Korir v Republic (Criminal Petition E008 of 2023)
[2024] KEHC 14456 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14456 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E008 OF 2023

E OMINDE, J

NOVEMBER 21, 2024

BETWEEN

JAMES KORIR ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of Defilement contrary to Section 145 (1) of the Penal Code in Eldoret Chief Magistrates' Court case no 10250 of 2003. The particulars of the offence were that on 19th April 2003 at [Particulars withheld] in Uasin Gishu District of Rift valley province, he had carnal knowledge of CC, a girl under the age of 14 years.

2. The Petitioner pleaded guilty and was sentenced to life imprisonment. Being aggrieved by the sentence, he instituted an appeal vide Eldoret High Court Criminal Appeal No. 2 of 2004. The High Court considered his appeal and dismissed the same, upholding the sentence. Being aggrieved with the decision of the High Court, he appealed to the Court of Appeal vide Court of Appeal Criminal Appeal No. 10 of 2005. Upon considering the appeal, the Court dismissed the appeal and upheld the sentence.

3. The Petitioner then approached this court vide a Petition of Appeal filed on 24th February 2023. The same is brought under Articles 21(1)(3)(4), 22(1), 23 25(a)(c)(d), 27, 28, 29 (a)(c)(d)(f), 47, 48 50(2)p)q), (4) 159, 165, 258 and 259 of *the Constitution* of Kenya 2010, Section 8(1) as read with Section 8(2) of the Penal Code Cap 63 LOK(sic) and Section 216 and 329 of the Criminal Procedure Code CAP 75 LOK.

4. The petition is premised on the grounds on the face of it and the contents of the supporting affidavit sworn by the petitioner. The Petition states that the reliefs sought are as follows;

    i. That the Petitioner is granted an opportunity to mitigate in a resentencing hearing.

ii. That, the Court determines whether the petitioner is entitled to the guaranteed remedy and be awarded a definite sentence and further considers a one third remission from the date of conviction.

iii. That, a declaration that Section 46(i) (ii) of the *Prisons Act*, to the extent that it is inconsistent with the provisions of Article 27(i) (4) of *the Constitution* on the right to equality before the law and the right to equal protection and equal benefit of the law including that the State shall not discriminate directly or indirectly against any person is unconstitutional.

iv. That a declaration that the treatment accorded to convicts under sections 8(i) (ii) of the Penal Code (sic) violates Articles 28, 29(f) and 51(1) of *the constitution*.

v. That the Court of Appeal in William Okungu Kittiny vs Republic (2018) Appeal No.56/2013 Kisumu ordered the petitioner to be produced in the trial court for re-hearing and resentencing.

vi. That in light of decisions of the High Court in Douglas Muthaura Ntoribi, Misc Appeal No. 4 of 2015, and the petitioners' case is fit for resentencing to award an alternative and definite rather than mandatory death penalty and the subsequent life sentence.

vii. That in *John Nganga Gacheru & Another v Republic, Criminal Case No. 31 OF 2016*, the Trial Judge concluded that, 'After considering all these factors, I am persuaded that a custodial sentence of fifteen (15) years will be an appropriate sentence for this homicide. In coming up with this global figure, I considered that file Accused Persons have been in custody since 10/12/2015.1 therefore sentence each of the Accused Persons to serve fifteen (15) years imprisonment."

viii. That, this Hon, Court admits the three decided legal law principles into records of Criminal Case NO. 10250 of 2003

ix. That. this Honourable Court be pleased to accordingly grant a re-sentencing to the petitioner and replace his indefinite life sentence with a term that is commensurate to his respective criminal responsibility in accordance with the judicial discretion in sentencing under the general provisions of Section 216 and 329 of the Criminal Procedure ode CAP 75 LOK and in accordance with the Supreme Court orders for the sake of justice and equal protection and application of the law,

x. That, this Honourable Court be pleased in the alternative, to order for representation of the petitioner in the Attorney General's decisions, constituting the extra-judicial re-sentencing frame-work ordered by the Supreme Court to ensure that the remedy is fair.

xi. That, the Court be pleased to consider the time already served and other mitigating factors and acquit the petitioner herein.

xii. That, in the interest of justice, the courts does exercise its inherent powers to do justice to the petitioner taking into account the period spent in custody.

xiii. That, the petitioner herein is a pauper and is unable to meet the legal fees,

xiv. That, the petitioner wishes to be present during the hearing of this petition,

xv. That, this Hon. Court may be pleased to make such other orders or further orders as this Court deems fit to grant.

The parties canvassed the petition vide written submissions.

Petitioners' submissions

5. The Petitioner filed undated handwritten submissions. Together with the said submissions, the petitioner filed what he titled as "Amended Grounds of Application (Supplementary)". In this amendment he states that he was relying on the decision by "Justice Odunga delivered in Machakos on Minimum and Maximum Sentence", Section 333(2) of the Criminal Procedure Code and the fact that while in Prison, he has undergone Theological Courses and Vocational Training and that he is sick and it has been a challenge getting medication in prison.

6. The Petitioner submitted that he is a first offender and so the sentence meted out was harsh and excessive. He relied on the Judiciary Sentencing Policy 2016 which requires that the mitigation of the accused person should be taken into consideration before meting out sentence. That based on these mitigating factors, a lesser sentence ought to be meted out. That his mitigation was not considered.

7. He cited the case of Dahir Hussein vs Republic, Criminal Appeal No. 115 (2015) where the Court laid out the objectives of sentencing and he listed them as deterrence, rehabilitation, accountability for one's actions, the protection of society, retribution and denouncing the conduct of the offender on the harm done on the victim. He submits that being a first offender, the sentence imposed was too harsh

8. Her submitted that much as he appreciates the stigma that was caused to the victim he mitigates that he is a first offender, he is remorseful, he is repentant, he has been rehabilitated and reformed with a positive record of reformation as is evident in the exemplary prison recommendation that he availed to court. That he has been in prison for more than 20 years and this has created a space for healing the mind of both the victim and entire community. Further that his act was out of peer pressure and having taken responsibility for his actions, he now knows the path to follow.

9. He cited the case of Republic v Thomas Patrick (2009) eKLR in urging that even as crime must be punished, the sentence of life imprisonment is excessive and it serves neither the interest of justice nor that of society. That sentencing should have a role salvaging and rehabilitating the offenders and it should therefore be treated with compassion and understanding.

10. That in his case he has reformed and the court should therefore apply the cases he has cited in support of his Petition and consider that he is remorseful. He urged the court to consider the time he has spent in prison and give him a determinate sentence, citing the case of Christopher Ochieng vs Republic in support of his submissions.

Respondents' submissions.

11. Learned counsel for the state filed submissions dated 15th October 2024. He submitted that the petitioner was charged and rightly convicted to life imprisonment for a charge of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. Further, that going by the decision of the Supreme Court in SC Petition No. E018 of 2023 – Republic v Joshua Gichuki Mwangi, the sentence meted on the petitioner is lawful and he urged the court to uphold the same.

Analysis & Determination

12. Section 8(3) of the *Sexual Offences Act* provides as follows;

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(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.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

In light of the above summation of the petition and the attenant submisions, in my considered opinion, the only issue for determination is

Case Law

13. After the decision of the Supreme Court in the case of Francis Muruatetu & another v Republic S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR), there have been many decisions from the Courts wherein courts have held that the ratio decidendi in the said Muruatetu Case applies mutatis mutandis to every case where the discretion of the court to mete out what it would consider to be a fair, just and proportionate sentence is fettered in spite of the peculiar circumstances of an individual accused in the mitigation advanced by dint of the imposition of mandatory and/or minimum sentences by the legislature because such a scenario is an affront to the principle of separation of powers. Here below are just but a few examples;

14. In the case of Maingi & 5 others *v Director of Public Prosecutions & another Petition E017 of 2021*) [2022] KEHC 13118 (KLR) (17 May 2022) Justice G.V Odunga J (as he then was) stated as follows;

> To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

15. Further, the Court of Appeal sitting in Eldoret, in the case of Daniel Kipkosgei Letting v Republic [2021] eKLR expressed itself as follows;

> With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.

16. Regarding the constitutionality of the life sentence, the Court of Appeal sitting in Malindi, in *Manyeso v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) expressed itself as follows;

> We note that the decisions of this court relied on by the appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim App No

> 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, 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.

17. Lastly, the Court of Appeal in Criminal Appeal no. 84 of 2015 – Joshua Gichuki Mwangi vs Republic held as follows on the issue of mandatory sentences;

> We acknowledge the power of the Legislature to enact laws as enshrined in *the Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of *the Constitution*.

18. In setting aside the decision of the Court of Appeal in the Criminal Appeal no. 84 of 2015 – Joshua Gichuki Mwangi vs Republic the Supreme Court in its decision in SC Petition Number E018 of 2023 Republic vs Joshua Gichuki Mwangi stated as follows;

> We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is

> declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

19. The Supreme Court went further to state as follows;

> Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

20. The Court went further to state that the Constitutionality of the various mandatory and minimum sentences provided under the *Sexual Offences Act* can only be considered on their own merits based on a specific petition filed challenging the same and that such a petition must meet the following threshold;

> The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against *the Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional.

21. The Supreme Court then proceeded to held as hereunder:

> .....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

22. In light of the above decision of the Supreme Court which now supersedes all the previous decisions of both the High Court and the Court of Appeal, all that this Court needs to do in the instant case is to consider whether the application meets the required threshold for a declaration that Sections 8(2) & (3) of the *Sexual Offences Act* unconstitutional.

23. In a nutshell given my summary of the Petition as above, it does not. Apart from making very general submissions on what in his view amounts to the unconstitutionality of Section 8 of the *Sexual Offences Act* and more particularly the provisions under which he has been charged, the Petitioner has basically seeks that his sentence be reduced that his sentence for reasons that it is harsh, it is excessive, it did not consider the fact that he is a first offender, it is contrary to the principles of sentencing as per the Judiciary Sentencing Policy 2016 and that he has since reformed.

24. This Application then, having not met that threshold required for a finding of the unconstitutionality of a Statute to be made, then in light of the herein cited decision of the Supreme Court, it is my finding

that the sentence meted out by the lower court was legal and lawful and the same is therefore affirmed. The Petition is accordingly dismissed. The Petitioner has 14 days to appeal.

READ DATED AND SIGNED AT ELDORET ON 21ST NOVEMBER 2024

E. OMINDE

JUDGE

E. OMINDE

JUDGE