Kiprop v Republic (Criminal Petition E007 of 2023)
[2024] KEHC 13482 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13482 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL PETITION E007 OF 2023

JRA WANANDA, J

NOVEMBER 6, 2024

BETWEEN

HILLARY KIPROP ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged in Iten Senior Principal Magistrate's Court Criminal Case (Sexual Offences) No. E020 of 2021 with the offence of attempted defilement contrary to the provision of law described as "Section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006". The particulars were that on 19/09/2021, at [particulars withheld] village within Keiyo North sub-county of Elgeyo Marakwet County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of NJ, a child aged 11 years. The Petitioner also faced the alternative charge of committing an indecent act with the same child contrary to Section 11(1) of the same Act.

2. After the trial, the Petitioner was convicted and was on 7/02/2023 sentenced to serve 10 years imprisonment.

3. The Petitioner has now approached this Court with the undated Notice of Motion filed on 17/08/2023 seeking review of the sentence. The grounds of the Application are that he is a first offender, that he is remorseful, repentant and reformed, that he has learnt, during his incarceration in prison, to take responsibility for his actions and that the sentence meted out was harsh.

4. The Respondent (State) opposed the Application vide the Submissions filed on 22/02/2024 through Prosecution Counsel Rachel Mwangi who submitted that the sentence meted out was legal, in accordance with the law and is proportionate to the seriousness of the offence. She submitted further that sentencing is an important administration of justice as it is based on judicial discretion and Courts must be careful not to interfere with a sentence unless it is demonstrated that it is manifestly excessive,

illegal, improper or founded or based on a misrepresentation of material facts. She also cited Section 362 of the Criminal Procedure Code in respect to the Revisionary powers of the High Court and submitted that the Petitioner has failed to demonstrate that the sentence was incorrect, illegal or improper and contended that by reason thereof, the Petitioner cannot seek Revision thereof. She urged that the sentence is lawful as it is the minimum punishment provided for under Section 9 of the *Sexual Offences Act*. In conclusion, Counsel submitted that if the Petitioner was dissatisfied with the sentence, his recourse is to appeal against the decision and not to seek review.

Determination

5. Before I delve into determining this matter, I may mention, as aforesaid, that the Charge Sheet describes the provision under which the Appellant was charged as "Section 9(1)(2) of the *Sexual Offences Act*, No. 3 of 2006". Needless to state, no such provision exists. The description in the charge sheet was therefore evidently incorrect. It is however clear to me that what was meant to be cited was "Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*, No. 3 of 2006". I have not however found any evidence indicating that the Petitioner was prejudiced in any way by this error. In any case, the same has not been raised as a ground herein. I will not therefore turn into an issue.

6. In any case, I believe that the defect is curable under Section 382 of the Criminal Procedure Code which provides as follows:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

7. Similarly, the Court of Appeal, in the case of Fappyton Mutuku Ngui v Republic [2014] eKLR, while dealing with a similar error as herein, namely, inaccurate reference to "Section 8(1) as read with Section 8(2)" instead of "Section 8(1)(2)" of the *Sexual Offences Act*, held as follows:

> "30. We now turn to the issue of the defective charge sheet. The appellant argues that he was charged contrary to 'section 8(1) (2)' of the *Sexual Offences Act* when in fact there is no such section. We note that the appellant did not raise this issue in his first appeal. Despite this, the High Court addressed it in its judgement in light of any prejudice or miscarriage of justice that the appellant may have faced as a result. The High Court relied on Section 382 of the Criminal Procedure Code which provides that:
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> .....
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> 31. The first appellate court was of the opinion that this defect was curable under section 382 cited above; the appellant had participated fully in his trial because he knew the charge that was facing him, and the trial process was fair. There was no prejudice that faced the appellant. We concur with the High Court and learned counsel for the respondent that the appellant was well aware of the charges he was facing, he had sufficient notice of the charges facing

him and that he participated vigorously in the trial process. Furthermore, the charge sheet outlines the essential ingredients and particulars of the offence. We therefore find no merit in this ground of appeal and dismiss it."

8. In the circumstances, the only issue that arises for determination in this matter is "whether this Court should review the sentence imposed by the trial Court".

9. Section 9(1) as read with Section (9(2) of the *Sexual Offences Act* under which the Petitioner was charged provide as follows:

    1. A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

    2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

10. It is therefore evident that upon conviction for the offence of attempted defilement, the minimum sentence prescribed is 10 years imprisonment which is the sentence that the trial Magistrate imposed. In view of the above, it is clear that the sentence imposed was within the law. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory minimum sentences should now be discouraged and that Courts should retain the discretion to depart therefrom. Although in this case, the trial Magistrate never expressly stated that he imposed the 10 years imprisonment because it is the minimum mandatory sentence, I will still analyze this issue of mandatory minimum sentences.

11. In relation thereto, the Supreme Court in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR, while dealing with a case of murder, stated as follows:

> "(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

12. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report.

13. On the strength of the Murautetu decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory minimum sentences imposed on convicts for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR, the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), and also the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR. I may also mention the oft-cited decision of Odunga J (as he then was), in the case of Maingi & 5 others v *Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR).

14. However, by the clarification made by the same Supreme Court in its subsequent directions given in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Court made it clear that Muruatetu only applied to murder cases, and not to any other type of case, not even sexual offences. This is how the Supreme Court put it:

> "7. In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.
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> .....
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> 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;
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> .....
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> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".
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> 11. .....
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> We therefore reiterate that this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.
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> .....
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> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
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> .....

18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

    i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code;

    ....."

15. Recently, just about 3 months ago, the Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment). In setting aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant in a sexual offence case, the Supreme Court stated as follows:

    52. We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.

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    57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

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    61. Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed.

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    62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

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68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, 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.

16. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting ultra vires were it to set aside the sentence of 10 years imprisonment on the sole basis that the same, being a mandatory minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

17. My above observation does not however mean that I cannot determine the issue whether the sentence was manifestly excessive or harsh. In view thereof, I cite Majanja J, quoting the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR) in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, where stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
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> (a) age of the offender;
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> (b) being a first offender;
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> (c) whether the offender pleaded guilty;
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> (d) character and record of the offender;
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> (e) commission of the offence in response to gender-based violence;
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> (f) remorsefulness of the offender;
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> (g) the possibility of reform and social re-adaptation of the offender;
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> (h) any other factor that the Court considers relevant.

18. Similarly, in the case of Daniel Kipkosgei Letting Vs. Republic [2021] eKLR, the Court of Appeal pronounced 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."

19. Applying the above principles to the facts of this case, I have considered that the offence of defilement or attempt thereof is a serious one. I have also considered that the complainant was an innocent young girl of only 11 years in age. Further, according to the girl, the Petitioner threatened to kill her should she inform anyone of the act. The above account demonstrates the harrowing and violent experience that the Petitioner put the complainant through. It was no doubt a traumatizing experience that the girl will have to live with. Although he may have been a first offender, the Petitioner and his ilk cannot surely seek the Court's sympathy after committing such a horrific offence. It was upon the trial Court to impose a sentence that is proportionate to the offence committed. For the said reasons, I agree that the Petitioner merited a stiff punishment. The Petitioner was given the opportunity to mitigate, which he did by pleading for a lenient sentence and the Court stated that in arriving at the sentence of 10 years imprisonment, it had considered the mitigation. In my view, the sentence is commensurate and proportionate to the crime committed and the manner in which it was committed.

20. Whereas the Petitioner claims that he has been rehabilitated, the objectives of sentencing, specifically deterrence, remain pertinent when the Court is reviewing a sentence.

21. Taking into consideration all the relevant circumstances in this case, and while acutely aware of the intrinsic seriousness and gravity of the offence the Appellant committed, my finding is that it has not been demonstrated that the sentence imposed was manifestly excessive nor harsh.

22. Regarding the jurisdiction of the High Court with regard to Revision, the same is a supervisory power provided under *the Constitution* in Article 165 (6) and (7) in the following terms:

> " 6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
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> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

23. Section 362 of the Criminal Procedure Code, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
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> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

24. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

25. The revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR as follows:

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

26. The operative phrase used by Odunga J above is therefore "to correct manifest irregularities or illegalities".

27. On his part, Nyakundi J, in Prosecutor vs Stephen Lesinko [2018] eKLR outlined the principles that should guide a Court in exercising its reversionary jurisdiction as follows:

a) Where the decision is grossly erroneous;

b) Where there is no compliance with the provisions of the law;

c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

d) Where the material evidence on the parties is not considered; and

e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

28. It is therefore clear that the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions. In this case, it has not been demonstrated in any way or even alleged that there were any manifest "irregularities" or "illegalities" or even "arbitrariness" or any "glaring acts or omissions" which this High Court should remedy. There is also no evidence that the Petitioner's mitigation was ignored. The "correctness, legality or propriety" of the sentence has also not been questioned. The Application is basically founded on the basis of sympathy and nothing else. That is not a sufficient ground for this Court to invoke its powers of Revision.

Final Order

29. In the circumstances, I decline the Application/Petition and dismiss it.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms. Ayuma for the State

Petitioner present virtually from Eldoret Main Prison

Court Assistant: Brian Kimathi