Kiptoo v Republic (Petition 2 of 2022) [2024] KEHC 602 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

PETITION 2 OF 2022

JN KAMAU, J

JANUARY 29, 2024

BETWEEN

ISAIAH KIPTOO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted on the main charge and sentenced to life imprisonment.

2. On 22nd November 2019, he filed an undated Notice of Motion application and Petition seeking a review of his sentence.

3. He asserted that the mandatory life imprisonment that was provided in Section 8(2) of the *Sexual Offences Act* was unconstitutional.

4. He further contended that he had served eight (8) years which was more than five (5) years he was required to serve to qualify for revision. He added that he had also undergone several rehabilitation programmes that had effectively led to his rehabilitation.

5. His undated Written Submissions were filed on 17th October 2023. The Respondent's Written Submissions were also undated. They were filed on 14th November 2023. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

6. Although the Petitioner did not seek for the time he had spent in prison be considered, he raised the same in his Written Submissions.

7. He also pointed out that he was seventeen (17) years at the time he was arrested and that he was not aged twenty nine (29) years. He asserted that he was of good character and had maintained discipline as per the authorities recommendations (sic). He emphasised that he was a first offender and that he had been rehabilitated while in prison and attained Grade III in masonry and a Diploma in Lamp and Light Kenya. He also expressed remorse of what transpired on the material date.

8. He further submitted that the mandatory life imprisonment sentence was inhuman, dehumanising, excessive and degrading as it deprived him of his dignity as enshrined under Article 28 of *the Constitution* of Kenya. In this regard, he placed reliance on the case of Phillip Mueke Maingi & 9 Others vs Republic [2022] eKLR where the court therein declared the mandatory minimum sentence unconstitutional and referred the matter back for resentencing.

9. He also referred to the case of Makumbi Subui Wanyeso vs Republic [2023] eKLR where the Court of Appeal declared life sentence unconstitutional. He thus urged this court to exercise its discretion in the decision it would render herein.

10. On its part, the Respondent did not object to his prayer under Section 333(2) of the Criminal Procedure Code. It averred that he had served ten (10) years nine (9) months and that the trial lasted for one (1) year eleven (11) months from 16th January 2020.

11. It, however, submitted that the life sentence that was imposed on him was lawful and constitutional as that was what the law provided. It pointed out that his appeal against the life sentence was dismissed and was upheld on the conviction and sentence. It added that he had also not provided any documentary evidence of his rehabilitation.

12. It was emphatic that he defiled an eleven (11) year old child causing her pain and physical injury. It termed the act as horrible and incomprehensible. It thus asked this court to find that the life sentence that was meted on the Petitioner was merited and dismiss the Petition herein.

13. Right at the outset, this court wished to point out that the Respondent's concession that the court could consider the period the Petitioner spent in custody which the trial was ongoing to have been misplaced weighed against its assertion that the life sentence that was meted upon him was lawful and ought not to be interfered with. This is because life imprisonment was indeterminate having no end of sentence. Be that as it may, this court noted that the Respondent did not object to this period being taken into account while his sentence was being computed. The said issue was considered later on in the decision herein.

14. Notably, Section 8(2) of the *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

15. The Trial Court erred in fact or law when it sentenced the Petitioner to life imprisonment whereas PW 1 was aged twelve (12) years and the sentence would have been twenty (20) years as provided in Section 8(3) of the Sexual Offence Act which states as follows:-

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

16. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

17. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

18. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

19. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

20. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

21. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

22. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

23. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

24. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to review the Petitioner's sentence herein to a sentence that lower than the life imprisonment that had been prescribed in Section 8(2) of the *Sexual Offences Act*.

25. There was now a global shift in not meting out life imprisonment on convicted persons as the same was deemed to be dehumanising, degrading and violates the right to dignity.

26. In dealing with a matter where the appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, in the case of Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal rendered itself as follows:-

> " ...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We,therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.

27. This court noted that on 17th September 2018, Cherere J dismissed the Petitioner's appeal and upheld both the sentence and conviction. Her court was of equal and competent jurisdiction such as this one. This court could not therefore purport to sit on appeal on her decision and set aside and/or vacate her decision. Only the Court of Appeal or the Supreme could vary and/or review her decision.

28. However, bearing in mind that the Petitioner herein was not appealing against the decision of the lower court again as that would have rendered the matter res judicata but rather was seeking a revision of his sentence in view of the unconstitutionality of his life sentence for the offence of defilement and for which there were decisions from the Court of Appeal in this regard to wit the the case of Manyeso v Republic (Supra) that was delivered on 7th July 2023, this court took the considered view that it could review the sentence that was imposed on him.

29. Indeed, due to the hierarchical nature of our courts, this court was bound by the decisions of the Court of Appeal and Supreme Court of Kenya. In addition, as provided in Article 50 (p) of *the Constitution* of Kenya, 2010, an accused person is entitled to the least severe punishment prescribed by the law. It states as follows:-

> " Every accused person has the right to a fair trial, which includes the right 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."

30. Further, Article 50(q) of *the Constitution* of Kenya stipulates that:-

> " Every accused person has a right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

31. According to Article 27(1) of *the Constitution* of Kenya, "Every person is equal before the law and has the right to equal protection and equal benefit of the law."

32. The Court of Appeal decision was delivered way after the Petitioner herein was convicted. He had a right to apply for review to benefit from least severe punishments that was being meted out for the offence of defilement under Section 8(2) of the Sexual Offence Act that attracts the sentence of life imprisonment. He was entitled to equal benefit and protection of the law. Failure to accord him this benefit could amount to discrimination against him which is prohibited by Article 27(4) of *the Constitution* of Kenya that states that:-

> " The State shall not discriminate directly or indirectly against any person on any ground (emphasis court), including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

33. Having said so, this court perused the proceedings herein and noted that there was a grave error apparent on the face of the record. Although the Petitioner was charged with defilement under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, the sentence meted upon him by the Learned Trial Magistrate was one provided for under Section (2) of the Act and not Section (3) that he was charged with. It was an error on the part of the Trial Court. This was unlawful.

34. A Birth Certificate was produced as Exhibit 4. It indicated that the Complainant (hereinafter referred to as "PW 1") was born on 30th October 2007. This meant that she was twelve (12) years on 13th February 2010 when the offence was committed. The Charge Sheet also indicated that she was aged twelve (12) years of age at the material time, a fact that the Trial Court acknowledged.

35. The Petitioner therefore ought to have been sentenced to twenty (20) years imprisonment and not life imprisonment that was meted upon by the Trial Court and upheld by the Appellate court.

36. Notably, Section 8(2) of t

37. he *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

38. On the other hand, Section 8(3) of the *Sexual Offences Act* stipulates that:-

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."(emphasis court)

39. The Trial Court therefore erred in fact or law when it sentenced the Petitioner to life imprisonment as that was not what was provided for by law under Section 8(3) of the Act.

40. Bearing in mind the cases of Dismas Wafula Kilwake vs Republic [2018] eKLR (Supra), GK vs Republic (Supra), Maingi & 5 others v Director of Public Prosecutions & Another (Supra) almost other cases cited hereinabove, this court took the view that it could exercise its discretion to sentence the Applicant herein to a lower sentence than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

41. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish him for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

42. Further, having found that it could mete out a determinate sentence upon the Petitioner herein, this court found and held that it could consider the period he had spent in custody while his trial was ongoing.

43. It was irrespective that he did not seek the said prayer in his Notice of Motion application and Petition herein for the reason that such consideration is not discretionary. It was mandatory by the very nature how Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) is couched. The word "shall" connoted the mandatory duty that was imposed on a court to consider the said period.

44. Taking into account that this court had concluded that it could mete out a determinate sentence upon the Petitioner herein, it therefore found and held that it could consider the period he had spent in custody while his trial was ongoing. It was irrespective that he did not seek the said prayer in his Notice of Motion application and Petition herein for the reason that such consideration is not discretionary. It was mandatory by the very nature how Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) is couched. The word "shall" connoted the mandatory duty that was imposed on a court to consider the said period.

45. In this regard, Section 333(2) of the Criminal Procedure Code provides as follows:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (Emphasis Court).

46. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

> " 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."

47. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

48. A perusal of the proceedings of the lower court showed that the Petitioner was arraigned in court on 16th February 2010 when he took plea. His bond was approved on the same date. The Surety was discharged on 18th January 2011 after he withdrew his surety whereupon the Petitioner was placed in custody.

49. It was not clear when he was released on bond a second time because the proceedings of 19th April 2011 showed that he in custody. However, the Prosecution was indicated as having asked the Trial Court to issue a warrant of arrest against him. The said warrant of arrest was lifted and he asked for a review of his bond. It was reduced to Kshs 50,000/= with a surety of a similar amount. A warrant of arrest was again issued on 3rd June 2011 and on 1st August 2011, he was remanded in custody.

50. On 24th October 2011, he told the Trial Court that he was twenty (20) years of age and asked for a cash bail. He was given a cash bail of Kshs 10,000/=. On 25th November 2011, the proceedings indicated that he was still out on bond but was in custody on 9th December 2011. It was not clear what transpired for him to have been remanded in custody. On 29th March 2012, he prayed for bond reduction. The Trial Court granted him an alternative cash bail of Kshs 100,000/=.

51. Although he was convicted and sentenced while he was in custody, it was very difficult to know when he was in custody and when he was out on bond from the way the proceedings of the lower court had been recorded. This court found it difficult to decipher the sequence of events from the way the proceedings were recorded. The Respondent did not make it any easier for this court as it only indicated the period he had served and how long his trial lasted without setting out the exact dates.

52. This court therefore dealt with the issue of the period spent from what it could decipher from the proceedings in the lower court despite the same not have been properly recorded with a view to bringing this matter to a conclusion.

Disposition

53. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's undated Petition that was filed on 22nd November 2019 was merited and the same be and is hereby allowed but only on the aspect of sentence. This court left his conviction undisturbed as the same was safe and lawful.

54. It is hereby directed that the sentence of life imprisonment be and is hereby vacated and/or set aside as the same was unconstitutional and replaced with a sentence of fifteen (15) years imprisonment to run from the date of sentence of the lower court which was on 21st March 2013.

55. It is hereby directed that the period the Petitioner spent in custody between 18th January 2011 and 14th April 2011 and again between 1st August 2011 and 21st March 2013 while his trial was ongoing be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

56. Taking into account the remission period, it did appear to this court that the Petitioner herein has already completed his sentence. It is hereby directed that he be released from custody forthwith unless he be held for any other lawful cause.

57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JANUARY 2024

J. KAMAU

JUDGE