REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO. 51 OF 2018

OMAR BAKARI MWAKURO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Nyoro for the Appellant

Ms. Sombo for the Respondent

RE-SENTENCING

Background

In this petition, the petitioner **Omar Bakari Mwakuro** was arraigned before the Chief Magistrate court at Malindi charged with the offence of trafficking of Narcotic drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic substances (Control) Act No. 4 of 1994.

He pleaded guilty to charge and upon the prosecution presenting the facts on the elements of the offence he was charged for trafficking in drugs namely 16 sachets of Heroine and 43 rolls of bhang valued at Kshs.2,030/=.

It followed therefore upon conviction the Learned trial Magistrate sentenced the petitioner to a fine of Kshs.1,000,000/= and in addition to life imprisonment.

Being aggrieved with conviction and sentence, the petitioner preferred an appeal to the **High Court in Criminal Appeal No. 69 of 2010.** On consideration of the matter in its entirety **Meoli J.** dismissed the appeal for want of merit and drawing from the fundamental principle on sentence by the Court of Appeal in **Kingsley Chukwu v R [2010] eKLR** the court stressed that the principles applied by the Learned trial Magistrate in arriving at the sentence to this specific offence cannot be faulted.

Hitherto, the petitioner further moved the Court of Appeal to reconsider the findings of the trial court as confirmed by the High Court. In a lengthy Judgment, the appellate court had this to say, conviction lacks substance and as for sentence imposed on the appellant it was one provided by the Law under Section 4 (a) of the Narcotics and Psychotropic substance (Control) Act No. 4 of 1994. Thus the allegations by the appellant to question the legality of the sentence falls flat on its face.

In a twist of events even after exhausting his appeals through the appeal system to the Highest Court of the Land, the petitioner find a notice of motion in terms of Article 50 (6) of the Constitution seeking a further review and re-sentencing on the following grounds:

> ***a). That the trial court and subsequent determination on sentence was in breach of Article 27 of the Constitution on right to equality and freedom from discrimination.***
>
> ***b). That the petitioner has not been treated fairly in regard to his human dignity as provided for under Article 28 of the Constitution.***

Further the petitioner urged the court in exercise of the jurisdiction under Article 50 (6) of the Constitution to make a declaration that by virtue of Article 29 his fundamental rights have been violated for being subjected to cruel, inhuman or degrading treatment or pursuant in view of the mandatory life sentence confirmed by the Court of Appeal.

Analysis

The starting point would be to determine whether this court is clothed with jurisdiction to entertain the petition. The guiding fundamental principles are clearly stated in Article 50 (6) 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 for appeal and***
> >
> > ***(b). The new and compelling evidence has become available.***

The same constitution on punishment of offender under Article 50 (2) (a) provides as follows:

> ***"A convicted person has a right to the benefit of the less severe of the prescribed punishment for an offence. If the prescribed punishment for the offence has been challenged between the time that the offence was committed and the time of sentencing and if convicted on appeal to apply for review to a higher court as prescribed by law."***

It suffices to say that the constitution has provided the perquisite process for an offender or convict to apply to the high court under Article 50 (6) to have the sentence reviewed in conformity with the fundamental principles of justice and fairness. What therefore is the nature of the new and compelling evidence to satisfy the criterion under Article 50 (6) of the Constitution was discussed in the case of the Supreme Court of **Tom Martin Kibibu v R Petition No. 3 of 2014 eKLR** where the court distinctively observed:

> ***"Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial, such a trial entails a reconstitution of the High Court forum, to admit the charges, and conduct a rehearing, based on the new evidence. The wounded of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the Court of Appeal, to the Highest court with jurisdiction to try the matter, secondly, there must be compelling evidence.***
>
> ***(b) We are in agreement with the Court of Appeal that under Article 50 (6) new evidence means evidence which was not available at the time of trial and which, despite exercise of the diligence could not have been availed at the trial and compelling evidence implies evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would have led to a different verdict.***
>
> ***A court considering whether evidence is new and compelling for a given case, must ascertain that it is, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against an accused person."***

The position stated above was similarly upheld in an earlier decision by the Court of Appeal in the case of **Rose Kaiza v Angelo M. Panju Kaiza Mombasa CA No. 225 of 2008** the court then propounded and held that:

> ***"Application on this ground must be treated with great caution, before a review is delivered on the ground of a 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, where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence. It is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entails a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

It is in this petition I would take approach of the above principles. It is for this reason that attempts must be made to establish whether the petitioner has satisfied the substantial and compelling reasons to be granted a review of the sentence.

In terms of the petition, after perusal of the record and the three Judgments of the trial court, High Court and with finality the Court of Appeal, the sentence of life imprisonment as provided for under Section 4 (a) of the Narcotic Drugs and Psychotropic substance (Control) Act was never varied in view of the recent jurisprudence development.

The only question raised in this petition is whether the sentence of life imprisonment at first instance and an appeal would merit review. Relying on the Court of Appeal cases of **Daniel Kyalo Muema v R CR Appeal No. 479 of 2007 and Gatharo v R [2005] 2 KLR 5S** where the court construing the phrases or words *"shall be liable"* to life imprisonment to be dictory and not mandatory requirement of the sentence. The effect of the two decisions was to depart from the consequential order in the case of **Chukwu v R CR Appeal No. 257 of 2007**, where upon consideration of an offender in Section 4 (a) of the Narcotics Drugs and Psychotropic Substances (Control) Act. An offender was automatically sentenced to life imprisonment.

The position of the court in the recent decisions of **Carolyne Aura Majabu v R Court Appeal No. 65 of 2014, Kabati Kalumekatsu v MSA Criminal Appeal No. 90 of 2014 and Antony Kasyula v R Criminal Appeal No. 134 of 2012** held that words shall be liable expressly provided for in Section 4 (a) of the Narcotics Act in a proper interpretation on sentencing is not be equated with mandatory but directory which allows that courts to exercise judicial discretion in imposing an appropriate sentence.

That therefore leaves the court in piecing together the evidence and circumstances of the offence to convict and sentence an offender to a maximum sentence of life imprisonment dependent on the peculiar facts of the case.

It is also true to state that the principle of proportionality in sentencing requires that sentence should correspond with the gravity of the crime and the offender's degree of responsibility (**Hoare v Queen 1989 167 CLR 348**).

Upon this conviction and sente4nce and following the principles in **Carolyne and Antony Kasyula** cases from the Court of Appeal the legality of the life imprisonment sentence under Section 4 of the Act is hereby interfered with and substituted by a term imprisonment of ten (10) years imprisonment and a fine of Kshs.6,090/= in default three (3) months imprisonment. The ten years' imprisonment to be computed from the date of conviction.

It is so ordered.

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

R. NYAKUNDI

JUDGE