Mausa v Republic (Criminal Petition E003 of 2021)
[2023] KEHC 23030 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL PETITION E003 OF 2021

HM NYAGA, J

OCTOBER 5, 2023

BETWEEN

GEOFFREY MOMANYI MAUSA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. I had given directions in my Ruling delivered on May 18, 2023.
2. Subsequently, an order by the Deputy Registrar dated July 4, 2023 ascertaining the applicant withdrew his appeal before the court of Appeal was filed on July 26, 2023.
3. I will now consider whether the applicant's plea for sentence re-hearing is merited.
4. In this case the applicant was sentenced to 15 years' imprisonment pursuant to the provisions of section 8 (4) of the *Sexual Offences Act* which provides that a person who defiles a child who is between the age of 16 years and 18 years, is liable to imprisonment for a term of 15 years.
5. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others vs Republic (2017) eKLR* (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the *Penal Code* was unconstitutional. The court took the view that:

> " Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to

conform to the tenets of fair trial that accrue to the accused persons under the article 25 of *the Constitution*; an absolute right."

6. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

> " . Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.
>
> ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
>
> iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
>
> iv. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
>
> v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code as well as those of the victim before deciding on the suitable sentence.
>
> vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
>
> vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
>
> 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 respect of gender based violence.
>
> f. The manner in which the offence was committed on the victim.
>
> g. The physical and psychological effect of the offence on the victim's family.
>
> h. Remorsefulness of the offender.
>
> i. Possibility of reform and social adaptation of the offender.
>
> j. Any other factor the court considers relevant.

k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.

7. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

8. For instance, in *Jared Koita Injiri vs Republic* [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that;

> "if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> "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 that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions 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."

9. The Court of Appeal in *Dismas Wafula Kilwake vs R* [2018] eKLR, held that the mandatory minimum sentence under section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

10. Odunga J (as he then was), in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;

> "Taking cue from the decision in Francis Karioko Muruatetu directed that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

11. In the case of *Fappyton Mutuku Ngui vs Republic* [2019] eKLR the court directed the trial court to rehear the applicant's sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

12. The court in *Hashon Bundi Gitonga vs Republic* [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

13. In *Samuel Achieng Alego vs Republic* [2018] eKLR the court stated as follows;

> "It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of *the Constitution* as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

14. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the *Sexual Offences Act* takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

15. In this case the trial magistrate stated that he had considered the mitigation of the accused person but proceeded to sentence him as per section 8(4) of the *Sexual Offences Act* which provides for the minimum sentence of 15 years. It is apparent therefore to reasonably presume that the trial magistrate proceeded on the footing that her hands were tied by the minimum sentence and failed to exercise discretion in sentencing. On this finding the appeal on sentence must succeed.

16. The Appellant in mitigation told court that

> "I pray for a non-custodial sentence as I want to serve the government as well as take care of myself"

17. I have considered the above mitigation and perused the resentencing report filed on 13th March,2023.

18. According to the report, the applicant is a total orphan and his family has no criminal history. The applicant schooled up to form three then dropped out. At the time of his arrest he was working as a caretaker in Grassland farm. He is married with one child. At the time of the offence he was 19 years old whereas the victim was 17 years old. He claimed he befriended the victim whom he considered as a person of his age. It is stated that the appellant at the time of the offence was quite young and his choice of action lacked insight of the repercussion that would come along. The victims' family could not be traced.

19. However, from the trial court's record, the applicant did not actually befriend the victim. Together with his accomplice he is said to have ambushed her and her friend and took them to an isolated place and stayed with them for several days. The two men actually held the two girls captive, locking them in a room while their parents were in a desperate search for them. These are circumstances that the court cannot ignore.

20. The report further indicates that the applicant enrolled in masonry while in prison and he intends to continue with this line of duty if released. He is said to be remorseful and the probation officer recommends he be placed on probation for a period of three years.

21. I have referred to other authorities on similar cases of defilement. For instance, *Louis Kaugi Nyaga v Director of Public Prosecutions* [2020] eKLR the applicant herein had been charged with defilement of a child contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act* and he was sentenced to 15 years' imprisonment. On revision, the court set aside the fifteen (15) years imprisonment sentence and substituted with one of ten (10) years imprisonment.

22. Similarly, the court in *Patrick Mutyangulu Muia v Republic* [2021] eKLR set aside the sentence imposed by the trial court of 15 years' imprisonment and substituted it with a sentence of ten (10) years' imprisonment for the applicant who had been charged with the same offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act*.

23. It is thus apparent that the trend has been to mete out sentences less than the "mandatory" sentence, unless there are aggravating circumstances. In this case, I am of the view that there were such circumstances. Holding a child captive for two weeks for sex is as inhumane as they come.

24. Therefore, I find that the sentence of 15 years imposed by the lower court on March 20, 2015 was not manifestly unjust or excessive. I find no reason to disturb it.

25. The petitioner will continue to serve the 15 years sentence but in line with the provisions of section 333(2) of the *Criminal Procedure Code*, it will run from the date the applicant was first remanded in lawful custody i.e. January 21, 2014.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Ms Murunga for state

Accused/applicant