REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL REVISION CASE NO. E088 OF 2021

STATE.....APPLICANT

VERSUS

CHARLES ZADOK ORIWA ORUKO.....RESPONDENT

(Application for revision of sentence by the State in

Bondo principal Magistrate's Court Sexual offence Case No. E009

of 2021 rendered on 26th August 2021 by Hon Stella Mathenge, Resident Magistrate)

JUDGMENT

Introduction

1. This Criminal Revision matter was brought to this court through a letter signed by Mr. Laban Ng'etich Senior Prosecution Counsel, Siaya dated 15th September 2021 and filed on the same date complaining in the way or manner in which the trial court in Bondo Criminal Case No. E009/2021 exercised its discretion in sentencing the Respondent **CHARLES ZADOK ORIWA ORUKO**. In that letter, the Senior Prosecution Counsel on behalf of the Director of Public Prosecutions (DPP) asked this Court to call for and examine the record of proceedings before the trial court for the purpose of satisfying itself on the correctness, legality and propriety of the sentence passed and enhance it accordingly.

2. The letter by the State Prosecutor is based on the following grounds:

a) ***The sentence meted against the accused was manifestly lenient given that section 11 (1) of the Sexual Offences Act prescribes imprisonment for a term not less than ten years upon conviction.***

b) ***The trial magistrate in pronouncing his sentence failed to take into account the fact that the complainant/victim of the offence being a minor had been permanently traumatized by the action of the accused therein.***

c) ***The trial court was not guided by the evidence on record and legal principles applicable in the matter before meting out the sentence. While sentencing is both a matter of law and judicial discretion, that discretion ought to be guided by evidence and sound legal principals.***

d) ***The trial court was not guided by the Judiciary Sentencing Guiding Principles which are in place to guide courts in factoring principles under pinning the sentencing policy. The principles relevant to this application are as follows;***

i. ***Proportionality of the sentence to the offending behaviour***

ii. ***Uniformity of sentence – similar offences should attract similar penalty/sanctions.***

iii. ***Deterrence – a deterrence sentence to discourage or eliminate a vice in the community or society***

iv. ***Retribution – appropriate sentence to act as a punishment for wrong done to help the victim see that injustice has been served***

v. ***Transparency – consideration taken as to what sanction the law provides***

e) ***The sentence meted against the accused person was not proportional to the nature of offence charged or committed.***

f) ***The sentence did not serve any retribution whatsoever considering that the victim of the offence feel greatly aggrieved the decision and dissatisfied with it hence this application.***

g) ***The trial magistrate erred in law and facts when she failed to take in to account the fact that the probation report was in direct contrast to the respondent's mitigation after he had been declared guilty.***

h) ***The trial court misapplied herself to guiding principles under the probation of Offenders Act Cap 64 by failing to impose strict probationary conditions upon the respondent despite the dangers posed to the minor, by the respondent.***

3. The background of this matter is that the respondent **CHARLES ZADOK ORIWA ORUKO** was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The Respondent pleaded not guilty to the charge and a full trial ensued. He was found guilty of the offence as charged and the trial court upon considering the presentence report dated 17.8.2021 and filed in court on the same date, the trial magistrate proceeded to sentence the Respondent to probation for a period of 3 years.

4. When this matter was brought to my attention as chamber matter on 20/9/2021, I directed that the Respondent be served to appear in court and respond to the request for revision of sentence. I also directed that the trial court record be availed to this Court for perusal and consideration pursuant to Article 165(6) and (7) of the Constitution. The revision was set for hearing *inter partes* on 25.10.2021. On the latter date, the Respondent who was self-represented appeared and submitted that he hailed from the same family with the victim in Bondo Sexual Offence Case No. E009/2021 and that the trial court placed him on probation because there was no sufficient evidence to convict him and further, that because there was no eye witness who witnessed the offence he was charged with other than the complainant and her mother. He further stated that he had not appealed against his conviction.

5. Counsel for the applicant urged the Court to revise the sentence handed to the Respondent as the respondent was found guilty under section 11 (1) of the Sexual Offences Act which provided for a minimum sentence of 10 years upon conviction.

6. Mr. Kakoi Senior Principal Prosecution Counsel further submitted that the **Francis Muruatetu & another v Republic, [2017]eKLR** case had recently been clarified by the Supreme Court and that the sentence imposed was not proportionate to the offence and further that the sentence imposed was illegal.

7. Ms. Achieng, advocate for the victim concurred with Mr. Kakoi's submission and added that the victim was 12 years old and that after committing the offence, the respondent told the minor that he would still go back to her when she was ready for sex. She submitted that the trial court ought to have considered a prison term for the Respondent.

Determination

8. The powers of the High court in revision are set out in Section 362 through to 366 of the Criminal Procedure Code (cap.75 of Laws of Kenya). Section 362 specifically provides that:

"***362. 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".***

9. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which provides:

"364. (1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

5. When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

10. It is clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its exercise of revision jurisdiction. However, there are some limiting factors to those powers.

11. First, the High Court in its revision jurisdiction cannot reverse or alter an order of acquittal. Secondly, it cannot make an order that is prejudicial to the accused person unless he has had an opportunity of being heard either personally or by an advocate. Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court, and no appeal is brought, revision proceedings cannot be sustained at the insistence of the party who could have appealed.

12. In the instant case, the State through the Office of the Director of Public Prosecutions (DPP) is before Court complaining about the exercise of discretion by the trial magistrate in sentencing the convict/ Respondent herein. The complaint is that the orders made in sentencing by the trial court were not proportionate to the seriousness of the offence charged involving a minor. That the sentence pronounced by the trial magistrate was manifestly lenient and inappropriate in the circumstances.

13. I have called for and perused the lower court file. In this case, the convict pleaded not guilty and the case went to full trial and Judgment delivered by the trial Magistrate. After conviction and prior to sentencing of the Respondent, the trial magistrate called for a pre-sentencing report to be availed. The report dated 17.8.2021 and filed on the same day recommended as follows:

> ***"Your Honour, I recommend that the offender be considered for a probation sentence for a period deemed appropriate by the Honourable court. However, this is subject to the court's discretion."***

14. The trial Magistrate then proceeded to sentence the respondent as follows:

> ***"I have considered the offence, mitigation as well as the pre-sentencing report availed. I proceed in agreement with the recommendation of the probation officer, to place the accused person on probation for a period of 3 years."***

15. In the circumstances, the DPP has complained that the trial court was inappropriately lenient and illegal as section 11(1) of the Sexual Offences Act provides for mandatory minimum sentence upon conviction. From the facts of this case, it is clear that the offence against the Respondent was a serious offence. I agree with the Senior Principal Prosecution Counsel that the sentence was inappropriate and unjustified and in my view illegal.

16. The question is whether this is a case where this Court can exercise its revision jurisdiction? One of the limitations of the exercise of revision powers is that where an appeal lies and no appeal has been filed, the party who is entitled to appeal cannot insist or maintain a cause for a Criminal Revision. The State or DPP has power to appeal to this court under Section 348A of the Criminal Procedure Code, which provides:

> ***"(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.***
>
> ***(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately."***

17. From the above provisions of the law, it is clear that the State has a very limited right of appeal. The State is not allowed to appeal on the issue of sentence but only from an acquittal or from an order refusing to admit or dismissing a charge by a subordinate court. The DPP has thus correctly approached this court in this matter through the revision procedure.

18. The other condition for revision is that no order shall be made to the prejudice of an accused person unless he has an opportunity to be heard either personally or through an advocate. This is what is stated under Subsection (2) of Section 364 of the Criminal Procedure Code. The convict Respondent herein was duly served with the request for sentence revision and he appeared in person and argued out his case, urging this court not to interfere with the sentence imposed on him by the trial magistrate on the grounds that he comes from the same family as the complainant and that the trial court placed him on probation because she found that there was no sufficient evidence against him. He further argued that there was no eye witness who saw him commit the offence and that he was not in good terms with the family of the complainant. Finally, that he did not commit the offence. The DPP has urged this court to review the sentence, and maintains that the sentence imposed on the Respondent was inappropriately lenient and illegal.

19. The penalty for indecent act with a child under section 11(1) of the Sexual Offence Act is an imprisonment term for not less than 10 years. The section provides:

> ***"11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."***

20. No doubt, Section 11 provides for mandatory minimum sentence of ten years upon conviction of an offender under the section. In the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR,** the Supreme Court held that such sentences failed the constitutionality test as it did not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.

21. The Court of Appeal taking a lead from the Supreme Court adopted the Supreme Court's reasoning in **Dismas Wafula Kilwake v R**

[2018] eKLR, by holding inter alia that ***" there was no rational reason why the reasoning of the Supreme Court in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015 that the mandatory death sentence was unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing."***

22. This was the case and a further holding in **Jared Injiri Koita v Republic [2019]eKLR**, among others until the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** recently **clarified in its directions and** stated that:

> ***"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.***
>
> ***[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.***
>
> ***[16] To the extent directly relevant to the matters under review in these directions, we note the Attorney General in his Report, together with the Task Force recommended, that:***
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> ***a) Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.***
>
> ***b) All offenders, subject to the mandatory death penalty, including those convicted and sentenced prior to 2010, who are serving commuted sentences, will be eligible for re-sentencing, including all offenders sentenced to death as at the time of the decision which was made on 14th December 2017.***
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> ***c) Where an appellant has lodged an appeal against a conviction and/or sentence, the appellate court must, at any stage before judgment, remit the case to the trial court for re-sentencing.***
>
> ***We note that the other recommendations in the Task Force report go beyond the terms of the orders of 14th December 2017, and deal, for example, with matters that are in the legislative province of Parliament or in the courts' exclusive jurisdiction and judicial discretion.***
>
> ***[17] The appellants in this matter, we have since learnt, were presented to the High Court and heard on their plea for re-sentencing; therefore, we make no further comment on them.***
>
> ***[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:***
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> ***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; (emphasis mine)***
>
> ***ii…;"***

23. Taking into consideration the decision of the Supreme Court in **Muruatetu 2021** (supra), it is clear that the mandatory sentence provided in section 11 (1) of the Sexual Offences Act is law unless otherwise changed and therefore any sentence to the contrary is illegal. The **Muruatetu Directions** were issued on 6th July 2021 which was before the Respondent herein was sentenced hence the trial court was under a duty to exercise discretion in accordance with the said directions. This was not the case.

24. Therefore, examining the instances in which a High Court can exercise its revisionary powers, it is noteworthy that no order to the prejudice of an accused person can be made by the High Court in a criminal revision unless he has been given an opportunity to be heard or the sentence is illegal.

25. Regarding the enhancement of sentence as prayed by the applicant, this Court is alive to the decision of the Court of Appeal in the case of **J.J.W. v Republic [2013] eKLR** where it was held as follows on enhancement of a sentence by the High Court:

> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The***

second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

26. In **Republic V Lina Mkunde David Kiritta [2008] eKLR,** Ojwang J (as he then was) stated:

"By s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya),

"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."

In such situations, the High Court may, where a conviction has been entered by the Subordinate Court, enhance sentence, where the sentence imposed is found not to be in accordance with the law (s.364 (a)). The High Court may also reverse "any other order [of the Subordinate Court] other than an order of acquittal," where such other order is found not to be in accordance with the law (s.364 (b)).

S. 364(2) thus provides:

"No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence..."

But there is a proviso to the foregoing:

"Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned."

It is clear then, on the basis of s.362 of the Criminal Procedure Code, that if the sentence imposed by the trial Court was illegal or improper, then the High Court has the jurisdiction to re-examine it; and the High Court, by virtue of the provision in s.364(a) of the same statute, may enhance the sentence if need be. It is equally clear that if the Subordinate Court failed to pass a sentence which it was required by statute law to pass, then the High Court, by virtue of s.364(2) of the statute may impose the correct sentence, even where the accused "has not had an opportunity of being heard either personally or by an advocate in his own defence."

In that case, the only limitation to the sentencing discretion of the High Court is as stated in s.364(3) of the statute:

"Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence."

It is this Court's understanding that, where a sentence imposed by the Subordinate Court was an illegal one, orders can be made imposing such minimum statutory sentence as may have been prescribed by law.

S.364(4) provides that –

"Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction."

It is this Court's understanding that there was no acquittal by the Subordinate Court, in the instant case; and therefore, by virtue of the detailed provisions of s.364 of the Criminal Procedure Code, it is open to this Court to impose the minimum statutory sentence, if the Subordinate Court failed to comply with this requirement.

Did the Subordinate Court impose sentence in accordance with the law? No, according to the State. I am inclined to agree with the State's position, for the following reasons.

(a) The learned Magistrate's last words in her 39-page hand-written judgement are as follows:

"Mitigation considered. She is 1st offender. She is given 10 years suspended sentence. Right of appeal, 14 days"

The foregoing passage bears no legal meaning; it is not clear whether "10 years suspended sentence" denotes a suspended term of imprisonment. So the sentence is vague, and does not meet the requirements of the law.

(b) If it is assumed that the learned Magistrate imposed a suspended imprisonment sentence of ten years, then this would be contrary to law…" [Emphasis added]

27. Applying the above legal provisions and reasoning to the instant case, it is apparent that the sentence imposed by the trial court was

illegal. This is so because Ten years imprisonment is the minimum sentence and therefore it is the less severe sentence contemplated in Article 50(2) (l) of the Constitution. The Article provides that:

> ***"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."***

28. The trial Court had the discretion to impose either ten years imprisonment or more and not less as no special circumstances were demonstrated to warrant a lesser sentence than the minimum mandatory sentence provided for by law. Further, I am satisfied that the respondent was made aware prior to the commencement of the hearing of the request for revision of his sentence that his sentence was likely to be enhanced. He was heard by this Court and therefore this Court can exercise its revision jurisdiction to change the lenient sentence meted against him taking into consideration the nature of offence committed and the victim, and the conduct of the respondent who believes that he is innocent yet by his own admission, he has not appealed against his conviction.

29. In the premise, I set aside, vacate and quash the illegal sentence of three years' probation imposed on the respondent, and impose the minimum lawful sentence of ten (10) years imprisonment to be calculated from the date of sentencing in the lower court on 26/8/2021.

30. And in accordance with the provisions of section 367 of the Criminal Procedure Code which provides:

> ***"367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith. "***

31. I hereby direct that the order of revision herein shall be certified by the Deputy Registrar of this Court and remitted to the trial magistrate at Bondo Principal Magistrates' Court for resentencing of the Respondent herein as directed herein and issue a committal warrant committing the accused person /Convict herein Charles Zadock Oriwa Oruko to Ten years imprisonment to run from 26th August 2021 and to submit forthwith the committal warrants to Siaya GK Prisons in respect of the convict herein who shall in the meantime be temporarily held at Siaya Police Station pending submission of the said committal warrant.

32. Orders accordingly.

33. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF NOVEMBER, 2021

R.E.ABURILI

JUDGE