MW v Republic (Criminal Petition 29 of 2018)
[2024] KEHC 14488 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14488 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 29 OF 2018

E OMINDE, J

NOVEMBER 21, 2024

BETWEEN

MW ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Petitioner was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 29/03/2009 at [Particulars withheld] in Lugari District within Western Province unlawfully and intentionally did an act which caused penetration with a female person in that he caused penetration of the genital organ [vagina] of CM, a girl aged 10 years, who is to his knowledge, his daughter.

2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*. The particulars of the charge were that on 29/03/2009 at [Particulars withheld] in Lugari District within Western Province he unlawfully committed an indecent act with CM, a girl aged 10 years.

3. In count 2 he was charged with the offence of deliberate transmission of HIV contrary to Section 26(1) of the *Sexual Offences Act*. The particulars of the offence were that that on 29/03/2009 at [Particulars withheld] in Lugari District within Western Province having actual knowledge that he was infected with HIV he knowingly and wilfully caused penetration of his genital organ [penis] into the genital organ [vagina] of CM, an act which was likely to lead the said CM to be infected with HIV.

4. The trial court found the petitioner guilty on counts 1 and 2 and he was sentenced to life imprisonment and 30 years imprisonment respectively. The sentences were to run concurrently.

5. Being aggrieved with the conviction and sentence, the petitioner instituted an appeal at the High Court vide Eldoret High Court Criminal Appeal No. 89 of 2009 which was dismissed vide the judgment delivered on 1st October 2013 by Justice G.W Ngenye Macharia.

6. The Petitioner then instituted the present petition vide an undated application seeking a resentencing hearing. The petition is premised on the grounds that he has not exhausted all his appeals. Further, that he was not accorded a fair trial thus contravening Article 50(2)(q) of *the Constitution* while relying on the case of Douglas Muthaura Ntobiri, Misc. App No. 4 of 2014 at Meru High Court and in the case of John Nganga Gacheru & Another in HCCR Case No. 31/016 at Kiambu High Court and William Okungu Kittiny v Rep. 2018 eKLR.

7. Additionally, the petitioner relied on the case of Francis Karioko Muruatetu & Another v Rep. Supreme Court Petition No. 15 of 2015 that the mandatory death penalty is unconstitutional thus seeking for appropriate sentence.

Petitioners' Submissions

8. The Petitioner contends that mandatory minimum sentences are unconstitutional and they are a threat to the doctrine of separation of powers and the independence of the Judiciary. When the legislature has legal access to undertake and discharge judicial functions of the Judiciary, then there can be no more threat to the doctrine of separation of powers and the independence of the Judiciary than that. He urged that Justice J. B. Ojwang, in Civil Application No. 11 of 2016 Kalpana H, Rawal &, 2 others v Judicial Service Commission & 3 others [2016] eKLR stated as follows:

> While *the Constitution* requires all State organs to perform their part in giving fulfilment to *the Constitution*, the ultimate arbiter is the Judiciary, which has unlimited powers of interpretation. Interpretation of *the Constitution* and of any law, is far-removed from a condition of violence, tumult, or hurt to anyone' as the Judiciary's operations are minutely governed by known law and procedure and this justifies the standing of the judicial function as the essential underpinning of the new constitutional dispensation.

9. On the subject of separation of powers, counsel referred to the decision in Wilfred Manthi Musyoka v Machakos County Assembly & 4 others [2018] eKLR. Further, that this principle is reflected in our own Constitution and appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1 (1) of *the Constitution* "belongs to the people of Kenya and shall be exercised only in accordance with this Constitution"::..,is delegated to the following State organs, which shalt perform their functions in accordance with this Constitution-

    (a) Parliament and the legislature assemblies in the county governments;

    (b) the national executive and the executive structures in the county governments; and

    (c) the Judiciary and independent tribunals.

10. He additionally cited the case of Trusted Society of Human Rights v The AG and Others, High Court Petition No.22 of 2012 and urged that the broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case.

11. The petitioner submitted that sentencing is an exclusively judicial function which creates a potential constitutional argument against minimum mandatory sentencing regimes in jurisdictions that

recognize the principle of a separation of powers between the legislature, executive, and judiciary. A judiciary that is, in effect, directed as to what sentence to impose does not act as a check and balance on legislative overreach.

12. That just as legislators cannot arrogate to themselves the function of determining an individual's guilt, so too they cannot arrogate to themselves the function of determining an individual's punishment. He urged that a court is not simply there to rubber-stamp a legislative or executive determination of guilt; nor is it there to rubber-stamp a legislative or executive determination of punishment. Courts have a substantive, not decorative, role in the constitutional design.

13. The Appellant cited the case of Liyanage v. The Queen [1967] A.C. 259, where the Privy Council invalidated a Ceylonese law providing for a minimum mandatory jail term of 10 years for particular offenders, because of the disproportionality in sentencing that resulted. He submitted that in jurisdictions like ours, whose Constitution provides expressly for a separation of powers between the judiciary and non-judicial arms of government, the Court can and should find that legislation mandating the imposition of particular penalties for proven particular activity, and requiring the court to rubber-stamp legislature approved outcomes created without regard to specific cases, is unconstitutional.

14. The Appellant cited the case of S v Mchunu and Another (AR24/11) (2012) Zakzphc 56 and urged that any sentence imposed must have deterrent and retributive force. Whilst deterrence and retribution are legitimate elements of punishment, they are not the only ones, or for that matter even overriding ones. He additionally cited the case of S v Toms 1990 (2) SA 802 (A) AT 806(L)-807(B) and S v Mofokeng 1999(1) SACR 502 (w) AT 506 (d), and S v Jansen 1999 (2) SACK 368 at 373 (g) - (h) in support of the submissions.

15. Counsel cited the decision of the Court of Appeal in Dismas Wafula Kilwake v Republic [2018] eKLR where the court set out the factors to be considered in sentencing as follows:

> " We 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".

16. Additionally, he cited the case of Evans Wanjala Wanyonyi, HCCR Appeal no 174 of 2015 and the case of Paul Ngei vs Republic [2019] eKLR in support of these submissions.

17. The Appellant implored this court to find that the sentence imposed was a statutory minimum mandatory sentence and that his mitigation would not have changed it since the trial judges' hands were then tied by the statutory provisions. He prayed the court to use its discretionary powers following the Constitutional provisions under article 50(2) (q) and substitute his sentence with a more lenient sentence.

18. The Appellant cited the case of Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General where the high court in Machakos held as follows;

118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows;

1) To the extent that *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentences to impose, such sentences fall foul of article 28 of *the constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in Francis Karioko Muruatetu another vs Republic 120171 e KLR (Muruatetu l) those who were convicted of the sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentences are at liberty to petition the high court for orders of resentencing in appropriate cases.

He also relied on the case of Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR.

19. The Appellant submitted that in any eventuality that the Court imposes a custodial sentence, regard be put on the period spent in custody since the date of arrest as per section 333(2) of the Criminal Procedure Code and the principles in the above cited cases. Further, that while in the correctional facility he has embraced the rehabilitative programs being offered. He attached biblical certificates and a certificate in financial education from Equity bank Foundation etc. he urged the court to consider his age and time spent in custody and impose an appropriate sentence on him.

Respondents' submissions

20. Learned counsel for the state, S.G. Thuo, filed submissions on 15/10/2024. Counsel submitted that the petitioner was rightfully convicted and sentenced to life imprisonment for the offence of incest with a female person below the age of 18 years contrary to section 20(1) of the *Sexual Offences Act* for count 1 and a jail term of 30 years for count 2 for deliberate transmission of HIV contrary to section 26(1) b of the same act. Counsel referred to the decision in SC Petition No. E018 of 2023, Republic vs Joshua Gichuki Mwangi at page 26 where the court clarified that the Muruatetu decision did not invalidate maximum and minimum sentences in the *Sexual Offences Act*. He urged the court to dismiss the petition and confirm the life sentence.

Analysis & Determination

21. The relevant provisions of the laws under which the Petitioner was convicted are Sections 20(2) and Section 26(1) of the *Sexual Offences Act* which provides as follows;

Section 20 (2) Incest by male persons

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

Section 26(1) Deliberate transmission of HlV or any other life threatening sexually transmitted disease

(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally,

knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know-

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.

In light of the above and having considered the Petition, the submissions and the submissions and the authorities cited upon which reliance has been placed by both parties, in my considered opinion the following issue arises for determination;

Whether the court should interfere with the sentence

Case Law

22. 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;

23. 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)

24. 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.

25. 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.

26. 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*.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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