



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

REVISION APPLICATION NO. 38 OF 2019

THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROJECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF AN INDIVIDUAL HIGH COURT PRACTISE AND PROCEDURE RULE 2013

AND

IN THE MATTER OF ARTICLE 22 (1) 23(1) 50 (P) (Q) AND TO WIT ARTICLE 165, 258 AS READ WITH 259 OF THE SOVEREIGN CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF DECLARATIONS IN JOHN KALAMA CHEA CR. APPEAL NO. 94 OF 2015

AND

IN THE MATTER OF THE DECISIONAL LAW TO WIT HIGH COURT JUDGMENT IN JOSEPH KAMAU NGUGI CR. APPEAL NO. 123 OF 2010

AND

IN THE MATTER OF COMMUNITY SERVICE ACT AND TO WIT PROBATION SERVICE ORDER ACT AND

IN THE MATTER OF SECTION 4 (A) OF THE NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCE CONTROL ACT NO. 4 OF 1994

AND

IN THE MATTER OF SECTION 362, 354 AND 364 OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

AND

IN THE MATTER OF INTERPRETATION OF THE PROVISION OF ARTICLE 50 (2) (P) (Q) OF THE CONSTITUTION OF KENYA

AND

IN THE INHERENT JURISDICTION OF THE HIGH COURT OF KENYA TO WIT ARTICLE 23 AS READ WITH ARTICLE 165 OF THE CONSTITUTION OF KENYA 2010

OMAR ALI ABDALLA.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

Ms. Sombo for the State

Mr. Jubale for the Respondent

RULING

The petitioner was charged with Trafficking Narcotics drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars of the charge were that on 20.11.2010 at around 10.00 a.m., at Maweni Estate – Malindi Location, the petitioner was found trafficking in narcotics to wit 14 sachets of Heroin valued at Kshs.1400/= by storing it in contravention to the said act. He pleaded guilty to the charge.

The prosecution presented the facts of the commission of the offence. Having considered the facts as confirmed by the petitioner, the trial court sentenced the petitioner to a fine of Kshs.100,000/= in default 2 years imprisonment.

Thereafter for reasons that the sentence was illegal are not clear. The file was placed before the High Court for revision of sentence. In consideration of the matter vide a letter dated 23.12.2010.

The High Court entered the sentence to life imprisonment without giving an opportunity to the petitioner to be heard on the change of circumstances to impose a severe and punitive sentence.

Background

The petitioner was charged with the offence of Trafficking Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars of the charge are that on 20th day of November 2010 at Maweni Estate, Malindi District in Coast Province, the petitioner was found trafficking the narcotic drugs to wit fourteen (14) sachets of Heroin valued at Kshs.1,400/= by storing it in contravention of the Act.

The petitioner on his own plea of guilty was sentenced to a fine of Kshs.100,000/= in default two (2) years imprisonment. Further, in a Judgment of the High Court delivered on 15th February 2011, the petitioner sentence of a fine of Kshs.100,000/= in default two (2) years imprisonment was varied and substituted with life imprisonment.

The bone of contention by the petitioner is that, the decision to enhance sentence to life imprisonment was in breach of Article 23 and 50 (2) (p) of the constitution.

Analysis and resolution

The Law

The petition is premised persuasive to Article 50 (6) (a) & (b) of the Constitution which provides that:

“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 entitled to appeal or the person did not appeal within the time allowed and

(b). New and compelling evidence has become available under Article 50 (2) (P) (Q) states as follows:

(P) To benefit of the least severe of the prescribed particular for the offence, if the prescribed punishment for an offence has been changed between the time the offence was committed and the time of sentencing and

(Q) If convicted to appeal to or apply for review by a higher court as prescribed by Law.

The superior courts on the cases of **Tom Martris Kibisu v R {2014} eKLR**, **Wilson Therimba Mwangi v DPP JR Misc. No. 271 of 2011**, **Rogers Ondieki Nyandi v State {2012} eKLR** It emerges that the courts have set out broad context of principles to be taken into consideration to demonstrate new and compelling evidence that has become available to the petitioner.

The basis of it as held in **Rogers Nyakundi (supra)** case is that:

“There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at trial or that the evidence was not available at the time of the hearing of the two appeals. The evidence is compelling, is admissible and credible and not merely corroborative, cumulative, collateral or complacency. Such evidence must not only be favourable to the petitioner but it must be such evidence as is likely to persuade this court to reach an entirely different decision from the decision already reached by the two appellate courts.”

In *Rose Kaiza v Angelo Mpanju Kaiza CA Appeal Mombasa No. 225 of 2008* the court also held that:

“applicants on this ground must be treated with caution, before a review is allowed on the ground of discovery of new evidence. It must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge.”

The overview of sentencing framework in Kenya is to be found in the **Sentencing Policy Guidelines 2016** which states that:

“that the fundamental purpose of sentencing is to contribute to crime prevention initiatives, maintenance of the rule of Law by imposing just and fair punishments commensurate to the offence.”

The same policy set out the following objectives:

- (1). Deterrence – to deter the offender and other persons from committing offences.**
- (2). To assist in rehabilitation of offenders.**
- (3). To provide reparations for harm done to victims or the public.**
- (4). To separate offenders from society.**

In the instant cluster of offences of trafficking narcotic drugs contrary to Section 4 (a) of the Act mandatory life imprisonment has been part of the Kenyan Penal Landscape for many years.

However, the Court of Appeal subsequently in various decisions like in **Carolyne Majabu v R CR Appeal No. 65 of 2014 Anthony Mbithi Kasyoka v R CR Appeal No. 134 of 2012** subsequently decided that there are substantial and compelling circumstances to justify a lesser sentence although life imprisonment would remain to be a valid maximum sentence for the offence.

The principle in the above cases was that the phrase shall be liable to life imprisonment does not connote mandatory but directory in nature. Therefore, permitting the court to deviate from the prescribed sentence of life imprisonment to any other lesser offence this feature in these cases combined with other facts provided courts with more discretion than might otherwise be the case.

The key elements of the proportionality principle as established in international and regional Instruments began to be reflected in the sentencing orders of the court with this new development of the Law.

The preamble to the 1961 UN Single Convention on Narcotic Drugs, the 1971 UN Convention on Psychotropic Drugs and the 1988 Convention on Illicit Traffic on Narcotic Drugs and Psychotropic Substances provides as follows:

“The core requirement of proportionality is that an individual’s rights and freedoms may only be limited to the extent that it is appropriate and necessary for achieving a legitimate aim. Such standards further require that of the range of available options for restricting an individual’s rights and freedoms in order to achieve a legitimate aim, the option that is least intrusive to fundamental rights should be adopted. In the context of drug offences, a legitimate aim of punishment should correspond with the basic objective of the UN Drug Control to improve the health and welfare of mankind. As a result, a proportionate sentence for a drug offence should be determined in accordance with the potential harm that a controlled substance may cause to the health and welfare of the community. Applying the principle of proportionality to drug control should transcend towards decriminalization of possession for personal use is a clear example that abstaining from punishment may well be the most appropriate outcome of a proportionality check of drug Laws and sentencing.”

Applying the above principles in so far as Section 4 (a) of the Act is concerned, the mandatory life imprisonment sentence is no longer good law.

As the Court of Appeal decisions in **Carolyne v R and Kasyoka v R (supra)** to mention just a few illustrates, the reality is that mandatory life imprisonment is no longer the harm but the exception.

The analytical framework to determine whether a sentence constitutes cruel and degrading punishment was recently clarified by the Supreme Court in **Francis Muruatetu v R {2017} eKLR**.

As I have already said in light of the decision in **Carolyne case (supra)**, the mandatory life sentence imposed against the petitioner was disproportionate to the facts and circumstances of the offence.

Further, under Article 29, of the Constitution it provides that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without a just cause.

In my view, the enhancement of the sentence from a fine of Kshs.100,000/= in default two (2) years imprisonment to life imprisonment was in violation of the principles of natural justice. Clearly there was no notice or due process for the petitioner to be heard prior to enhancement of sentence. With respect the principle of proportionality was not satisfied in the crafting of the sentence.

Accordingly, the impugned sentence of life imprisonment is hereby set aside and substituted with the period of six (6) years period already served by the petitioner.

In the result, he is set free unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE