Katuta v Republic (Criminal Miscellaneous Application E034 of 2024)
[2024] KEHC 11597 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL MISCELLANEOUS APPLICATION E034 OF 2024

FR OLEL, J

SEPTEMBER 30, 2024

BETWEEN

SAMMY MUTHANGYA KATUTA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

A. Introduction

1. The applicant was charged and convicted of the offence of Robbery with violence contrary to section 296(2) of the penal code in Kitui CMCR Case No 411 of 2010 and after full trial was sentenced to suffer death on 11th April 2012. Aggrieved by the said decision, the applicant did file Machakos High Court Criminal Appeal No 51 of 2012, which too was heard on merit and dismissed on 30th October 2013. Still dissatisfied by the said outcome, the applicant further exercised his right of Appeal and filed COA Criminal Appeal No 85 of 2016, which upon consideration too was dismissed on 23rd October 2020.

2. The applicant did file this petition seeking to be resentenced based on the supremacy of the *Constitution* as espoused under Article 22,23, 50(1) as read with Article 165(3), (a),(b),(d) &(i) of the Constitution of Kenya 2010. Further, the applicant relied on the recent decision of *Francis Karioko Muruatetu* (supra), which outlawed mandatory sentencing as it interfered with the trial court inherent jurisdiction on sentencing based on peculiar facts of each case. The death sentence handed down to him also was an affront to human dignity, equality, equity and the spirit, purport and objective of the bill of rights. The Applicant also relied on the case of Criminal Case No 56 of 2013 at Kisumu, *William Okungu Kittiny Vrs Republic*, where the court of Appeal applied these principles and upheld the right of resentencing.

3. The Applicant also submitted that he was a first offender and had personally reformed and acquired good skills, while in prison. He was remorseful for the harm he caused the complainant and any other person who had been affected by his action. He prayed for leniency and for the court to have mercy on him.

4. He further stated that the period already served in prison was adequate and he prayed that this period served be considered adequate for the purpose of his punishment and he be released to reintegrate back into society as a reformed person. In the alternative, the applicant urged the court to reduce the death sentence handed, down to a definite term.

5. The state opposed this petition through their submissions filed on 08.02.2022. they contended that the court was functus offcio as the applicant's Appeal against conviction and sentence had been upheld by the High Court and the Court of Appeal and this court did not have locus to reconsider the same

B. Analysis of Law

Nature and scope of resentencing

Jurisdiction

6. It bears repeating that, the High Court has the mandate under Article 165 (3) of the Constitution to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the *Constitution*. A further leapfrog development; under Article 50(2)(p) of the *Constitution* 2010:

> 50(2) Every accused person has the right to a fair trial, which includes the right—
>
> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

7. In *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others,* Application No. 2 of 2011, the Supreme Court did pronounce itself that:

> "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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..."

8. The Court of Appeal in the case of *William Okungu Kittiny v R* [2018] eKLR stated:

> "The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the *Constitution*, the decision of the Supreme Court has an immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases".

9. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal grounds. To me, denying an accused the benefit of the court's discretion to impose an appropriate sentence is inconsistent with the right to a fair trial, which includes sentencing. On that basis, this court has jurisdiction to determine review of the sentence.

10. A similar position was taken by the High Court, in *Stephen Kimathi Mutunga v Republic* [2019] eKLR and *Michael Kathewa Laichena & Another v Republic* [2018] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforce fundamental rights and freedoms as enshrined in the Constitution. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

C.Sentencing

11. The appellant was convicted of the offence of robbery with violence, contrary to section 296(2) of the penal code and upon conviction was sentenced to suffer death. In the Muruatetu Case, the Supreme Court agreed with the petitioners that the mandatory nature of the death sentence was unconstitutional and as a result that the commutation of their death sentence to life imprisonment was equally untenable. For that reason, the persons then serving the mandatory death sentence or whose sentences to death had been commuted to life by executive fiat could now petition for rehearing and re-sentencing. Within the same appeal, the Supreme Court was asked to look into the sentence of life imprisonment.

    The Supreme Court framed the issue thus: "(c) Whether this court should fix a definite number of years of imprisonment subject to remission rules, which would constitute life imprisonment."

12. In answering the issue, the Supreme Court was of the view that the issue of life imprisonment was not within the jurisdiction of the court to deal with. The court agreed with the view expressed in *Jackson Wangui and Another v Republic* [2014] eKLR where the court observed: -

> " As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature...as to what amounts, to life imprisonment, this is a matter for the legislative branch of Government. It is not for our courts to determine for the people what should be a sufficient term of years for a person who committed an offence that society finds reprehensible to serve."

13. The Supreme Court went on to state at Paragraph 95 that:-

> " We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevance judicial officer along established parameters of criminal responsibilities, retribution, rehabilitation and recidivism."

14. The court then proceeded to recommend to the Attorney General to develop legislation on what constitutes "life imprisonment." That legislation has not come into force yet.

15. In *James Kariuki Wagana v Republic* [2018]eKLR Prof. Ngugi J observed that while the penalty of death is maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty it deemed fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and the most heinous level of robbery with violence or murder. In the said case the learned Judge noted that the force used was not excessive nor did the

appellant "unnecessarily injure the complainant during the robbery and was not armed". He further reduced the appellant sentence of death to imprisonment for fifteen years from date of conviction.

16. This court would not normally reconsider the issue of sentencing, where the matter has regurgitated before the high court and court of Appeal. In this matter, the Court of Appeal did not consider the issue of the Appellant's sentencing by dint of section 361(1) of the *Criminal Procedure Code.* While the high court finding was made in 2013 before the new jurisprudence had been developed regarding re-sentencing. Further, the high court as noted above has original jurisdiction under Article 165(3) of the *Constitution* 2010, to hear and determine any petition touching on the petitioner's fundamental right and where appropriate resentence him based on the current jurisprudence developed on mandatory sentencing, which tied the court hands as at the time he was convicted and sentenced.

D. Determination

17. The undisputed facts in this case is that the applicant was in a gang of robbers who went to rob Majengo Karolina Bar, situated at Majengo sub-location, township location of Kitui District, while armed with a metal bar, panga's, rungu's hammer, bows and arrow and indeed did rob one Stephen Nzioki Zolo, the various items listed in the charge sheet. The local police were informed and rushed to the scene. As the applicant and other robbers were trying to escape from the scene, he was shot in the leg and apprehended. All the issues raised in defence during the trial and the appeal process were considered and the conviction was upheld.

18. The petitioner in mitigation stated that he was a first-time offender and was remorseful for the offence committed. He had learnt from his incarceration and had been adequately rehabilitated by undertaking different certificate courses and acquiring skills to make ends meet if released. He was of the opinion that the time already served was adequate and he should be allowed to reintegrate back into the community as he had suffered adequate punishment for the offence committed.

19. Having considered all the above factors I do find that it is unlawful to jail the petitioner to an indeterminate period of time as that runs contrary to Article 50(2), (q) of the *Constitution* and Article 27, (1) &(2) and 28 of the *Constitution* of Kenya 2010.

20. In the circumstances of this case I do exercise my discretion and set aside the death sentence imposed on the Appellant vide the judgement of Principal Magistrate (Hon Beatrice Kimemia) delivered In Kitui Pricipal Magistrate Court Criminal Case No 411 of 2010, and substitute the same with a sentence of twenty years (20) which will run from 17th May 2010, when he was arrested and subsequently charged in court.

21. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of September 2024.

In the presence of;

No appearance for Applicant

No appearance for Respondent

Susan Sam Court Assistant