



**Njagi v Republic (Constitutional Petition E020 of 2023)
[2024] KEHC 9285 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E020 OF 2023
LM NJUGUNA, J
JULY 30, 2024
IN THE MATTER ARTICLES 50(2) (P & Q), 159(2), 160(1) AND
165 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF CLAUSE 7(1) OF THE TRANSITIONAL AND
CONSEQUENTIAL PROVISIONS
AND
IN THE MATTER OF SECTIONS 216, 329 AND 333(2) OF THE
CRIMINAL PROCEDURE CODE
AND
IN THE MATTER OF THE COURT OF APPEAL IN ELDORET IN
OPRODI PETER OMUKANGA V. REPUBLIC, CRIMINAL APPEAL
NO. 260 OF 2019 (UR) DELIVERED ON 14TH APRIL 2023**

BETWEEN

NASARIO IRERI NJAGI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner has filed petition dated 25th May 2023 seeking the intervention of this court on the sentence imposed. The orders sought are as follows:



- a. That the court be pleased to review the death sentence imposed by the trial court and upheld by the high court and which was commuted to life imprisonment through a presidential directive, to a more lenient sentence pursuant to Article 50(2)
 - b. of *the Constitution*;
 - c. That if the result of sentence review will result in a balance of a term of 3 years or less, the court be pleased to grant him probation orders if the circumstances so fit; and
 - d. Any other orders that the honourable court deems fit to grant in the interest of justice.
2. The petitioner stated that he was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code in Siakago Magistrate’s Court Criminal Case no. 1817 of 2007 and he was sentenced to suffer death. He stated that the court condemned him to the mandatory sentence prescribed in law without considering the mitigating factors. He appealed against the conviction and sentence in Embu High Court Criminal Appeal No. 116 of 2008 where the findings of the trial court were upheld. The petitioner lodged a further appeal at the Court of Appeal in Nyeri Criminal Appeal No. 19 of 2010 but the same was dismissed. Through a presidential directive, the death sentence was commuted to life imprisonment. He urged the court to apply the findings of the Supreme Court in Francis Karioko Muruatetu & Another v. Republic (2017) eKLR and its discretion as bestowed to it by *the constitution* to review the sentence downwards.
 3. The court directed the parties to file written submissions but only the respondent complied.
 4. In its submissions, the respondent stated that the petition is properly before the court in light of the Muruatetu jurisprudence. However, it opposed the petition stating that the sentence imposed by the court is appropriate given the circumstances under which the offence was committed. That the sentence will serve the objectives of retribution and deterrence as envisioned in the Judiciary Sentencing Policy Guidelines 2023.
 5. The issue for determination is whether the petition has merit.
 6. The petitioner was sentenced to suffer death after he was convicted of the offence of robbery with violence. This sentence was commuted to life imprisonment following a presidential directive. It was the petitioner’s case that at the time of sentencing, the trial court did not consider mitigation and subjected him to the mandatory prescribed sentence. That so far, he has spent 15 years in prison and he urged the court to review his commuted sentence downwards from life imprisonment. Article 48 of *the Constitution* guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which includes the right to downward review of a sentence.
 7. The Supreme court in the case of Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (supra), held thus regarding imposition of mandatory prescribed sentences:
 - “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....



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.”
8. In the case of William Okungu Kittiny v Republic (2018) eKLR, the Court of Appeal stated thus regarding application of the Supreme Court’s findings in Francis Karioko Muruatetu & Another v. Republic (2017) eKLR in cases of robbery with violence:
- “From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”
9. The Supreme Court warned on application of Muruatetu 1 in its directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), stating thus;
- “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*”
10. This court is guided by the directions in Muruatetu 2 and will thus proceed cautiously, while considering the guidelines for resentencing as provided therein. The petitioner herein has been in prison for the past 15 years, serving the life imprisonment sentence. The Court of Appeal has held a life imprisonment sentence to be discriminatory given its indeterminate nature. Such were its findings in the cases of Julius Kitsao *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) and Evans Nyamari Ayako v. Republic Criminal Appeal No. 22 of 2018. The jurisprudence from the superior courts hold both the death sentence and life imprisonment as discriminatory with direct reference to *the Constitution*.
11. This court will therefore be guided by the cited decided cases in reviewing the sentence. It is the petitioner’s case that he has since reformed and he has acquired useful skills to help him navigate life outside prison. The court has had a chance to peruse the trial and appellate records as well as the probation officer’s report.
12. In the end, the court finds merit in the petition. The sentence imposed by the trial court is hereby set aside and substituted with a sentence of 35 years imprisonment to run from the date of conviction.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the Petitioner

..... for the Respondent

