**Liyai v Republic (Miscellaneous Criminal Application 69 of 2020)**
**[2024] KEHC 2032 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2032 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VIHIGA**

**MISCELLANEOUS CRIMINAL APPLICATION 69 OF 2020**

**JN KAMAU, J**

**FEBRUARY 26, 2024**

**BETWEEN**

**DOUGLAS LIYAI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

## Introduction

1. The Applicant 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 tried and subsequently convicted by the Learned Trial Magistrate, Hon E. W. Muleka, Resident Magistrate under Section 8(3) of the *Sexual Offences Act* No 3 of 2006 and sentenced to twenty (20) years' imprisonment.

2. Being aggrieved by the said decision, he lodged an appeal at the High Court in Kakamega HCCRA No 108 of 2009 which was dismissed in its entirety. He indicated to court that he withdrew his appeal to the Court of Appeal in Kisumu in the year 2022.

3. He filed the application for review of his sentence herein for the reduction of his sentence to the least possible sentence on 25th November 2020. He averred that the sentenced that was imposed on him was harsh, excessive and demeaning. He expressed remorse and pleaded for mercy and leniency. He prayed for a second chance as he had been reformed and rehabilitated. He urged this court to reduce his sentence with five (5) years or that a probation report be ordered.

4. On 22nd March 2023, this court directed that the Deputy Registrar, Vihiga High Court call for the records of the Trial Court and those of High Court Kakamega that dealt with HCCRA No 108 of 2009 for perusal and its consideration of the application herein.

5. When the matter was mentioned before this court on 7th December 2023, it noted that efforts to trace the Kakamega High Court Appeal file records and all lower court records had been futile and only proceedings of the trial court and Judgment was availed in court.

6. In view of the fact that the said files could not be traced, this court determined that it was in the best interests of justice to proceed on the basis of the certified copies of the proceedings and judgment of the lower court that the Deputy Registrar, High Court Vihiga had supplied and to ascertain if there were other Rulings in respect of the Applicant herein that had been posted in the Kenya Law Reports website.

7. This court therefore directed the Applicant herein to file his Written Submissions. The same were undated and filed on 7th December 2023. The Respondent indicated that it would not be filing any written submissions herein. The Judgment herein is based on the said Applicant's Written Submissions.

**Legal Analysis**

8. A perusal of the Kenya Law Report website did not indicate the decision on his appeal in Kakamega High Court. However, in his application in the Court of Appeal, *Douglas Liyai v Republic* [2018]eKLR, Githinji J.A indicated that the Applicant had appealed to the High Court against conviction and sentence and the same was dismissed sometimes in 2016.

9. After extensive search on the Kenya Law Reports Website, this court did not find any other Rulings in respect of the Applicant herein save for the one by Musyoka J, herein directing the Deputy Registrar to call for the trial records in Hamisi PMCCRC No 24 of 2018 and Kakamega HCCRA No 108 of 2009. It therefore deemed that it would be safe to proceed on the documentation that it had with a view to doing substantive justice to the Applicant whose case had stalled as the previous records could not be traced.

10. The Applicant averred that he had asked for forgiveness from the complainant and his family for his actions which caused him pain. He added that he had also asked God to forgive him and reiterated that he was remorseful. It was his submission that he would use the remaining years of his life to teach other good lessons and crusade for good morals in the society.

11. He submitted that Section 39(2) of the *Sexual Offences Act* grant the court the judicial discretion to release an offender after serving part of the sentence and condition his release set out in subsection 3-6. He placed reliance on the cases of *Daniel Onyango Ochar v Republic* Cr App No 35 of 2019 (eKLR citation not given) and *Geofrey Odhiambo Odhiambo v Republic* Cr App No 74 of 2019 (eKLR citation not given) without highlighting the holdings he was relying upon in the said cases.

12. Notably, JM (hereinafter referred to as "PW 1") was aged fourteen (14) years at the material time of the incident on 4th June 2012. The Trial Magistrate did not therefore err when it convicted the Applicant herein for the offence of defilement pursuant to Section 8(3) of the *Sexual Offences Act* and sentenced him to twenty (20) years imprisonment because that was what was provided by the law.

13. Notably, Section 8(3) of the *Sexual Offences Act* states 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."

14. The above notwithstanding, this court took cognisance of the fact that there is emerging jurisprudence that mandatory minimum sentences in defilement cases were unconstitutional and courts had a discretion to depart from such minimum mandatory sentences.

15. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v 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.

16. 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 v 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.

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

18. 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.

19. 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.

20. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v 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.

21. 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.

22. 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 sentence the Applicant herein to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

23. 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.

24. Turning to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), the said section provides that:-

> " 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
>
> 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).

25. The requirement under Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

26. Further, Clauses 7.10 and 7.11 of the *Judiciary Sentencing Policy Guidelines* (under) provide 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."

27. The Charge Sheet attached to the trial court proceedings indicated that the Applicant was arrested on 15th June 2012. In his unsworn evidence, he alluded to his arrest and stated that he was arrested on 15th June 2012.

28. A perusal of the proceedings of the lower court did not show if he was ever granted bail/bond. He was subsequently convicted on 18th January 2013.

29. In the absence of any other evidence to the contrary, this court determined that the best date to work with for purposes of considering the merit or otherwise of applicability of Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) herein was 15th June 2012. This court therefore found and held that he was in custody for seven (7) months and three (3) days.

30. Taking into account the remission of a third and the said period that he spent in prison while his trial was ongoing, the Applicant has therefore completed his sentence. The computation brings this to 12th June 2022. The period that he spent in prison while his trial was ongoing had therefore been subsumed in the period of incarceration.

31. As he had technically completed his sentence, he fell outside dangerous sex offenders who could be considered for a long term supervision of a rehabilitative nature, which was for a period of not less than five (5) years, as provided in Section 39(3) of the *Sexual Offences Act*.

32. It was not therefore necessary to order for Probation Report contemplated under Section 39(4) of the *Sexual Offences Act* for him to have benefitted from long term supervision that was provided for under Section 39(2) of the *Sexual Offences Act*.

33. Even so, this court took cognisance of the fact Section 39(2) of the *Sexual Offences Act* would still not have been applicable herein as he had five (5) years remaining to finish his sentence pushing him outside the purview of the *Probation of Offenders Act* inapplicable. This is because the Section 5(1)

of the *Probation Offenders Act* only provides for a maximum of three (3) years' probation. The said Section 5(1) of the *Probation of Offenders Act* stipulates that:-

> " A probation order shall have effect for such period, of not less than six months and of not more than three years..."

**Disposition**

34. For the foregoing reasons, the upshot of this court's decision was that although the Applicant's conviction was safe and the same be and is hereby upheld, his Notice of Motion application that was filed on 25th November 2020 was merited and the same be and is hereby allowed.

35. It is hereby directed that his sentence of twenty (20) years imprisonment that was imposed on him be and is hereby vacated and/or varied and/or set aside and reduced to fifteen (15) years imprisonment and the same to run from 15th June 2012.

36. Taking into account the reduction of the sentence, the Applicant has already completed his sentence. It is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

37. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF FEBRUARY 2024**

**J. KAMAU**

**JUDGE**