



**Ndenda v Republic (Criminal Petition E006 of 2023)
[2024] KEHC 9656 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION E006 OF 2023**

**JN KAMAU, J
JULY 31, 2024**

BETWEEN

GIDEON INDIRE NDENDA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death.
2. Being aggrieved by the said decision, he appealed in Kakamega HCCRA No 149 of 2004. His appeal was dismissed and his conviction and sentence upheld.
3. On 24th April 2023, he filed a Notice of Motion application dated 28th March 2023 seeking a review of his death sentence. He asserted that his right to mitigate as provided under Section 216 and 329 of the Criminal Procedure Code was rendered ineffective by the mandatory nature of the sentence.
4. He stated that his right to equal protection and equal benefit of the law as provided for under Article 27(1) of the Constitution of Kenya, 2010 was violated by the imposition of the death sentence on him.
5. He urged the court to substitute his death sentence with a least severe one as provided for under Article 50(2)(p) of the Constitution.
6. His Written Submissions were dated 15th August 2023 and filed on 29th September 2023 while those of the Respondent were dated and filed on 19th October 2023. This Judgment herein was based on the said Written Submissions which both parties relied on in their entirety.



Legal Analysis

7. The Petitioner submitted that he was arrested at a young age of twenty seven (27) years and that he was a sole bread winner of his family of six (6) children of a single mother. He pointed out that he had spent nineteen (19) years in prison.
8. He pleaded with court to consider that he was a first offender and had gone through rehabilitative programs and had been empowered with different skills, change of mindset and perspective in spiritual nourishment.
9. He contended that the imposition of the death sentence was predetermined by the legislature contrary to the doctrine of separation of powers between the Judiciary and Parliament pursuant to Article 160(1) of the Constitution thereby depriving the magistrate of his sentencing discretion.
10. He further submitted that individual cases called for individual circumstances and mitigation which guided the court to exercise discretion while imposing sentences. It was his case that the mandatory sentence for robbery with violence under Section 296(2) of the Penal Code took away the court's discretion and infringed on fair trial as guaranteed under Article 50 of the Constitution and that the same was noted in the Kenya Judicial Sentence Policy Guidelines of 2016.
11. He was emphatic that Section 296(2) of the Penal Code was inconsistent with the provisions of Article 27 and 28 of the Constitution of Kenya which provides for equal rights on equality and dignity. He asserted that death sentence being commuted to life imprisonment was double jeopardy.
12. In that regard, he relied on the case of Vinter & others v The United Kingdom 111 ECHR317 where it was held that life sentence was degrading and inhuman punishment. He argued that mandatory life sentence denied a convict the opportunity to be heard in mitigation unlike those facing lesser sentences who were allowed to be heard on mitigation. He asserted that that posed an unjustifiable discrimination and violated Article 27 of the Constitution.
13. He further submitted that sentencing should not only be used for purposes of retribution but also for the rehabilitation of a prisoner. He pointed out that this court had the power to hear his Petition by virtue of Article 165(3)(5) and Article 50(q) of the Constitution of Kenya.
14. He relied on the case of Malindi Criminal Appeal No 12 of 2021(eKLR citation not given) where it was held that life sentence was unconstitutional. He argued that the said decision applied to all capital offences. He asserted that his petition was not *functus officio* before this court and relied on the case of Diana Suleiman & another v Republic [2014] eKLR where it was held that a court can review its own orders.
15. He urged the court that in the event it reviewed his death sentence, then the same should start to run from the time of his arrest. In that regard, he placed reliance on the case of 88 Prisoners v DPP, AG and Prison Home Made Petition (eKLR citation not given) where it was held that the accused person's liberty was lost once arrested.
16. On its part, the Respondent submitted that the death sentence that was meted upon the Petitioner was legal and fair and urged the court to uphold the same.
17. Notably, Section 296 (1) and (2) of the Penal Code provides as follows:-
 1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or



immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

18. The Petitioner herein was convicted for the offence of robbery with violence. This court could not therefore fault the Trial Court for having imposed on him the death sentence as that is what was provided in the law.
19. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences were unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.
20. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including robbery with violence.
21. The holding in the case of *Francis Karioko Muruatetu & another v Republic* (*supra*) was therefore inapplicable herein as the Petitioner had been charged and convicted for the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines.
22. Further, in a decision that was delivered on 12th July 2024, *Joshua Gichuki Mwangi v Republic* [2022] eKLR the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic* (*supra*) and stated that the Court of Appeal and by extension all other courts had no jurisdiction to exercise discretion on sentences that had mandatory minimum sentences.
23. Until such time that further directions were given in respect of sentences in robbery with violence cases, the hands of this court were tied and could only mete out the punishment that was presented by law, which was death.
24. It was not clear if the Petitioner's death sentence was commuted to life imprisonment as in most cases as he had asked this court to set aside the death that was imposed on him. In view of the scarcity of information, this court therefore opted not to interrogate this issue further.

Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application that was dated 28th March 2023 and lodged on 24th April 2023, was not merited and the same be and is hereby dismissed. The Petitioner's conviction and death sentence be and are hereby upheld as they were both lawful and safe.
26. However, for the avoidance of doubt, in the event the Petitioner's death sentence had already been commuted to life imprisonment, the said life sentence would remain undisturbed.
27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JULY 2024

J. KAMAU

JUDGE

