



REPUBLIC OF KENYA



**Tundo v Director of Public Prosecution (Criminal Petition  
E022 of 2021) [2024] KEHC 10865 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL PETITION E022 OF 2021  
SC CHIRCHIR, J  
AUGUST 26, 2024**

**BETWEEN**

**PAUL LUTUNGA TUNDO ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein was charged with the offence of robbery with violence contrary to section 296 (2) of the penal code, in Mumias Chief magistrate's court criminal case No.393 of 2006 . He was convicted and sentenced to suffer death. He appealed to the high court at kakamega ,and his Appeal on both conviction and sentence was dismissed. His second Appeal to the court of Appeal at Kisumu was equally dismissed on both grounds. Later his death sentence was commuted to a life sentence.
2. The petitioner has now filed this petition seeking for a declaration that his rights under Articles 50(2) (p), 26(1), 27(1)(2), 28,29(d) and (f) of *the constitution* were violated.
3. The petition was canvassed by way of written submissions.

**Petitioner's submissions.**

4. It is the petitioner's submission that though the president commuted his death sentence to life imprisonment , he did not have the mandate to do so, and that his fate should not have been handed over to the president. He has therefore come to court to address the issue of the sentence as passed by the court, not the commuted sentence by the president.
5. It is the petitioner's submission that the death sentence imposed on him , which was meted out , without any discretion on the part of the court ,violated his rights under Article 50 of *the constitution*. He further submits that the trial magistrate did not have any discretion on the sentencing and thus he was not given a chance to mitigate.



6. The petitioner further submits that the death sentence violated his right to life under Article 26 ( 1) of *the constitution*; that death sentence disregards the personal circumstances of an individual and is thus degrading , inhuman and deprives him of the right to dignity.
7. It is further submitted that death sentence deprives an individual of the right to equality before the law. The petitioner queries why convicts of crimes on terrorism and murder are treated leniently compared to persons convicted of the offence of robbery with violence.
8. He urges the court to consider that the purpose of punishment is also rehabilitation. He states that he has been in custody for the last 17 years ; that he has since reformed and his health has since deteriorated. He urges the court to consider this period when reviewing his sentence.
9. The petitioner finally submits that pursuant to Article 23(1) of *the constitution*, this court has jurisdiction to determine this petition.
10. To buttress his submissions he has relied on the past decisions;
  - a. Kakamega High Court Petition Number 57 of 2018 Stephen Akhonya Musonye vs. Republic
  - b. Kakamega High Court Petition Number 151 of 2012 Sabastian Okwero Mrefu vs. Republic
  - c. Kakamega High court petition number 58 of 2019 Teddy Kinambuga Inyangala vs. republic.

### **Respondent's submissions**

11. It is the Respondent's submissions that the petitioner has not demonstrated the illegality or unconstitutionality of death sentence ; that the fact that the petitioner was sentenced to death does not make the sentence illegal but it means the circumstances warranted the said sentence.
12. It is further submitted that there is no evidence of the alleged ill- health that has been submitted to court and any skills he has acquired while in prison cannot be equated to reform in character

### **Determination**

13. The petitioner has invoked the jurisdiction of this court under Article 165(1)(3)(a) of *the constitution*. He pleads that his rights under Articles 22(1), 26(1), 27(2), 29, 48 and 50(2) of *the constitution* have been violated. He further seeks for declaration that section 296(2) of the penal code is inconsistent with Article 26(1), 27(1) (2), 28, 48, and 50 (1)(2) (p) of *the constitution*. He therefore seeks for a review of sentence ,and upon review, he urges the court to further take into account the period of 17 years that he has spent in custody.
14. Under Article 165(3) (b) of *the constitution* this court is clothed with the jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied , violated, infringed or threatened.
15. Further in *Muruatetu & Ano vs Republic & 5 others* (2021) KESC 31 (KLR) ( otherwise referred to as *Muruatetu 2*) the supreme court directed as follows: “To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached.....”



16. Thus pursuant to the provisions of Article 165(3) (b) of *the constitution* , and the supreme court’s directions in Muruatetu 2 as aforesaid , this court is bestowed with the jurisdiction to hear and determine this petition
17. The infringements that the petitioner has referred to are the right to life under Article 26(1), freedom from discrimination under Article 27, the right to human dignity under Article 28, Article 48 on the access to justice and Article 50(2) on the right to fair trial.

#### **Article 26(1)- The right to life**

18. Save for the unlimited rights set out in Article 25, of *the constitution* all other rights and fundamental freedoms may be limited. The right to life does not fall under the purview of Article 25. Further Article 26(3) directly sets out the limitation to this right. It provides as follows: “A person shall not be deprived of life intentionally except to the extent authorized by this constitution or any other written law”
19. In the case of Joseph Kaberia Kahinga & others vs. A.G (2016) eKLR, the court of appeal, after an elaborate discourse on death sentence which involved comparative analysis with other jurisdictions and considerations of various international instruments, held as follows: “It is quite clear from these inferential instruments and determination that the death penalty is still recognized as a lawful sentence but with certain gratification..... it can be seen very clearly that in Kenya the court have stated and re-stated again and again that the death penalty is a lawful sentence which is recognized both under the epoch and the current constitution.....The death sentence in Kenya as a penalty for offences prescribed under the penal code as stated above is not unconstitutional. It was contemplated in *the constitution* in that the same envisaged a situation where the right to life provided under Article 26(3) of *the constitution* could be curtailed by written law. Conversely the death sentence perse is not cruel, inhuman or degrading treatment.
20. The above answers the question of right to life under Article 26 . It is my finding that death sentence does not constitute a violation to the right to life.

#### **The right to fair under Article 50(2)**

21. In the Indian supreme court case of Natasha Singh vs. CBI {2013} 5 SCC 741 cited by Justice Odunga in Andrew Nthiwa Mutuku vs The court of Appeal & 4 others (2021) e KLR the court expressed itself on the central place of fair trial in criminal trials. It held: “Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person’s right to fair trial be jeopardized.”
22. In the case of Francis Karioko Muriatetu & Ano vs. Republic (2017) eKLR, the supreme court was considering the right to fair trial against the mandatory nature of death sentence under section 204 of the penal code. The court held as follows: “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 deprive the courts of the legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial.....” In further stated : “Indeed the right to fair-trial is not just a fundamental right. It is one of the inalienable right enshrined in Article 10 of the universal declaration of human rights and in the



same vein, article 25 (c ) of the constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant.”

23. The supreme court reasoning was that the minimum sentence takes away the discretion of the judge; that sentencing was part and parcel of hearing and that the mere act of allowing an accused person to make what would be mitigating factors doesn't allow the court to take into account the circumstances unique to a particular case. In my view the reasoning by the supreme court can be applied to every other mandatory minimum sentence where such sentences apply. Mitigation, in the face of such mandatory sentences then becomes merely academic, it serves no purpose at all.
24. Mandatory sentence also ignores the fact that sentencing is part of the trial process. In Francis Muruatetu ( supra) the supreme court further stated: “It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means the principle of fair trial must be accrued to the sentencing stage too”
25. I do find that section 296(2) contravenes the right to fair trial under Article 50(2)

### **Equality and freedom from discrimination. ( Article 27 )**

26. Article 27 provides as follows: “ 1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.  
2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms”
27. In the case of Woodson vs. North Carolina (1976) 428 US, 280 cited in the case of Chepkwony vs Republic( 2023) KEHC 1168(KLR) ,the court was of the view that a mandatory sentence treated the offenders as a faceless undifferentiated mass to be subjected to the blind infliction of the penalty of death, thereby discriminating them
28. The petitioner herein has rightly questioned the rationale behind the flexibility allowed when sentencing murder convicts which is equally a capital offence , while denying those convicted of the offence of robbery with violence.
29. It is an undeniable fact that just as in murder cases or any other offence, the circumstances surrounding a robbery with violence vary from one case to another, and the roles played by a robber, where they are more than one, may vary. The reasoning of the supreme court in Francis muruatetu case appreciated this fact. There is no reason at all not to apply this appreciation to cases of robbery with violence. To treat robbery with violence convicts differently from other convicts is an act of discrimination and is a violation of Article 27 of the constitution.

### **Article 28- The right to human dignity**

30. In the case of MWK &Ano vs AG & 4 others ( 2017)KEHC1496(KLR) Justice Mativo had this to say about human dignity: “ The right to dignity is at the heart of the Constitution. It is the basis of many other rights. The basis is that of recognizing that every person has worth and value and must be treated with dignity.....”
31. The supreme court in Francis Muruatetu case (supra) , again, stated as follows in regard to the right to dignity: “It is for this court to ensure that all persons enjoy the right to dignity. Failing to allow a judge discretion to take into consideration the convict's mitigating circumstances, diverse character of convicts, and the circumstances of the crime, but instead subjectively them, to the same (mandatory) sentence thereby treating them as an undifferentiated mass violates their right to dignity..... the



dignity of the person is ignored if the death sentence which is final and irrevocable is imposed without the individual having any chance to mitigate...”

32. Am duly guided and I hold that section 296(2) of the penal code violates the right to dignity of the human person.

#### **Article 48-The Right of access to justice**

33. To borrow from the reasoning of the supreme court again in Francis muruatetu ‘s(supra) mandatory sentence impedes any chance of appeal or review. The court held as follows: “Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict’s sentence cannot be reviewed by a higher court, he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.”
34. I do therefore find that the mandatory death penalty under S.296 violates Articles 27, 28, 48 and 50(2) (9) of the Constitution.
35. In the present case however , the petitioner’s sentence was commuted to life imprisonment. He argues that , the commutation by the president was illegal .
36. Am alive to the fact that the court of Appeal has since declared life imprisonment as illegal and I will consider the petitioner’s plea based on the said finding.
37. In Manyeso vs Republic (2023) KECA 827(KLR) which while considering the issue of indeterminate sentences, held: “ We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi vs Rep [2019] eKLR and Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation, which is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution.”
38. Am in agreement with the petitioner therefore that life imprisonment subjects the convict to almost similar fate as death sentence . It is a violation of Articles 27 and 28 of the constitution.
39. In view of the aforesaid the life sentence imposed on the petitioner is hereby set aside.

#### **Mitigation**

40. I will now turn to consider the mitigation of the petitioner herein. He pleaded for mercy; he said he had tuberculosis; that one of his legs was paralyzed and that he had a young family and children who were suffering. I have also considered the circumstances of the offences. I have noted that despite the robbery, no life was lost.
41. However on the aggravating side , evidence show that the Accused and his companions injured at least 2 people that night. After they were chased from the complainant’s house, they went to another home of a person identified as Samuel Akoko Alubala (PW4). It is clear therefore that the petitioner was least



bothered about the consequences of the crime he had committed in the first homestead. It was an act of defiance to law and order.

42. In the circumstances I will sentence the petitioner to 35 years in prison. In compliance with section 333(2) of the criminal procedure code, the sentence will run from 15/3/2006 being the date he was first arraigned in court.

**DATED, SIGNED AND DELIVERED BY NAIROBI VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF AUGUST 2024.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:

Godwin Luyundi- Court Assistant.

