Gatogo v Republic (Criminal Revision E128 of 2024)
[2025] KEHC 2011 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2011 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL REVISION E128 OF 2024

LN MUTENDE, J

FEBRUARY 19, 2025

BETWEEN

JOHN KAMAU GATOGO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Through a Notice of Motion dated 18th day of July, 2024, the Applicant seeks review of sentence in Criminal Case No. 1084 of 2008. The application is premised on the ground that Article 50(2) (p) (q) grants an Applicant a right to benefit from the least severe sentence and to have his sentence reviewed. That the sentence imposed contravenes Section 216 and 389 of the *Criminal Procedure Code* on mitigation and the values of sentencing as provided in the *Sentence Policy Guidelines, 2016*.

2. The application is supported by an affidavit deposed by the Applicant who depones that he didn't appeal; he has no pending re-sentencing application; and, that the court has jurisdiction under Article 165 (3) (b) of the *Constitution* to determine the application.

3. The Respondent/State filed grounds of opposition through Gladys Kariuki, learned Senior Principal Prosecution Counsel who stated that the Appellant/Applicant was sentenced to life imprisonment for the offence of incest, a sentence within law as provided by Section 20(1) of the *Sexual Offences Act*. That grounds raised by the Applicant are clearly grounds of appeal which is against Section 364(5) of the *Criminal Procedure Code*. She called for dismissal of the application.

4. The Applicant disposed the application through written submissions. He submits that the trial culminated into a sentence of life imprisonment and being dissatisfied he appealed to the High Court, Nakuru HCCRA No. 4 of 2010 where the appeal was dismissed in its entirety. Aggrieved, he appealed to the Court of Appeal, Criminal Appeal No. 21 of 2011, an appeal that was dismissed in its entirety.

Therefore, he has approached this court pursuant to Articles 22, 25, 27 and 50(2) (p) and (q) of the *Constitution*. That the Applicant is before court only on sentence rectification.

5. Further, he urged that mandatory minimum sentences have been found unconstitutional and they are a threat to the doctrine of separation of powers and the independence of the Judiciary.

6. That the broad principle of separation of powers incorporates the scheme of checks and balances, but the principle is not to be applied in theorical parity for its ultimate object is good governance, which involves phases of co-operation and corroboration, in a proper case.

7. That sentencing being exclusively judicial function, it creates a potential constitutional argument against minimum mandatory sentencing regime in jurisdictions that recognize the principle of separation of powers between the legislature, executive and judiciary.

8. To buttress the argument the Applicant cited the case of *S v Mchunu and Another* (AR24/11) (2012) Zakzphc 56 Kwa Zulu, where the High Court held that;

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in S v Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35:
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> 'Plainly any sentence imposed must have deterrent and retributive force. But of course, one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'
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> The judgment continues:
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> '. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'"

9. Arguing that courts have always frowned on mandatory sentence, that limit judicial discretion, reference was made to *S v Toms* (2) SA 802(A) AT 806 (L) – 807 (B) where the South African Court of Appeal (Corbett CJ) held that;

> " The infliction of punishment is a matter of the discretion of the trial court. Mandatory sentences reduce the court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing function of the court. A provision which reduces the court to mere rubberstamp is wholly repugnant."

10. Also, in *Dismas Kilwake v Republic* [2018] eKLR where the Kenyan Court of Appeal observed that;

> " We hold that the provisions of Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right

of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

11. And, *Evans Wanjala Wanyonyi v Republic*, [2019] KECA 679 (KLR) where the Court of Appeal sitting in Kisumu held that;

> " We are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court."

12. In addition, reference was also made to *Phillip Mweke Maingi & 3 Others v Director of Public Prosecutions & the Attorney General* (Petition E017 or 2021) [2022] KEHC 13118 (KLR) where the High Court in Machakos held that;

> " Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:
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> 1. To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.
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> 2. Taking cue from the decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.
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> 3. Save for the foregoing, the other reliefs are declined since this Court cannot grant a blanket order for resentencing in the manner sought."

13. The Applicant concluded by submitting that while in the correctional facility, he has embraced fully rehabilitative programs and having been in prison for sixteen (16) years he expressed remorse.

14. I have considered submissions put forward by the Applicant and the grounds of opposition filed by the Respondent. In doing so, I am guided by the principle of stare decisions. This court is obligated to adhere to the decisions made by Superior Courts.

15. Post the decision of *Francis Kariako Muruatetu & Another v Republic* [2017] eKLR (Muruatetu 1) courts interpreted the decision to apply to other offences including sexual offences. The sentence to murder cases being mandatory death penalty having been found unconstitutional, courts were of the view that necessary changes where applicable to minimum mandatory sentences hence the holding by the Court of Appeal.

16. However, the Supreme Court did clarify the issue in *Republic v Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* Petition No. E018 of 2023[2024] KEC 34 KLR where it was held that;

> " The ratio decidendi in the decision was summarized as follows:
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> "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".
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> 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."

17. The High Court is inferior to the Supreme Court which is the highest court in the land. Its decisions are binding on both the Court of Appeal and the High Court. The decision that was made by the Supreme Court was the final decision which the High Court cannot purport to unsettle. Therefore, the instant application is misinformed following decisions that were unsettled in 2023. It does not hold any water.

18. Be as if may, the Applicant may have not been candid, or if the submissions were drawn on his behalf, and, indeed he did not prefer an appeal; then the sentence meted out was within the law. If he was aggrieved he would have appealed.

19. From the foregoing, the application lacks merit. Accordingly, it is dismissed.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY, 2025.

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L.N. MUTENDE

JUDGE