JMM v Republic (Criminal Case E013 of 2023)
[2024] KEHC 1293 (KLR) (29 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1293 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL CASE E013 OF 2023

TA ODERA, J

JANUARY 29, 2024

BETWEEN

JMM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By an undated Application, the Applicant sought to review the sentence imposed on him in Ogembo PMCCR. No. 10 of 2017 Republic v JMM.

2. The Respondent opposed the application. Mr. Ochengo for the Respondent submitted that the applicant deserved a life sentence given that the offence related to a charge of defiling his 8-year old daughter. He further stated that the State would be pushing for an enhanced sentence if the Applicant opted to proceed with the application.

3. In response, the Applicant urged the Court to reconsider the sentence. He submitted that he was suffering in jail, his family was suffering, he and his wife were sick and prayed for the court's leniency.

Determination

4. I have considered the application and the submissions in opposition.

5. The Applicant was charged with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*, No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. Before the hearing commenced, the prosecution substituted the charge on 28.6.2017, with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*, No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The record indicates that the charges were read out to the Accused to which he pleaded not guilty to.

6. I note that the applicant has not raised any question with regard to the substitution of the charges preferred against him. In any event, looking at the manner in which the charges were substituted, I find that the same was regular and procedural in the circumstances.

7. Being an application for revision, the relevant law is: Section 362 of the *Criminal Procedure Code* which provides as follows: -

> The High Court may call for and examine the record of any criminal proceedings before a 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. Emphasis mine

8. Section 364 of the *Criminal Procedure Code* provides thus: -

> 364. Powers of High Court on revision
>
> (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-
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> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
>
> (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
>
> (c) in proceedings under section 203 or 296[2] of the *Penal Code*, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances [Control] Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecutions has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
>
> (2) 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'

9. 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. Emphasis mine

10. It is settled law that sentencing is a preserve of the Trial Court.

11. I am persuaded by the decision of *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment). In that decision, Justice J.V. Odunga (as he then was), held that:

> 92. That sentencing is a matter within the discretion of the trial court is not in doubt. That position is well recognized in many jurisdictions. In *S vs Mchunu and Another* (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that:
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> "It is trite law that the issue of resentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be.

The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:

> Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'

12. Closer home, the Court cited the case of *Dismas Wafula Kilwake vs Republic* [2019] eKLR where the Court of Appeal stated as follows:

> " In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."
>
> [Emphasis mine]

13. In the case of *MM1 v Republic* [2022] eKLR, the Court referred to the decision of the Court of Appeal in *Benard Kimani Gacheru vs. Republic* [2002] eKLR where it stated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

14. It then follows, that for a court to interfere with a court's exercise of discretion, the applicant must establish the following: -

    a. The sentence was manifestly excessive in the circumstances of the case;

    b. The Trial Court overlooked some material factor;

    c. The Trial Court took into account some wrong material;

    d. The Trial Court acted on a wrong principle.

15. In the case of *MM1 v Republic* [2022] eKLR, the Court referred to the case of *Mokela vs. The State* (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court.

In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

16. The Court also cited the Court of Appeal case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, where it held that "The Court does not falter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

17. The Court further cited the case of *Shadrack Kipkoech Kogo vs R*. Eldoret Criminal Appeal No. 253 of 2003 where the Court of Appeal held that:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka-vs-R. (1989 KLR 306))

18. Going back to the facts of the instant suit, Section 20[1] of the *Sexual Offences Act* provides as follows:

> 20. Incest by male persons
>
> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.
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> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

19. The Applicant was afforded an opportunity to mitigate, which he did as per the record. The record indicates that the Trial Court considered the mitigation and sentenced the Applicant to serve 20 years imprisonment. The sentence imposed was well-within the confines of Section 20(1) of the *Sexual Offences Act*, No. 3 of 2006.

20. The Applicant has failed to establish that the sentence imposed was manifestly excessive; or that it overlooked some material factor; or that it considered some wrong material; or that it acted on a wrong principle. I therefore decline to interfere with the sentence imposed by the Trial Court.

21. Lastly, while considering the record, I noted that the time spent in remand was not considered by the Trial Court. Even though the Applicant has not asked this Court to intervene on the same, I will exercise the inherent powers of this Court and address that issue. the Applicant sought to have the term spent in remand considered.

22. Section 333(2) *Criminal Procedure Code* provides thus:

> (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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.
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> Provided that where the person sentenced under subsection [1[has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

23. *The Sentencing Guidelines* (2023) provide thus:

> 2.3.18 Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offence that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.
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> 2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated- and courts should make an enquiry particularly with unrepresented offenders- for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.
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> 2.3.20 An offender convicted of a misd31.emeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately."
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> See the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR.

24. In the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the Court of Appeal held that the court is obliged to consider the period an accused person has spent in custody before they were sentenced. The Court held thus:

> " 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."

25. According to the charge sheet, the Accused Person was arrested on 31.1.2017. He was convicted and sentenced on 10.1.2018, that is a period of roughly 11 months and 10 days. The Applicant shall therefore serve the sentence imposed of 20 years which period shall run from the date of arrest i.e 31.1.17.

26. Save for the foregoing, I find no merit in the Application and I proceed to dismiss it.

27. It is so ordered.

28. File is closed.

DATED, DELIVERED AND SIGNED AT KISII THIS 29TH DAY OF JANUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Koima for the State

The Accused Person/Applicant

Oigo - Court Assistant