Tarus v Republic (Petition E044 of 2024) [2024] KEHC 12052 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

PETITION E044 OF 2024

JR KARANJA, J

OCTOBER 8, 2024

BETWEEN

STANLEY KIMUTAI TARUS ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant; Stanley Kimutai Tarus, was charged before the Magistrates' Court at Kapsabet with the Sexual offence of defilement, Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and upon conviction he was sentenced to life imprisonment pursuant to Section 8(2) of the *Sexual Offences Act* which provides that.

> " a person who commits an offence of defilement with a child aged eleven years and less shall upon conviction be sentenced to imprisonment for life."

Herein, the child victim was aged four (4) years at the material time. The sentence was therefore lawful.

2. However, being aggrieved by both conviction and sentence the Applicant preferred a first appeal to the High Court, but it was dismissed. A second appeal to the Court of Appeal was similarly dismissed in its entirety.

Having exhausted the appeal process, the Applicant found refuge in the *Constitution* of Kenya, 2010 and filed the present application praying for review of the sentence on the basis of recent jurisprudence on the constitutionality of mandatory sentences under the penal code and its *sexual offences Act* as founded on the decision of the Supreme Court in the famous case of *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR.

3. Articles 50(2)(b) and 50(6) of the *Constitution* were herein invoked by the Applicant but they are clearly irrelevant and improper for the purposes of the present application. However, this is a matter to be dealt with on the basis of substance rather than procedural technicalities. In that regard, the

crux of this petition is that the life imprisonment sentence in so far as it is a mandatory sentence is unconstitutional and runs foul of the principles enunciated in the *Muruatetu Case* (*Supra*) as cascaded in several decisions of the Court of Appeal and the High Court.

4. Although the principles laid down in the *Muruatetu case* applied to the mandatory death sentence imposed under the *Penal Code*, the principle were imported to apply to mandatory imprisonment sentences under the *Sexual Offences Act*. Thus, the superior costs in particular the Court of Appeal and the High Court have since established a culture of frowning upon mandatory sentences in as much as they encumber or place limitation on judicial discretion.

5. In the South African Case, *S. v Toms* [1990] 25A 802 which was cited herein by the Applcant, the court held that: -

> "the infliction of punishment is a matter of discretion of the trial court, mandatory sentence reduce the court's normal sentencing function to the level of a noble stamp. The imposition of mandatory sentence by the legislature has always been considered an undesirable intrusion upon the sentencing function of the court. A provision which reduces the court to a mere stamp is wholly repugnant."

6. In a recent decision of the Court of Appeal in the case of *Julius K. Manyeso v Republic*, Criminal Appeal No. 12 of 2021 at Mombasa, delivered on July 7, 2023, the Mandatory life imprisonment sentence found in our penal statutes, was declared unconstitutional and somehow "abolished" altogether. It was therein found that such sentences are an unjustifiable discrimination, unfair and repugnant to the principles of equality before the law under Article 27 of the *Constitution*.

7. It is a principle of international law that all prisoners including those serving life sentences be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

   The European Court of Human Right in the case of *Vinter and Others v U.K.* [2016] III ECHR 317, reasoned that an indeterminate life sentence with no hope of parol was degrading and inhuman.

8. Being guided by all the foregoing legal principles and considering that the Applicant is pleading for reduction of his sentence based on those principles and the fact that he has been in jail in custody and serving sentence since the year 2010, this court has no reason to disbelieve him when he says that he has fully embraced the rehabilitation programmes offered by the prison department. This implies that he is now sufficiently reformed to be given a second chance in life. In that regard, this court finds it appropriate to exercise its discretion in his favour by setting aside the mandatory life imprisonment sentence imposed upon him by the Magistrate's Court and substituting it for the period already served i.e. fourteen (14) years or thereabout. This clearly means that the Applicant shall forthwith be set at liberty unless otherwise lawfully held.

   Ordered accordingly.

DELIVERED AND DATED THIS 8TH DAY OF OCTOBER, 2024

J. R. KARANJAH,

JUDGE