William Chemase Sitienei v Republic (Criminal Petition E182 of 2019)
[2024] KEHC 14268 (KLR) (15 November 2024) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E182 OF 2019

RN NYAKUNDI, J

NOVEMBER 15, 2024

BETWEEN

WILLIAM CHEMASE SITIENEI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 1.11.2008 at [particulars withheld] Mwamba sub location, Lumakanda location in Lugari district within Western province, the Petitioner unlawfully and intentionally caused penetration of his genital organ into the genital organ (vagina) of IC a girl of the age of 10 years.

2. The alternative charge was that of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were more less the same.

3. The applicant pleaded not guilty, was tried, convicted and sentenced to serve life imprisonment. He subsequently appealed against sentence and conviction before this court, which appeal was summarily dismissed under section 352(2).

4. He has filed the present application seeking review of his sentence pursuant to the provisions of Section 362,364 (1) b & 365 of the *Criminal Procedure* together with Article 50(2) (p) (q). the Petitioner filed submissions in urging the court to be lenient enough and review the sentence imposed. The Petitioner submitted that he has health complications. He submitted that he is suffering from complications of plastic anemia and Pneumonia. In his view, the sentence is harsh given that the prison environment does not offer him proper medical care, which he submitted that it is in contrary to Art 43 of the *Constitution*.

5. Further, he submitted that Justice G.V. Odunga in *Philip Mueke Maingi and 5 others* interpreted the provisions of the *Sexual Offences Act* as not to take the discretion of the court in sentencing. That the learned judge went ahead to state as follows:

> " Those who were convicted of 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 Petitioner the High Court for orders of re-sentencing in appropriate cases."

6. The petitioner argued that the sentence does not live up to the objectives of sentencing. That the mitigating factors such as age of the offender, being a first offender, reformation and social re-adaptation and remorsefulness among others. He stated that he has since served 14 years and 3 months in prison and the court should consider a lesser sentence for the said sentence has achieved rehabilitation. He equally urged the court to consider the provisions of Section 333(2) of the *Criminal Procedure Code*.

Analysis and Determination

7. I have considered the application and the mitigation submissions by the applicant. The issue manifest for determination is whether the sentence review is merited, cognizant of the fact that his appeal was summarily dismissed by this court.

8. A glimpse of the Petitioner's application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of the *Constitution* provides as follows:

> Every accused person has the right to a fair trial, which includes the right—
>
> p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

9. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.

> (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
>
> (a) The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
>
> (b) New and compelling evidence has become available.

10. The foregoing provisions are instructive in matters brought before the high court for a new trial. The application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

11. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the Muruatetu case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).

12. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in

the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner's counsel offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

13. The offence of defilement contrary to the provisions of Section 8(1) and 8(2) attracts life imprisonment. I am of the considered view that life imprisonment is such indeterminate sentence that deprives one off humane treatment and courts are now embracing sentences that will achieve the objectives of sentencing. 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.

14. In *vlex.co.uk/vid/r-v-bieber-792684237 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...".

15. 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.

16. Having said so, I have considered The *judiciary.go.ke/download/sentencing-policy-guidelines-2023/ 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.

17. 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.

18. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the life sentence imposed and substitute it with a lesser sentence of 20 years' imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the *CPC* the sentence shall run from the date of conviction at the trial court i.e. 7th October, 2009.

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

R. NYAKUNDI

JUDGE