Chivoli v Republic (Criminal Miscellaneous Application E061 of 2020)
[2024] KEHC 14295 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14295 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL MISCELLANEOUS APPLICATION E061 OF 2020

RN NYAKUNDI, J

NOVEMBER 15, 2024

BETWEEN

KEBBY CHIVOLI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. On 19th January, 2011, the trial court in Eldoret CMCCR Case NO. 5129 OF 2009, convicted and sentenced KEBBY CHIVOLI to life imprisonment with hard labor for the offence of defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The applicant lodged an appeal Eldoret High Court Criminal Appeal No. 13 of 2011 which by a judgment dated 12th May, 2011 upheld the conviction and sentence with the alteration of excluding hard labor.

3. The Applicant subsequently appealed to the Court of Appeal in Eldoret Criminal Appeal 140 of 2011 which by a judgment dated 28th October, 2016 similarly upheld the conviction and sentence.

4. The applicant is before this court for re-sentencing. He cited the decision "Muruatetu case" and prayed for a favorable sentence and prayed that he may be considered for a non-custodial or any reduced sentence.

Analysis and determination

5. At the time of the applicant's conviction, mandatory sentences had not been declared to be unconstitutional.

6. The Supreme Court's decision in Francis Karioki Muruatetu & Another v Republic & 5 others [2016] eKLR declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory sentences.

7. I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

8. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

9. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. The sentence provided for defilement of a child with the age of 11 years or below is indicative of the seriousness of the offence. In this case, the child was aged 11 years. I will not underestimate the life-long indelible mark left upon the minor. These are very serious matters which should be taken into consideration in sentencing. I do also note the mitigation by the applicant to wit; that he is a first offender, he is an orphan who entirely depends on his grandparents for upkeep, that he is a young man and ought to be given a chance to reform.

10. In the case of Francis karioko muruatetu & another vs republic, criminal petition no. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

> " It is for this Court to ensure that all persons enjoy the rights to dignity.
>
> Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity."

11. In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

    (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 response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaption of the offender;

(h) any other factor that the Court considers relevant."

12. Mandatory sentences have now been outlawed and courts have moved towards imposing sentences that promote the objectives of sentencing in totality. The Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR)

> " we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in 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.

13. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

14. From the foregoing authorities, it is evident that mandatory sentences and particularly life imprisonment is unlawful. I form the opinion that life imprisonment in its nature is pegged on the accused's balance of years until death. It results to ambiguity for both the society and the accused person. Such indeterminacy undermines the goals of rehabilitation and is inconsistent with the principles of justice and fairness which are at the heart of our criminal justice system.

15. When I take all these factors in consideration, it is my considered view that the life imprisonment should be interfered with. I therefore re-sentence the applicant to 30 years from 19th January, 2011 when he was convicted.

16. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER, 2024

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R. NYAKUNDI

JUDGE