



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 4 OF 2019

(From Original conviction and sentence in Criminal Case No. 2169 of 2010 of the Chief Magistrate's Court at Naivasha and HCCRA 65 of 2014)

FRANCIS WAITHIRU NGAHU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON SENTENCING

1. The applicant applied by Chamber Summons seeking re-sentencing arising from a sentence delivered pursuant to a conviction in SPMCC No. 2169 of 2010 Naivasha for defilement. He was then sentenced to incarceration at the President's Pleasure, as he was found guilty but insane as he had some level of mental instability.
2. The lower court file is not available for perusal as it has been impossible to trace despite all due efforts being made since 2018. Available records show that the said file had been sent to Nakuru for purposes of an appeal in HCCRA No. 65 of 2014. However, the lower court file has never been returned to Naivasha and has now been determined to be lost. Accordingly, this court does not have the benefit of referring to any proceedings or judgment of the lower court.
3. The applicant's application is grounded on **Article 22, 23, 165 (3) (6), 27 (1) (2) and 47 (1), (2) and (3)**, of the **Constitution**. The applicant contends that he was found insane after psychiatric test. He seeks, essentially, an award of a clear defined sentence in accordance with the aforesaid provisions of the Constitution.
4. The Court called for submissions by the parties, and also directed that the Kenya Prison Service and the Probation Officer should file their respective reports in the matter in respect of the applicant. These were filed and are on record. The Court also directed that the applicant be facilitated to see a psychiatrist and that, too, was done at Gilgil Hospital. The psychiatric report shows that although the applicant suffers from chronic psychotic disorder (schizophrenia) the same is well controlled.
5. The applicant was convicted to serve at the Presidential Pleasure for defiling a seven year old girl. Had he not been found insane, the proper sentence would have been life imprisonment under **Section 8 (2) of the Sexual Offences Act**.
6. The prosecution has neither opposed nor supported the application. The DPP availed the case of **AOO & 6 Others v The Attorney General and ODPP [2017] eKLR**. There, the Court (Mativo J) stated as follows concerning incarceration at the Presidential Pleasure:

*"Imprisonment at the President's pleasure is a legal **term of art** referring to the indeterminate sentences of some prisoners. Originating from the United Kingdom, it is based on the concept that all legitimate authority for government comes from **the Crown**. The term is used to describe **detention** in prison for an indefinite length of time. Prisoners held at Her Majesty's pleasure are frequently reviewed to determine whether their sentence can be deemed complete. Prisoners' sentences are typically deemed to be complete when the reviewing body is "satisfied that there has been a significant change in the offender's attitude and behavior."*

*Indefinite imprisonment or indeterminate imprisonment is the imposition of a **sentence** by **imprisonment** with no definite period of time set during sentencing. Its length is instead determined during imprisonment based on the inmate's conduct. The inmate can be returned to society or be kept in prison for life. In theory, an indefinite prison sentence could be very short, or it could be a **life sentence** if no decision is made after sentencing to lift the term. It has neither a minimum nor a maximum term that can be served allowable by law. The main rationale for imposing indefinite as opposed to fixed sentences is to protect the community. An offender can then be kept behind bars until it is determined the offender would not pose any danger to the society."*

7. There is no doubt that a sentence is intended to serve a purpose: (See the Judiciary Guidelines on Sentencing). In my view, where this purpose cannot be achieved the court should be slow to mete a sentence that appears inconsistent with constitutional objects for enhancement of fundamental rights and freedoms.

8. It is inherently inconsistent with such constitutional principles for a court to mete a sentence that cannot in any event achieve the objects of sentencing; and it is for the courts to make an interpretation of the law that will give expression to such constitutional principles in enhancement of good governance and the best welfare of its citizens. One of the weaknesses of the Criminal Procedure Code provisions that entitle trial courts to mete sentence at the President's pleasure is that it distorts the separation of powers principles of sentencing. The courts are vested with the sole responsibility and discretion for sentencing. Thus, the provision allowing the President's pleasure to be exercised in determining the length of a sentence amounts to an executive interference into the arena of judicial authority and discretion. Hence, the exercise of presidential authority obviates separation of powers principles.

9. In the **AOO & 6 Others** case, the court stated

“Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. Review of sentences imposed by sentencing courts is a judicial function to be performed by appellate courts. ‘Sentence’ is defined to mean a dispositive order of a criminal court consequent upon a finding of guilt, whether or not a formal conviction is recorded. It also includes indefinite sentences of imprisonment imposed immediately following conviction as well as extended supervision and detention orders which, although not imposed by a sentencing judge immediately following a finding of guilt or conviction, are indirectly founded upon a conviction. The definition of ‘sentence’, compared with other forms of sanctions and penalties, is constitutionally critical, as sentencing is a judicial power that, can only be constitutionally vested in a court.” (Emphasis added)

10. In that case, the court finally determined:

“b) A declaration be and is hereby issued declaring that that to the extent that the second to the seventh petitioners herein were imprisoned for an indefinite and or an undetermined period of time at the pleasure of the president, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provision of separation of powers, their imprisonment at the president's pleasure is unlawful to the extent that it violates the concept of separation of powers and the principles of constitutionalism under the repealed constitution and the constitution of Kenya, 2010.” (Emphasis added)

11. There are a number of other authorities dealing with the question of custody at Presidential pleasure, all of which discredit the concept for interference with judicial discretion. I agree with that position and will invoke and apply it in this case.

12. I have also carefully perused the Probation Officer's Report and the Kenya Prisons Service Report on the applicant. Both clearly indicate that the applicant's psychiatric condition is quite stable and under medical control; that he has undergone rehabilitation; and that he has been of good behaviour whilst in prison.

13. The applicant has already served almost 10 years since he was formally sentenced in 14th October, 2011. The Probation Report recommends that the applicant be granted a probationary sentence and a maximum sentence term of 3 years.

Disposition

14. I have taken those reports into account, and accept their underlying thrust that recommends a determinate and reduced sentence for the applicant. This is in accord with the objects of sentencing.

15. Accordingly, I determine that the proper sentence to be meted on the applicant is a determinate sentence. I hereby mete on the applicant a determinate sentence of twelve (12) years with effect from the date of his first incarceration.

Administrative directions

16. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference.

Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

17. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

18. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 19th Day of July, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Francis Waithiru Ngahu – Present in person in Naivasha Maximum Prison
3. Court Assistant – Quinter Ogutu