Khaemba v Republic (Criminal Miscellaneous Application E003 of 2024) [2024] KEHC 4234 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL MISCELLANEOUS APPLICATION E003 OF 2024

DK KEMEI, J

APRIL 26, 2024

BETWEEN

FRANCIS MAKOKHA KHAEMBA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for review of the sentence meted out to the Applicant in Bungoma CM Criminal Case No. S.O. E085 of 2022 by Hon. T M Olando in the judgement delivered on 13/2/2024)

RULING

1. The Applicant herein Francis Khaemba has filed a notice of motion dated 7th March, 2024 and sought for orders of revision under Article 27,48,50,20, 165 (6) of the Kenyan *constitution* 2010 and section 365, 364 of the *Criminal Procedure Rules* seeking the following reliefs: -

    a. Spent

    b. Spent

    c. That Bungoma Chief Magistrate's case No. S.O E085 of 2022 be called for and remitted to the High Court for revision in line with Article 50 of the *constitution* and section 362 and 364 of *Criminal Procedure Code*.

    d. That this Honourable court be pleased to revise and or review the judgement of Chief Magistrate's Court in Criminal Case No. S.O E085 of 2022 dated 28th February, 2023.

2. The application is supported by the grounds on the face thereof and by the supporting affidavit of Francis Makokha Khaemba sworn on even date. The Applicant's gravamen is inter alia; that his family has suffered ever since he was convicted and sentenced; that he was the sole breadwinner to his family

of 3 wives and 14 issues and after being convicted his family is suffering a lot due to lack of basic needs that he used to provide; that he was convicted and sentenced to five years' imprisonment for the offence without an option of a fine; that the applicant is suffering from heart disease together with inflated prostrate making it difficult for him to survive custodial sentence ; that due to heart conditions, he does not take medication daily both for the heart pressure and prostrate; that custodial sentences is as good as condemning him to death despite his age and medical conditions; that he pleads for leniency; that he has never absconded court and that he is willing to obey the orders made.

3. There was no response to the application by the Respondent as learned counsel Miss Kibet indicated that she was not opposed to the same.

4. I have considered the applicant's application for review of sentence. It is not in dispute that the Applicant does not challenge his conviction. It is also not in dispute that the Applicant was ordered by the trial court to serve a sentence of five (5) years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. That being the position, i find the only issue for determination is whether the application for revision of sentence has merit.

5. The power of review is donated to the High Court by Article 165 (6) and (7) ofthe *constitution* and sections 362 and 364 of the *Criminal Procedure Code* as follows:

   Article165 (6)-The High Court has supervisory jurisdiction over subordinate courts, body or authority exercising a judicial or quasi-judicial function but not over a superior court.

   Article 165(7)-For the purposes of clause (6), the High Court may call for the record of any proceedings before subordinate court or person or body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

   Section 362(CPC)-The High Court may call for and examine the record of any criminal proceedings before any 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 subordinate court.

   Section 364(CPC)- empowers the High Court to exercise its revisionary powers conferred to it as a court of appeal by section 354, 357 and 358 and may enhance sentences.

   Article 50(2)(g)-Every accused person has the right to a fair trial which includes the right, if convicted, to appeal or apply for review by a higher court as prescribed by the law.

6. A brief summary of the record of the lower court is that the Applicant 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. The particulars are that on the 23rd day of June, 2022 at around 0700hours at Khalaba village in Bungoma South Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of M.B.A a child aged 13 years old. The Applicant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006 with the particulars being that on the 23rd day of June, 2022 at around 0700hours at Khalaba village in Bungoma South Sub-County within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of M.B.A a girl aged 13 years old. The prosecution called five witnesses in support of its case while the Applicant tendered a sworn testimony. The learned trial magistrate later found him guilty and convicted him accordingly. He was sentenced to five years' imprisonment.

7. It is noted that the Applicant herein seeks a review of sentence and hence he is deemed that he does not challenge his conviction and that he is satisfied with the conviction arrived at by the trial court.

8. As regards the issue of sentence, section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides 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. This is the prescribed sentence for the offence for which the applicant was charged and convicted. The Applicant has sought to urge this court to interfere with the sentence imposed by the trial court and maintains that he ought to have been given an alternative of a non-custodial sentence such as imposition of a fine or a sentence to serve under probation. He has urged this court to look at the propriety or otherwise of the sentence imposed by the trial court. It is trite that sentencing is always at the discretion of the trial court and that an appellate court ought not to interfere with the same unless the same is disproportionate and excessive. Had the applicant lodged an appeal then this court would then have the opportunity to deal with it substantially unlike the present scenario where the applicant has urged this court to find fault with the trial court's order regarding the sentence of five years' imprisonment. In the case of *Charo Ngumbao Gugudu Vs R* [2011] eKLR, the Court of Appeal held as follows:

> '' Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is thus not proper exercise for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See Ambani V. R [1990] eKLR.''

Also in the case of *Benard Kimani Gacheru V. Republic* [2002] eKLR, the Court of Appeal held as follows:

''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 noteasily 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.''

9. As the Applicant has sought relief under section 362 and 364 of the *Criminal Procedure Code*, this court will confine itself to the record of the trial court. The said record indicates that the trial court duly received the Applicant's mitigation as well as the pre-sentence report and it went ahead to sentence the applicant to serve five years' imprisonment. The applicant has taken great exception as to why the trial court did not grant him an option of a fine. It is noted that the offence in question does not provide for the payment of fines as the same relates to a serious offence which attracts a minimum sentence of twenty years' imprisonment upon conviction. Upon a thorough scrutiny of the lower court record, i do not see any error committed by the learned trial magistrate and further, the pre-sentence report dated 27.2.2023 confirmed that the victim was so devastated and who now behaves in an abnormal manner as she had developed a tendency of disappearing from her home and that she had stopped attending school. These circumstances were taken into consideration by the trial court before the sentence was passed against the Applicant. Even though the Applicant's circumstances had also been captured in the social enquiry report dated 27.2.2023, the trial court exercised its discretion and rejected the same. The trial court did not in my view consider irrelevant considerations and hence there is no impropriety or illegality committed by the learned trial magistrate contrary to the assertions by the Applicant. I find that his rights were not infringed at all. In fact, had the Applicant approached this court by way of an appeal against sentence, then the impugned sentence was likely to be enhanced since the same is like a slap on the wrist as it were. The Applicant seems to be aggrieved by the trial court's failure to consider his circumstances regarding his state of health but fails to appreciate the gravity of his actions against

the hapless complainant who was under his care and protection as his pupil. Indeed, the social enquiry report presented to the trial court revealed that members of the community were aghast at the actions of the Applicant and that they strongly condemned the same. There is no evidence of impropriety on the part of the trial court.

10. In the result, it is my finding that the Applicant's application dated 7.4.2024 lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF APRIL 2024.

D.KEMEI

JUDGE

In the presence of :

Francis M Khaemba Applicant

Muyala for Applicant

Minishi for Respondent

Kizito Court Assistant