Barasa v Republic (Criminal Petition E049 of 2023)
[2025] KEHC 3981 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E049 OF 2023

E OMINDE, J

MARCH 27, 2025

BETWEEN

AMOS LITALI BARASA ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner was charged with two counts of the offence of defilement contrary to Section 8(1) and 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between the 7th and 10th of March 2018 at [Particulars Withheld]at kapseret Sub County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of TN a child aged 9 years.

2. In the 2nd Count the Petitioner was charged with the offence of defilement contrary to Section 8(1) and 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between the 7th and 10th of March 2018 at [Particulars Withheld]at kapseret Sub County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of GWK a child aged 6 years.

3. The Petitioner faced two alternative counts. Firstly, in the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between the 7th and 10th of March 2018 at [Particulars Withheld]at kapseret Sub County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of TN a child aged 9 years.

4. In the second alternative charge, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that

on diverse dates between the 7th and 10th of March 2018 at [Particulars Withheld]at kapseret Sub County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ(vagina) of GWK a child aged 6 years.

5. The Petitioner pleaded not guilty and the matter went to full haering and upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate found the petitioner guilty on the two main counts and sentenced him to life imprisonment on each count. The sentences were to run concurrently.

6. Being aggrieved with the sentence, the petitioner filed an Appeal against both conviction and sentence. The appeal was heard and dismissed by the Hon Lady Justice J.W.W. Mongare who upheld both the conviction and sentence. The then filed a Notice of Appeal dated 24th April 2023 intending to appeal against the decision of the Hon Lady Justice J.W.W. Mongare. The appeal, COACRA No. E003 of 2023 is pending and inactive before that court. The court has inquired from the petitioner whether he still intends to pursue the appeal and he says that he does not

7. Subsequently, the petitioner filed the present application dated 30th April 2024 seeking that the court considers the time he spent in remand under Section 333(2) of the *Criminal Procedure Code* and also a review of his sentence under the provisions on Article 50(2)(p) of *the Constitution* and Sections 362 as read with Section 364 of the *Criminal Procedure Code*.

8. On the petition for re-sentencing, the petitioner urged that the sentence of life imprisonment imposed upon him is unconstitutional as was held in the case of Julius Kitsao Manyes*o v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR). He therefore prayed that going by the said decision, the court does utilise the principles enunciated therein and set aside the sentence of life imprisonment and substitute the same with a definite sentence. The application is premised on the grounds on the face of it and the averments in the affidavit in support of the application. That further, the trial court imposed upon him a maximum mandatory sentence that was upheld by the High Court but in the case of Maingi & 5 others *v Director of Public Prosecutions & another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) the court held that maximum mandatory sentences are unconstitutional

9. The petitioner in support of his application that the time spent in remand be factored into his definite sentence if the same be commuted from life imprisonment, deposed that he was arrested on 10th march 2018 and sentenced on 25th March 2022 at Eldoret Chief Magistrates' Court and urged that the court invokes the provisions of Section 333(2) of the *Criminal Procedure Code* and directs that his sentence starts running from the date of arrest.

Respondents' submissions

10. The state through Prosecution Counsel S.G Thuo by way of oral submissions conceded to the prayer that the petitioner's sentence be reviewed under the provisions of Section 333(2) of the *Criminal Procedure Code* as the petitioner has prayed for the period that he was in remand custody during the course of the trial. He submitted that the petitioner was held in custody from the date of arraignment in court on 12th March 2018 and released on bond on 30th April 2018. He relied on the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR. Further Counsel also conceded to the petitioner's application seeking that his life sentence be commuted to a definite term given that there was already a pronouncement by the Court of Appeal that by dint of its indeterminate nature, life sentences are unconstitutional.

Consideration of time spent in custody

11. Section 333(2) of the *Criminal Procedure Code* is mandatory. It provides as follows:

> " Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

12. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

13. The Court of Appeal, in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR held thus on the same said issue;

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.

14. And lastly, the Court of Appeal in the case of held that the sentence of life imprisonment is inhuman and degrading and therefore unconstitutional due to its indeterminate nature and commuted the same that was meted out against the appellant in the case to a term of 40 years' imprisonment.

15. I have considered the Petition as well as the submissions. In light of the decision of the Court of Appeal in Julius Kitsao Manyes*o v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) I am satisfied that this condition meets the provisions of Article 50(2)(p) of *the Constitution*. I also take into account the fact that the state has conceded to the commutation of the sentence as prayed by the petitioner. In this regard therefore, in tandem with the decision of the Court of Appeal in the cited case, the sentence of life imprisonment imposed upon the petitioner herein is now hereby commuted to a term of imprisonment for 40 years

16. Further, I have perused the record of the Trial Court. It shows that the appellant took plea on 12th March 2018. The appellant was granted a personal bond of Ks. 300,000/- plus 1 surety and on 30th April 2018 his surety was approved. As was rightly stated by the Counsel for the State, he was in custody for an aggregate period of 48 days. The record of sentencing shows that the period spent in remand was not considered by the trial magistrate. In this regard, I find merit in the application by the appellant and order that the aggregate period of 48 days be factored into the sentence of 40 years' imprisonment to which this court has commuted his sentence of life imprisonment to. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 27TH MARCH, 2025

E. OMINDE

JUDGE