sentencing the Applicant to 20 years imprisonment, the trial Magistrate in this case acted on the understanding that her "hands were tied" by the mandatory 20-year sentence set out in Section 8(3). If this is the case, then *Muruatetu 1* would come to the aid of the Applicant. I proceed to interrogate that issue.

26. In this case, the record shows that after conviction and before he was sentenced, the Applicant made his mitigation. While sentencing the Applicant, the trial Magistrate then stated as follows:

> "I have considered what the accused has said in mitigation. Hew has been convicted ands does not seem remorseful. What he did was a heinous crime and quite prevalent in most parts of the country. A determinant sentence is called for. I sentence the accused to 20 years imprisonment. He shall have 14 days R/A."

27. A reading of the above statement does not indicate that the trial Magistrate imposed the sentence of 20 years imprisonment simply because or on the basis that the same was the mandatory statutory minimum sentence stipulated. On the contrary, I find that the trial Magistrate heard the Applicant's mitigation and expressly stated that she had considered it. Her stated reasoning for imposing the sentence was because what the Applicant "did was a heinous crime and quite prevalent in most parts of the country" and that as a result, "determinant sentence is called for".

28. I therefore find that the reasoning in *Muruatetu 1* does not apply to the Applicant's situation since there is no indication that the 20 years prison sentence was imposed pursuant to the mandatory statutory minimum penalty provisions of the law. For the same reason, the decision of Hon. G.V. Odunga (as he then was) in *Maingi & 5 others v Director of Public Prosecutions* (*supra*) which the Applicant very strongly relied upon does also not apply.

29. Regarding the Prosecution Counsel's argument that *Muruatetu 1* does not apply to the *Sexual Offences Act* as was reiterated by the Court of Appeal in *Juma Abdalla v Republic*, it is true that in *Muruatetu 2* the Supreme Court subsequently clarified that its directions given in *Muruatetu 1* regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and did not necessarily extend to sexual offences. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, the Courts are nevertheless free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained to impose the provided sentences if the circumstances do not demand it.

30. Although I would therefore agree with the Prosecution's general statement of law regarding interpretation of *Muruatetu 1*, would not have applied it to deny the Applicant the right to seek resentencing. However, having held that this Court lacks the jurisdiction to entertain the present Application and having also ruled, in the alternative, that even if there was jurisdiction, the Application would still fail on merits, my above view that *Muruatetu 1* would not apply to deny the Applicant recourse to seeking review of his sentence, is of no consequence.

Final Orders

31. In the end, the Application herein is dismissed for want of jurisdiction and also, in the alternative, for lack of merits

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

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WANANDA J. R. ANURO

JUDGE