REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 43 OF 2018

THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF AN INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES 2013

JACKSON JUMA KENGA.....PETITIONER

VERSUS

REPUBLIC..... RESPONDENT

RULING

Coram: Hon. Justice R. Nyakundi

Petitioner in person

Ms. Sombo for the state

Jackson Juma Kenga was tried and convicted of defilement of a girl contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act.

Following the conviction, the petitioner was sentenced to serve life imprisonment under Section 8 (2) of the Act. The brief facts that constituted the charge were that the petitioner on the 22.9.2010 within Malindi Township intentionally and unlawfully committed an act which caused penetration of his genital organ into the genital organ of NLN, a girl aged at the time 3 ½ years.

The circumstances of this trial of the petitioner are that, having been aggrieved with the sentence of the trial court, he appealed to both the High Court and Court of Appeal. The two superior courts having heard the petitioners respective grievances rendered their decisions in which primarily both conviction and sentence were dismissed for lack of merit. The import of the apex court decision being that the Judgment of the trial court carried the day in so far as the indictment and prosecution of the petitioner is concerned.

The petitioner still not satisfied with the determination and having exhausted his constitutional right of appeal filed the instant petition under Article 50 (1) (2) (P) (Q) of the Constitution seeking a review and rehearing of his case afresh.

The petitioner contends that the imposition of mandatory life sentence was arbitrary and that the execution of the same in the instant

case was a denial of a right that as provided for in Articles 25 (5) and 50 (2) of the Constitution. That he has already served 7 years imprisonment of the life sentence. that he is first offender. That he promises to live well with the society as he raises his family. That in terms of the petition he requests for a lenient sentence. The petition was disposed of by way of written submissions.

Analysis and resolution

This court informed of the proceedings and the submissions by the petitioner and the respondent is now called upon to decide whether the petitioner has a meritorious petition pursuant to Article 50 (2) (P) (Q) of the constitution to warrant him to invoke the jurisdiction of this court.

I reiterate that the jurisdiction for this court to entertain a constitutional petition is provided for under Article 23 (1) of the constitution.In furtherance of the above constitutional provision the High Court on application can determine redress of a denial, violation or infringement threats to, a right or fundamental freedom in the bill of rights (See Article 165 of the Constitution). Further that in the proceedings brought under Article (22) the court has power to grant the reliefs in Article 23 which consists of:

1. A declaration of rights.

2. An injunction.

3. A conservatory order.

4. A declaration of invalidity of any law that denies, violates, infringes or threatens, a right or fundamental freedom in the bill of rights and is not justified under Article 24.

5. An order for compensation.

6. An order for judicial review.

The petitioner relying on Article 50 (2) P of the constitution which provides that he is entitled to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed from the time that the offence was convicted and the time of sentencing he submitted and urged the court to review the life imprisonment sentence.

Counsel for the respondent urged the court to disallow. The petition on the basis that under Article 50 (6) (b) of the constitution, the petitioner has not availed any new and compelling evidence to be entitled to a relief under the metric of rights to a fair hearing and due process.

It is with all this material that I must establish whether the provisions of Article 50 (2) (P) and (6) of the constitution have been violated in view of the life imprisonment imposed against the petitioner. Is the provision on this sentence at odds with other provisions that there are potential inequities. The purpose of it all boils to the holding in the case of County Government of **Nyeri & Another v Cecilia Wangechi Ndungu {2015} eKLR** where the Court of Appeal held:

“A time to the fact that we are called upon to interpret the aforementioned provision, we remind ourselves that the cardinal rule for construction of a statute that is a statute should be construed according to the intention expressed in the statute itself. The intention of a statute can be identified through a number of factors.”

In **Cusack v Harrow London Borough Council 2013 4 ALL ER 97** it was observed:

“Interpretation of any document ultimately involves identifying the intention of parliament, the drafter or the parties that intent must be determined by reference to the precise words used, their particular documentary and factual content, and where identifiable, their aim and purpose. To that extent …… every issue of interpretation is unique in terms of the nature of the various factors involved.”

However, that does not mean that the court has a completely free hand when it comes to interpreting documents. That would be inconsistence with the rule of Law and with the need for as much certainty and predictability as can be deburred bearing in mind that each case must resolved by reference to particular factors.

The first contention by the petitioner is that the Learned Justices of Appeal holding and confirming the life imprisonment sentence for the offence of defilement is a violation of his rights under the constitution.The petitioner contends that by confirming the sentence without mitigation in their Judgment he emphasized that its inconsistent with the right to a fair hearing under Article 50 of the constitution. The legal framework on sentences is spread out under the various statutes and the principles in the Criminal Procedure Code. It is also provided for in the sentencing policy guidelines of the judiciary 2016. That the fundamental purpose of sentence is to contribute towards punishing crime, to deter the offender and others from committing the offences, against society. Further, to separate offenders from the community, when a particular situation is considered necessary, to assist in reforming and rehabilitating the offender. It also allows to promote a sense of accountability and responsibility in the offenders of crime. That in serious offences long custodial sentences is an acknowledgement of the harm inflicted to the victims and the greater public at large.

In the matter before me parliament has legislated for the mandatory life imprisonment under Section 8 (2) of the Sexual Offences Act for any person found culpable to have defiled a child under the age of 10 years old.

There is no doubt that the mandatory sentence of imprisonment limit judicial discretion in the event. The court is of the view that particular circumstances demand a more higher or alternative sentence besides the one prescribed by parliament. As noted in Kenya, the category of offences with the minimum remain to be just a lawful, mainly within the scheme of sexual offences penal regime. It seems to me that although mandatory sentences are apparently punitive and harsher in nature the wide range of offences and their compelling reasons to justify the imposition of a mandatory sentence cannot be underscored. That has remained to be the position in Kenya where the juristic Judgment of the Supreme Court in **Francis Muratetu v R {2017} eKLR** determined that the mandatory nature of the death penalty for the offence of murder under Section 204 of the Penal Code was unconstitutional. It follows therefore, that the trial court now has a discretion to depart from the mandatory sanction and impose the death penalty only in very rare or compelling cases.

The principle in **Muruatetu** is the source of the petition from which the petitioner implores the court to review the sentence. In **Muruatetu** in the Supreme Court determined in the Judgment and endorsed the approach of aggravating and mitigating circumstances among other factors as the premier in sentencing process.

However, this approach has been imported and adopted in several decisions which fall under Section 8 (2) of Sexual Offences Act by none other than the Court of Appeal in **Evans Wanjala Wanyonyi v R {2019} eKLR Christopher Ochung v R {2015} eKLR**. The Sexual Offences Act, the Court of Appeal looked at the question of mandatory sentence of life imprisonment and found that other punishment of imprisonment commensurate with the crime and each of deterrence as a primary consideration can be imposed besides the prescribed life imprisonment.

The issue for determination in this matter is whether or not the applicant is entitled under Article 50 (6) of the constitution for a review of his life imprisonment sentence. Regarding the obligations imposed on a petitioner by this Article of the constitution the Supreme Court in **Tom Martins Kibisa v R {2014} eKLR** declared:

“We are in agreement with the Court of Appeal that under Article 50 (6), new evidence means, evidence which was not available at the time and which despite exercise of due diligence, could not have been availed at the trial and compelling evidence implies evidence that would have been admissible at the trial of high probative value and capable of belief and which if adduced at the trial could probably have led to a different verdict. A court considering whether evidence is new and compelling for a given case must ascertain that it is prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against the accused person.”

In the petition before me the petitioner’s submissions are founded on lack of mitigation, at the trial the seven (7) years imprisonment already served and that he has had a chance to reform while in prison custody. The injustice of the matter according to the petitioner is that if the trial court and subsequent superior courts could have been availed this evidence they would be fully informed in the terms of the sentence to impose against him for the offence precluding him from the life sentence under Section 8 (2) of the Sexual Offences Act. Taken to its logical conclusion the petitioners argument means just because there is a possibility not certainty, I should find that his rights to a fair hearing were violated.

What makes this submission even more glaring is the circumstances under which the offence was committed against the victim of crime on the contrary the positive obligation on the exercise of discretion by either of the courts may or may not have tempered with sentence in his favour.

In this petition the averments and facts contributing the cause of action necessary for this court to invoke its jurisdiction under Article 50 (6) of the constitution as to the contravention of the constitution has not been demonstrated by the petitioner. The petitioner in making his submissions ignores the fact that life imprisonment is not prohibited nor is it unconstitutional as a first punishment for the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act.

My reading of Article 50 (6) specifically requires the court to consider the petition or an application for that matter which has satisfied the threshold issue of prima facie evidence on new and compelling evidence persuading the court to direct its need to alter or vary or review the impugned order at the review stage of the trial. Its purpose is to prevent vexatious and frivolous petitions or applications being filed under the guise of a constitutional infringement. In our local jurisdiction, courts are now spending more of their judicial time and resources to determine filed petitions premised and purposed as constitutional petitions.

The triangular situation of an individual entangled in an ever ending criminal mitigation even after exhausting all his constitutional right of appeal is a fundamental and essential question which must be answered now in the context of the largely relied upon Supreme Law of the Land. I must say that the jurisdictional issue, in the subject at hand for the High Court after the doctrine of exhaustion to give a right to an aggrieved party complaining of infringement has to be considered, holistically otherwise it would conflict with the provisions under Article 162 of the constitution on system of courts. The respective jurisdictions for the Supreme court in Article 163, Article 164 for the Court of Appeal and Article 165 in regard to the High Court. The Court of Appeal under Article 164 is the ultimate judicial authority to exercise powers on the appellate jurisdiction of invoking criminal trials.

As a matter of policy by the Court of Appeal exercising jurisdiction of the appeal from the petitioner in accordance with the enabling statute and its purposes, a person who has no sufficient reason in the concluded matter has no recourse to the High Court for a review or rehearing of the case on the same set of facts. The current approach associated with applications, and petitions one after another in a highly charged judicial environment with busy dockets calls for new measures relating to standing and a cause of action.

Properly confined every petition/application subsequent after exhaustion of his right of appeal to the Court of Appeal should subject to Article 50 (6) of the Constitution render in admissible of the evidence on matters arising on the same of subject matter under the doctrine of res judicata and estoppel.

These doctrines were legislated and forms part of English Common Law, though more practical in civil law, to some large extent should be applied to the criminal law context. Thus, in the Supreme Court of Canada in the **Queen v Rathis Kumar Mahalingan {2008} 3 SCR 2008** the Court observed:

“Like most principles of Criminal Law that have been repeatedly endorsed by the court, issue estoppel has been sustained over the years because, whatever its problems it serves the ends of justice. Issue estoppel serves three purposes, one integral to a fair criminal justice system.

1. Fairness to the accused who should not be called upon to answer questions already determined in his or her favour.

2. The integrity and coherence of the criminal law and the institutional values of judicial finality and economy.”

In **South African Court Masara v Tsepong 2015 LSLC** the court held:

“The principle of res judicata requires that one establishes that the current and old matters are based on the same set of facts and have been finalized between the same parties on the merits of a cause of action.”

In the similar interpretation in **P N Eswaras Iyer v The Registrar (Indian Supreme Court)** opined that:

"A review of a Judgment is a serious step and the court resort to it is proper only where a glamming omission or patent mistake or like grave error has crept in earlier judicial fallibility. A mere repetition through different counsel of old and over sited argument, a second trip over ineffectively covered ground or minor mistakes of inconsequential important obviously insufficient"

Further in **Ever Fresh Market Virginia v Shoprite Checkers {2011} 2ACC 30** the court stated that:

"The doctrine of res judicata in Criminal Law can only be relaxed in justice would result should the order be allowed to stand".

The position at law on res judicata is an appropriate remedy where only matters to a new litigation in choses in action with compelling and substantial evidence which was not available at the time and if admitted would change the character of the decision. The primary requirement laid down in the case of **Belize Port Authority Shipping Services Ltd CA No. 13 of 2011** further held:

"The doctrine of res judicata in the modern law compounds three distinct components which nevertheless share the same underlying public interest that there should finally in litigation and that a party should not be twice vexed in the same matter. The same components are:

1. Cause of action estoppel, which, where applicable is an absolute bar to mitigation between the same parties or their privies.

2. The issue estoppel, which where applicable also prevents the re-opening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances and

3. Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests of justice, a party is misusing or abusing the process of the court, by seeking to raise it, the issue which could have been raised before."

In the instant petition, it is clear that the ground on conviction and sentence was alive issue all the way at trial court upto the Court of Appeal. It is not enough for the petitioner to point out that his constitutional rights have been violated, but the onus is on him to discharge the burden that the Court of Appeal in affirming the 1st appellate court and trial court Judgment arguably it acted in contravenes of no hesistation. The exercise of discretion I am being asked by the petitioner to exercise is of a higher threshold in view of the fact that the Court of Appeal determined it with finality.

Whether the petitioner as such satisfies the criterion on compelling reasons contingent on there being a sound basis to interfere with the sentence and review the previous decision appears to be a case arguably not discharged given the nature of the evidence before me.

I must say that the finality of decisions in a criminal process heard on the merits is fundamental in any legal system as it ensures fairness, integrity, accountability, certainty, equity, governance, predictability in the dispute resolution under Article 10 of the Constitution.

This means that res judicata as used in civil law the petitioner is estopped to re-open any criminal trial on the same set of facts. In my view, there is no prima facie evidence of new and compelling evidence to warrant this court to admit the petition.

No better words describes the efficacy of the Res Judicata doctrine then the speech by **Lord Simon of Glaisdale** which resonates well in this particular petition:

"Important though the issue may be, how extensive so ever the evidence, whatever the eagerness for further ***Fray Society says."***

"We have provided courts in which your rival contentions have been heard. We have provided a code of Law by which they

have been adjudged. Since Judges are fallible human beings, we have provided appellate courts which do their own fallible best to correct errors. But in the end you must accept what has been decided. Enough is enough and the Law echoes: res judicata. The matter is adjudged."

When interpreting the provisions of Section 8 (2) of the Act regarding sentence, the Court of Appeal gave effect to the full object and spirit for the petitioner to serve life imprisonment.

In my view it would be indeed an unfortunate exercise of jurisdiction for this purpose to hold that the mandatory life sentence escaped the record of the Learned Justices. Based on this submission on error, or mistake so vigorously agitated by the petitioner to my understanding, I find no merit in the petition.

While reference on this petition could be easily endorsed under Article 50 (6) of the Constitution.The error referred to cannot be accurately addressed for lack of sufficient and compelling reasons to be relitigated within Article 20 (1) (22) (1) (3) (23) and Article 50 (6) of the Constitution.

In the instant case, I am of the conceded view that the sentence of life imprisonment though seen as punitive and excessive from an eye of the petitioner, its legal and valid sentence for the offence. My strong feeling is that even with the submissions on mitigation, there would be no justification to review the sentence downwards. There is nothing which this court can do on the matter. Consequently, the petition is dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF DECEMBER, 2019

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R. NYAKUNDI

JUDGE