Waneema v Republic (Criminal Petition 34 of 2018)
[2024] KEHC 12979 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 34 OF 2018

RN NYAKUNDI, J

OCTOBER 25, 2024

IN THE MATTER OF RE-HEARING OF SENTENCE UNDER ARTICLE 22(1), 1(1)(3), 2(4), 19(3), 25, 26, 27(1), 28, 29, 50(2)(Q), 160(1), 159(1), 165(3)(B) THE CONSTITUTION OF KENYA

BETWEEN

LOSI WAMBULWA WANEEMA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner herein was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death which was later commuted to life sentence by the president of the Republic of Kenya.

2. What is pending before me for determination is undated Notice of Motion Application where the Petitioner is seeking the following orders:

    a. That this Honourable Court be pleased to determine his application for re-hearing of the sentence imposed against him.

    b. That, it is within the rules of law for the same to be considered.

3. The application is supported by the undated annexed affidavit sworn by Losi Wambulwa Waneema, the Petitioner herein, in which he avers as follows:

        a. That I was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death which was later commuted to life sentence by the president of the Republic of Kenya.

b. That I humbly make this application in regard to the above mentioned articles in reliance of article 165(3)(b) of *the Constitution* of Kenya which empowers this Honourable Court to handle application of this nature.

c. That I am the applicant who has exhausted all the appeals.

d. That I the applicant herein was not accorded fair trial of sentencing from the trial court to the last court of appeal thus contravening article 50(2)(q) of *the Constitution* while relying on the case of DOUGLAS Muthaura Ntoribi Misc App. No. 4 Of 2015 At Meru High Court, The Case Of Murder Of John Nganga Gacheru And Another In Hccr. Case No. 31/016 At Kiambu High Court & William Okungu Kittiny Vs Rep Appeal No. 56 OF 2013 in *the constitution* petition no. 2 of 2011 at Kisumu Kenya Court Of Appeal.

e. That, I am the applicant herein further relying in the case of: - Francis Karioko Muruatetu And Another Vs Rep (supreme Court Petition No. 15 of 2015) that death penalty is unconstitutional thus seeking for appropriate sentence.

Analysis and Determination

4. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

5. Resentencing in Kenya is a new kid on the block having been introduced by the Supreme Court in the now infamous Francis Karioki Muruatetu in which it declared the mandatory death sentence under Section 204 of the penal code unconstitutional with a rider test the decision did not disturb the validly of the death sentence as contemplated under Article 26(3) of *the Constitution*.

6. It is in deciding on what to do upon the declaration above that the Court made the following statement:

> "(98) The petitioners submitted that upon declaring mandatory death sentence unconstitutional the Court should order for a sentencing as opposed to a re-sentencing as they would in effect have been imprisoned illegally for seventeen years. Further, they contended that re-sentencing would not be fair as they had been in custody way too long and that they deserved compensation.
>
> (99) The respondent was of the view that it was premature and un-procedural at this stage to award damages as the only time the Court can consider if the petitioners were unlawfully held in custody or prison is after the re-hearing. It was the respondent's case that the award for damages is a civil claim that demands a separate and distinct hearing.
>
> (100) The amici curiae urged the most appropriate remedy was a sentencing hearing by the High Court since there had never been a valid sentence passed in the petitioners' case. They urged that the Court could set guidelines for the sentencing before magistrates and superior Courts while awaiting Parliament to formulate the guidelines.

(101) The Attorney General stated that the prayer that the petitioners be taken to the High Court for retrial sentencing should be declined. He submitted that the petitioners had sufficient recourse for pardon, substitution or remission of punishment under Article 133 of *the Constitution*. He urged the Court to refrain from supervising a re-sentencing and instead task him to form legislative framework to address the same.

(102) We find that both petitioners are deserving of a remedy as they were denied a fair trial - a right that accrued to them under to the previous Constitution, and to which they are still entitled under the present Constitution. We have looked at comparative case law to give us guidance as to how this should be done.

(103) In Reyes, the Privy Council when dealing with the unconstitutionality of the mandatory death penalty held that: "The case should be remitted to the Supreme Court of Belize in order that a judge of that Court may pass appropriate sentence on the Appellant having heard or received such evidence and submissions as may be presented and made."

(104) Similarly, upon finding the mandatory death sentence was unconstitutional, the Supreme Court of Uganda in Kigula proceeded to make the following orders:

> " 1. For those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under art 121 of *the Constitution* must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the executive, the death sentence shall be deemed commuted to imprisonment for life without remission.
>
> 2. For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."

(105). Article 121 of the Uganda Constitution (similar to Article 133 of the Kenya Constitutions) provides:

> (1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of-
>
> (a) the Attorney General who shall be the chairperson; and
>
> (b) six prominent citizens of Uganda appointed by the President.
>
> (2) ...
>
> (3) ....
>
> (4) The President may, on the advice of the committee-

(a) grant to any person convicted of an offence a pardon either free or subject to lawful conditions;

(b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him or her for an offence;

(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or

(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

(5) Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the Court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.

(6) A reference in this article to conviction or imposition of a punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a Court martial or other military tribunal except a field Court martial."

(106) In essence, the Ugandan Supreme Court's approach was that: for those respondents whose cases were still pending or had not been finalized by the highest Court, they were to be remitted back to the High Court to rehear the case on sentencing. For those who had exhausted all avenues of appeal or concluded their matters they would rely upon the power of mercy under Article 121 of *the Constitution* of Uganda for reprieve. The Court further set a three-year timeline for the Advisory Committee on the Prerogative of Mercy to perform its duty failure of which the mandatory death sentence is automatically converted to life imprisonment.

(107) In Malawi, the Constitutional Court in the case of Kafantayeni held that: "We make a consequential order of remedy under s 46(3) of *the Constitution* for each of the plaintiffs to be brought once more before the High Court for a judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence." [Emphasis added]

(108) The Malawi Court took a similar approach as the Ugandan Supreme Court. It remitted the cases back to the High Court for proper sentencing on the basis that the High Court is better placed to give an appropriate sentence having heard the mitigating factors.

(109) Here in Kenya, in the case of Mutiso, the Court of Appeal stated [para 38]: "In all the circumstances of this case, the order that commends itself to us is to

remit the case to the superior Court with the direction that the Court records the prosecution's as well as the Appellant's submissions before deciding on the sentence that befits the Appellant."

(110) We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. 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.

(111) It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case." (emphasis added)

7. A clear reading of the Supreme Court decision above will show that the case was supposed to be referred back to the Court that heard the case to take up the mitigation and pass a new sentence taking into account the mitigation of the accused person.

8. It is this misunderstanding of the Muruatetu decision which has created confusion in the criminal justice system on what is now called the resentencing hearing and the jury is still out waiting for the Attorney General to do that which the Supreme Court directed him to.

9. Until then, my understanding of the Muruatetu decision, is that the same is only applicable to those who were sentenced to the mandatory sentences as provided in law and because of the mandatory nature of the sentences, they were not given an opportunity to mitigating and even when they did, the mitigating factors were not taken into account. Thus, the Court gave a window, the door having been closed for them to enter into the room of justice once again for Court to look at it again with the lenses of the discretion now given, with the death sentence being the maximum available base on the circumstances of each case.

10. With the above in mind, the question therefore for the Court to determine is whether the Applicant herein meets the criteria for resentencing?

11. The issues raised by the Applicant are now within the jurisdiction of power of mercy as it is not for this Court to look at how the Applicant has reformed since conviction but at his blameworthiness as at the time of the commission of the offence.

12. The arguments submitted by the Applicant cannot come to his aid as the same are in respect of the Court either exercising its original jurisdiction or appellate jurisdiction and not where the Applicant as in this case is applying for resentencing under the Muruatetu principles. The Applicant had or still has

an opportunity to advance his claim to a lesser sentence on appeal to the Court of Appeal, this Court having exercised discretion and mated out a lesser sentence on appeal.

13. I therefore find no merit in the application herein and the same is dismissed under Section 382 of the Criminal Procedure Code.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 25TH DAY OF OcTOBER 2024

R. NYAKUNDI

JUDGE

In the Presence of

Mr. Mugun for the State