Mwangi v Republic (Petition E006 of 2023)
[2024] KEHC 10457 (KLR) (21 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

PETITION E006 OF 2023

AK NDUNG'U, J

AUGUST 21, 2024

BETWEEN

SHADRACK MAINA MWANGI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. By way of a Notice of Motion undated but filed on 24th February 2024, the Petitioner sought orders that;-

    a. That this court be pleased to review my sentence downward as per above provisions of the law.

    b. This court be pleased to hear my prayers within the rule of law under Article 27 of *the constitution*.

    c. That the court be pleased to refer to the cited provision and various judgement that have previously been delivered pertaining matters that are similar at hand (sic).

2. The petition is based on the Petitioners affidavit the gist of which is that the Petitioner was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment. His appeal before this court (Kasango J) was dismissed and a further appeal to the Court of Appeal was also dismissed.

3. He avers that he has filed this petition purely for a re-hearing on sentence only. He petitions the court to review his sentence based on the recent decision in Julius Kitsao Munyeso vs Republic where the court declared life sentence unconstitutional.

4. The Petition elicited a Preliminary Objection dated 20/2/24 based on grounds that the Petition is misplaced, ill-advised and incompetent since it is unsupported by law and that this court lacks jurisdiction to entertain it.

5. No submissions were made on the preliminary objection.

6. Recent developments in the hierarchy of courts and especially revolving around the Supreme court decision in Muruatetu case have triggered enormous misapprehension on the law with many a party approaching this court either alleging constitutional violations or seeking sentence re-hearing as the applications are regularly referred to.

7. This court has stated before that when a party has had an appeal determined by the court of appeal, any subsequent application before the High to review a sentence affirmed or varied by the court of appeal would be irregular as the same is tantamount to sitting on appeal in respect of such a decision. I have not come across a provision of the law conferring such a jurisdiction.

8. In my view, the above principle also applies where a matter has been determined by the High Court before another judge. This for reason that the court cannot sit on appeal over a decision of a court of concurrent jurisdiction.

9. Thirdly, the oft cited reformation and acquisition of skills at prison are not grounds upon which to approach the court for review of sentence except through the known procedures under the power of mercy and remission of sentence provisions that guide corrective institutions or within structured decongestion exercises by courts.

10. It is trite law that a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. (See Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011).

11. In the case of Antony Nyaga Njagi v Republic [2020] eKLR, the court stated;

> " The jurisdiction of the High court is provided for under article 165(3) of *the Constitution* and includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on it by legislation. The High court further has supervisory jurisdiction over subordinate courts donated by Article 165(6) of *the Constitution*. This jurisdiction is expounded under sections 362 and 364 of the Criminal Procedure Code.
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> 9. In my opinion, there is no law which bestows this court with jurisdiction to review a decision by a court of concurrent jurisdiction and/or its own decision. The appellant having been dissatisfied with the decision of Hon. F. Muchemi, J., he ought to have appealed to the Court of Appeal. This is appreciating the provisions of Article 50(2)(q) of *the Constitution* of Kenya 2010 which guarantees as a tenet of fair hearing the right of a person if convicted, to appeal to, or apply for review by a higher court. Further, this is since it is the court bestowed with jurisdiction pursuant to Article 165(3) of *the Constitution* and section 379(1) of the Criminal Procedure Code).

12. By reviewing the said sentence, this court would be arrogating itself the appellate jurisdiction to entertain an appeal from its own decision or decision of a court of concurrent jurisdiction. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their

peers of equal and competent jurisdiction much less those courts higher than themselves. (See Daniel Otieno Oracha v Republic [2019] eKLR)".

13. Coming to the main anchor of this petition, the Petitioners case is that pursuant to the decision in Julius Kitsao Munyeso vs Republic that declared life imprisonment unconstitutional, his sentence should be reviewed. This reasoning is flawed since this decision does not apply retroactively.

14. I am guided by the decision of Justice Joel Ngugi (as he then was) in John Kagunda Kariuki vs Republic [2019] eKLR where the Learned Judge held thus:-

> " 8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision in Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....10.In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....".

15. Finally, the Petition meets its waterloo in the recent developments in the law following the Supreme Court decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) Neutral citation: [2024] KESC 34 (KLR) where the court quoting its earlier Muruatetu directions stated;

> " 10. It has been argued in justifying this state of affairs, that, by paragraph48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:
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> > "[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right".
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> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section204 of the Penal Code and it is the mandatory

nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. The ratio decidendi in the decision was summarized as follows:

> "69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

.....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours]

> (52) We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.
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> (53) As we have stated before in several cases, unlike in other jurisdictions, Kenya's stare decisis principle is a constitutional obligation meant to enhance the legal system's predictability and certainty. In the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, SC Petition No. 2B of 2014 [2014] eKLR, we stated that Article 163 (7) of *the Constitution* is the embodiment of the time-hallowed common law doctrine

of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. It is imperative for all courts bound by decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

(54) Turning to the specific issue confronting us in this appeal, we are of the view that, in failing to follow the Muruatetu decision and later Directions, the Court of Appeal's blanket application of the ratio decidendi in the Muruatetu case conflated the concept of mandatory sentences with minimum sentences.

(55) Black's Law Dictionary, 9th Edition, defines a mandatory sentence as follows:

> "A sentence set by law with no discretion for the judge to individualize punishment." While minimum sentence is as defined as follows:
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> "The least amount of time that a convicted criminal must serve in prison before becoming eligible for parole."

(56) Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum

sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime,

enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities".

16. Flowing from the foregoing, the application seeking sentence re-hearing herein is misplaced and untenable in law. This court has no jurisdiction to review the sentence downwards as prayed as the Supreme Court has affirmed the law on mandatory sentences under the *Sexual offences Act* and in any event, the applicant having been heard on appeal before this court and sentenced affirmed as well as the same having been affirmed by the court of appeal there exists no jurisdiction under which he can have a second bite of the cherry.

17. In the premises, the application lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF AUGUST, 2024

A.K. NDUNG'U

JUDGE