



REPUBLIC OF KENYA



**Ndungu v Republic (Criminal Revision E027 of 2024)
[2024] KEHC 10441 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E027 OF 2024
FN MUCHEMI, J
AUGUST 22, 2024**

BETWEEN

STEPHEN WAINAINA NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination dated 20th February 2024 and filed on March 5, 2024 seeks for orders for review of sentence.
2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 5791 of 2009 with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#) and was sentenced to death. The applicant appealed to the High Court in Murang'a being Criminal Appeal No. 395 of 2013 and the appeal was dismissed on 20th May 2016.
3. The applicant says he does not intend to appeal to the Court of Appeal. He has chosen to apply for review of sentence before this court.
4. The respondent states that the applicant was charged with the offence of robbery with violence, gang rape and stealing stock and was found guilty of the offence of robbery with violence where he was sentenced to death. He further states that he was found guilty of the offence of indecent assault and stealing stock but the trial court discharged him on those two counts under Section 35 of the [Penal Code](#). Being dissatisfied, the applicant filed an appeal at Murang'a High Court *vide* Criminal Appeal No. 395 of 2013 where the court dismissed his appeal upheld the sentence of robbery with violence which was death. He further states that the court found that the offence of indecent act was not proved but found the offence of stealing stock had been proved. He was then sentenced to serve five (5) years imprisonment.



5. The respondent states that the death sentence was commuted to life sentence by the president. The respondent argues that the applicant has not stated that the sentence imposed was harsh or excessive. Neither has he complained that it was illegal or improper or that the trial court acted on a wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing. The respondent further states that the applicant has given generalized reasons which do not suffice interference with the discretion of the trial court in sentencing warranting upsetting the sentence imposed by the trial court.
6. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial and high court.
7. The respondent argues that the High Court in Murang'a has similar jurisdiction with the instant court and therefore since the court in Murang'a pronounced itself on the issue of sentencing, this court is functus officio. As such, the applicant ought to pursue an appeal in the Court of Appeal.
8. The respondent states that the applicant is forum shopping, abusing the court process, wasting precious judicial time and thus the application ought to be dismissed.

The Applicant's Submissions

9. The applicant relies on the cases of *Eliud Njire Gatura v Republic* Petition No. 67 of 2019 and Nairobi High Court Miscellaneous Criminal Application No 430 of 2015 and submits that the trial court's discretion in sentencing at the time of his conviction, was limited by the mandatory nature of the sentence imposed under Section 296(2) of the *Penal Code*. He relies on the cases of *George Munyinyi Kihuyu v Republic* (no citation given) and *John Sila Mutua v Republic* Petition No. 18 of 2020 and urges the court to exercise its discretion and review his sentence in line with the current jurisprudence on sentencing
10. The applicant submits that he was arrested and charged at the age of 30 years. His experience and suffering in custody, he says he has learnt his lessons in life. He further submits that he has undergone some courses as a form of rehabilitation and further that during his time in custody, he has lived peacefully with his fellow inmates.
11. The applicant states that he is a first offender and he was constitutionally guaranteed the benefit of the least sentence. He further submits that the mandatory sentence of death and later commuted to indefinite life sentence has ruined his hopes for future release and amounts to psychological torture contrary to Section 28 and 29 of the Constitution. The applicant submits that he is remorseful for the offence that he committed and urges the court to grant him a lenient sentence in conformity to the case of *Joseph Mutuma v Republic* [2019] eKLR.

The Law

12. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
13. The applicant has come to this Honourable court by way of review provided for under Article 50 of the *Constitution*. It provides:-
 - (2) Every accused person has the right to a fair trial, which includes the right:-



- (q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.
14. In the case of *Samuel Kamau Macharia v KCB & 2 Others*, Civil Application No. 2 of 2011, it was stated:-
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
15. The applicant herein was convicted for the offence of robbery with violence by Thika Chief Magistrate Court in Criminal Case No. 5791 of 2009 and sentenced to death. He appealed to the High Court in Murang’a *vide* Criminal Appeal No. 395 of 2013 and the court dismissed his appeal and upheld the conviction and sentence of the offence of robbery with violence.
16. Article 50 (2) of the *Constitution* is worded in such a manner that it allows a convicted person to choose between review and appeal. The applicant has already gone through an appeal which was unsuccessful. As such, the applicant is barred from filing an application for review before any court.
17. The Murang’a High Court which heard the applicant’s appeal dealt with the issues of both conviction and sentence in its judgment. This is a court of concurrent jurisdiction with Murang’a High Court and cannot hear an application for review of matters dealt with by another high court.
18. It is my finding that this application is misconceived and incompetent. It is hereby struck out with no orders as to costs.
19. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

