



Lemiso v Republic (Miscellaneous Criminal Application E007 of 2023) [2024] KEHC 9531 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 9531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2023**

RL KORIR, J

JUNE 27, 2024

BETWEEN

JOSPHAT JOKILA LEMISO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. He was convicted and sentenced to serve 15 years in prison.
2. The Applicant applied for re-sentencing and relied on the following grounds reproduced verbatim: -
 - I. That I have reformed and rehabilitated while in prison.
 - II. That I am remorseful and repentant.
 - III. That I am sickly, suffering from a terminal disease and therefore asks this court to set him free so as to access further medical attention.
 - IV. That I have no other prison conviction record.
 - V. That this Honourable Court be pleased to grant sentence reduction or non-custodial sentence so that he could access his four young school going and needy children.
 - VI. That despite being sentenced, I have decided to do something with my life.
 - VII. That I am the sole bread winner in my family.
3. The Applicant filed written submissions on 28th May 2024 where he submitted that he was remorseful and regretted his actions. That he had taken advantage of the prison rehabilitation programs i.e. theology, carpentry and joinery. He further prayed for this court’s mercy and leniency.



4. It was the Applicant's submission that he was the sole breadwinner of his family. That he was now a saved Christian and would crusade for good morals within the society. It was his further submission that he would promote reconciliation.
5. The Applicant submitted that he was a traditional medicine man before his imprisonment and that his parents had missed him since he was incarcerated. That this was his first offence that he had been charged with.
6. The Applicant implored this court to let him serve the remaining part of his sentence under community service order or probation.
7. The learned Prosecution Counsel, Mr. Njeru made oral submissions in court. He stated that he was not opposed to the reduction of the sentence. That there was judicial precedent to that effect and that sentencing was at the discretion of the court.

Analysis and determination

8. The Applicant was charged and convicted under section 8(4) of the *Sexual Offences Act* which provides:-

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
9. The sentence above is couched in mandatory terms. In a clarification regarding the validity and constitutionality of mandatory minimum sentences, the Supreme Court in the case of *Muruatetu & another vs Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* (2021) KESC 31 (KLR) (6 July 2021) (Directions) stated that: -

“[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 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;

“[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 Articles 25 of the Constitution; an absolute right”.

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 Section 204 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”.

- (11) 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.” (Emphasis Added)

10. Recent jurisprudence have provided the court with an option to depart from the mandatory minimum sentences if the circumstances of the case demanded so. The courts seem to reclaim their discretion in sentencing notwithstanding the statutory mandatory sentences. The Court of Appeal in *Dismas Wafula Kilwake vs. Republic (2019)* eKLR held: -

“Here at home in a judgment rendered on 14th December 2017 in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....

..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing.”

11. Similarly in *Daniel Kipkosgei Letting vs Republic (2021)* eKLR, the Court of Appeal held that: -

“The trial court sentenced the appellant to life imprisonment which was upheld by first appellate court. Both Courts expressed the view that, that was the only available sentence for the offence. However, the Supreme Court in Francis Karioko Muruatetu v Republic [2017] eKLR, have since held that the mandatory death sentence provided by section 204 of the penal code deprived Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Further that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused persons pursuant to article 25 of the Constitution. This Court in Jared Koita Injiri v Republic [2019] eKLR guided by the sentiments of the Supreme Court aforesaid observed thus with regard to mandatory minimum sentences:

“ If the reasoning in the Supreme Court case was applied to this provision it too should be considered unconstitutional on the same basis—and set aside the sentence for life imprisonment imposed and substituted it therefore with a sentence of 30 years from the date of sentence by the trial court.”

With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that



meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”

1. In considering the sentences, this court is guided by the objectives of sentencing as set out in law and various legal texts. The Sentencing Policy Guidelines 2023 outlines the objectives of sentencing at paragraph 1.3.1 as follows:-

Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other- in so far as possible, sentences imposed should be geared towards meeting the objectives in totality.

- i. Retribution.
- ii. Deterrence.
- iii. Rehabilitation.
- iv. Restorative justice.
- v. Community Protection.
- vi. Denunciation.
- vii. Reconciliation.
- viii. Reintegration.

13. The Sentencing Policy Guidelines 2023 also outlines the principles underpinning the sentencing process at paragraph 1.2 as follows:-

- i. Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
- ii. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for the same offences committed by offenders in similar circumstances.
- iii. Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing principles laid out in these guidelines.
- iv. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.
- v. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behavior as a whole.
- vi. Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote, and not undermine, human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya.



Sentencing impacts on crime control and has direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.

- vii. Enhancing Compliance with Domestic Laws and Recognised International and Regional Standards on Sentencing: Domestic law sets out the sentences that can be imposed for each offence. In addition, those international legal instruments, which have the force of law under Article 2 (6) of the Constitution of Kenya should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing.
14. I have noted the Applicant's main ground for applying for resentencing was that he was sick. He attached letters from the Ministry of Health and Sanitation dated 26th January 2023 and from Longisa County Referral Hospital dated 10th January 2021 which indicated that he had diabetes. The medical report did not however state that the Applicant was suffering from a life threatening or terminal disease. The court is also in receipt of a letter from Bomet Main Prison dated 21st March 2024 which states that the Applicant's sugar keeps on fluctuating and needs close monitoring and proper nutrition. The prison urged the court to let the Applicant serve the remainder of his sentence on probation at home. While accepting that the Applicant suffers diabetes, this court is not persuaded that the same was a terminal illness as stated by the Applicant. As stated in the medical report, he was under management and follow up. The medical reports did not allude that the condition was terminal.
15. It is salient to note that the Prosecution did not oppose the reduction of the Appellant's sentence.
16. No doubt the Applicant was convicted of a serious offence which was an affront to the well-being and safety of a child aged 13 years. It was proper that he serve a custodial and deterrent sentence. I have considered that he is currently serving a 15-year sentence which begun on 17th July 2021 being the date of his arrest and has shown remorse. There is a possibility that he has reformed and was now somewhat rehabilitated.
17. However, and as stated above, there must be proportionality between the offence committed and the sentence. In my view, he should continue serving a custodial sentence which would still act as a deterrence to other members of the society.
18. In the end, the Applicant will benefit from the mercy of this court and have his sentence reduced from 15 years to 10 years from 17th July, 2021.
19. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 27TH DAY OF JUNE, 2024.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused Mr. Njeru for the State and Siele (Court Assistant)

