



REPUBLIC OF KENYA



KENYA LAW
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**Kilaka v Republic (Criminal Revision E108 of 2024)
[2024] KEHC 14962 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E108 OF 2024
FN MUCHEMI, J
NOVEMBER 28, 2024**

BETWEEN

PETER MATIVO KILAKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The petition for determination is undated whereas the applicant seeks for orders of review of sentence in Thika CM Criminal Case No. 787 of 2008.
2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 787 of 2008 with Count I robbery with violence contrary to Section 296(2) of the *Penal Code*, Count II rape contrary to Section 3(1) of the *Sexual Offences Act* No. 3 of 2006. The applicant pleaded not guilty to the charges. In Count I, he was sentenced to death while the sentence on Count II was suspended.
3. The applicant appealed to the High Court in Nairobi vide Criminal Appeal No. 104 of 2010 and the appeal was dismissed on 15th April 2014. The applicant appealed to the Court of Appeal in Nairobi vide Criminal Appeal No. 53 of 2015 and the appeal was dismissed on 8th March 2019. The conviction and sentence were upheld by the Court of Appeal.
4. The applicant states that the death sentence was later commuted to life sentence which he is currently serving. The applicant argues that the indefinite sentence of life does not accord him an opportunity to be released on pardon and remains archaic without undue consideration of his mitigation, the unique facts and individual circumstances of the case.
5. The applicant argues that the Court of Appeal has declared life sentence unconstitutional in Criminal Appeal No. 12 of 2021 *Julius Kitsao Manyeso v Republic* [2024] eKLR. The applicant further argues



that the current court has developed jurisprudence over the same in Constitutional Petition No. 5 of 2022 (Consolidated with Petition No. 6 of 2022) and Kapenguria High Court Misc. Criminal Application No. E007 of 2024 *Boniface Keya v Republic*.

6. The applicant states that the period in remand custody from 19/12/2007 when he was arrested, be computed into the eventual sentence pursuant to Section 333(2) of the *Criminal Procedure Code* and the case of *Abolfathi Mohammed & Another v Republic* (2018) eKLR and *Vincent Sila Jona & 87 Others v Attorney General*.
7. The respondent states that the applicant was charged at Thika Law Courts vide Criminal Case No. 787 of 2008 with the offences of robbery with violence and rape. After the trial, the applicant was found guilty for both the offence of robbery with violence where he was sentenced to death and rape but the sentence was deferred. Being dissatisfied, the applicant filed an appeal at Nairobi High Court vide Criminal Appeal No. 104 of 2010 where the appeal was dismissed on 15th April 2014. The applicant then filed an appeal at the Nairobi Court of Appeal vide Criminal Appeal No. 53 of 2015 where his appeal was dismissed on 8th March 2019. The death sentence was commuted to life sentence by the president.
8. The respondent states that applicant having appealed at the High Court and to the Court of Appeal. As such, he has no recourse to come back for resentencing. Under Article 50(2) of the *Constitution* provides for an applicant to chose to appeal or apply for review by a higher court as prescribed by law.
9. The respondent argues that the applicant has not stated that the sentence is manifestly harsh and excessive, that the sentence 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.
10. The respondent argues that both the High Court and Court of Appeal pronounced themselves and upheld both the conviction and sentence thus this court has become functus officio.
11. 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.
12. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

13. The applicant relies on the case of *Francis Muruatetu v Republic* [2021] eKLR ; Mombasa Petition No. 5 of 2022 as consolidated with Petition No. 6 of 2022 *Shaban Salim Ramadhan & Others v Republic* and *Omukanga v Republic* Criminal Appeal No. 260 of 2019 [2023] KECA 430 (KLR) (14 April 2023) (Judgment) and submits that the mandatory death sentence for the offence of robbery with violence is unconstitutional. The applicant further relies on the *Sentencing Policy Guidelines* 2023 at paragraph 4.8.16 and submits that the issue of sentencing was never addressed at the court of Appeal and neither did the High Court or the court of Appeal consider the mitigating circumstances of the case. The applicant argues that he has been in lawful custody for sixteen (16) years and is urging the court to grant him a lenient definite sentence keeping in mind that the life expectancy of a human being is seventy (70) years.
14. The applicant argues that the death sentence imposed on him is cruel, inhuman, degrading and violates his rights.



15. The applicant further relies on the cases of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment); *Evans Nyamari Ayako v Republic* Cr App. No. 22 of 2022 Kisumu and *Boniface Keya v Republic* Misc. Criminal Petition No. E007 of 2023 and submits that the indefinite life sentence has been declared unconstitutional as it violates his fundamental rights and freedoms.
16. The applicant submits that he is a first offender; that no life was lost during the commission of the offence; he has been in prison for 16 years and that he has undergone sufficient rehabilitation and therefore he deserves a definite lenient sentence.
17. The applicant further relies on Section 333(2) of the *Criminal Procedure Code* and the cases of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Jona & 87 Others v Kenya Prison Service & 2 Others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) (Judgment) and urges the court to consider the time he spent in custody from the date of arrest whilst resentencing him.
18. The applicant urges the court to consider the sixteen years he has served as adequate time for the offence he committed relying on the cases of *James Kariuki Wagana v Republic* [2018] eKLR; *Simon Kimani Maina v Republic* [2019] eKLR; *Joseph Kaberia Kabiga v Republic* [2019] eKLR and *Martin Bahati Makoha & Another v Republic* [2018] eKLR.

The Respondent's Submissions

19. The respondent reiterates what she deponed in her affidavit and urges the court to uphold the sentence of the trial court.

The Law

20. 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.

21. Section 362 of the *Criminal Procedure Code* provides:-

The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

22. Section 364(1) of the *Criminal Procedure Code* provides:-

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
- b. In the case of any other order other than an order of acquittal alter or reverse the order.



- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.
23. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of [Joseph Nduvi Mbuvi v Republic](#) [2019] eKLR:-
- “In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”
24. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
25. 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.
26. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 787 of 2008 with Count I robbery with violence contrary to Section 296(2) of the Penal Code, Count II rape contrary to Section 3(1) of the [Sexual Offences Act](#) No. 3 of 2006. He pleaded not guilty He was sentenced to death on Count I while the sentence on Count II was deferred.
27. The applicant appealed to the High Court Nairobi Criminal Appeal No. 104 of 2010 whereby the appeal was dismissed on 15th April 2014. The applicant thereafter appealed to the Court of Appeal (Nairobi) Criminal Appeal No. 53 of 2015. This second appeal was dismissed on 8th March 2019 thus upholding the conviction and sentence. The applicant states that while in prison, the death sentence was commuted to life sentence by the president. The applicant has, therefore, exhausted all the two appeal levels that were available to him upon conviction. He has now approached this court to review his sentence based on the jurisprudence recently developed by the superior courts in this country to the effect that mandatory death sentence is unconstitutional and that life sentence normally referred to as “indeterminate sentence” violates his constitutional rights and freedoms.
28. The applicant relies on [Sentencing Policy Guidelines](#), 2023 where it is stated that “a resentencing application can be made once an applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating and circumstances of the case.”
29. The Sentencing Guidelines recognize the fact that trial courts, upon development of jurisprudence have considered the principles laid down in regard to resentencing. I have perused the judgment of the



Court of Appeal in the applicant's second appeal and I have noted that the issue of sentence was never addressed for the reason that it was not an issue in the High Court. The applicant had raised issues regarding the legality of his conviction which was the only issue considered by the second appellate court. As such, the applicant's case falls under paragraph 4.8.16 of the [Sentencing Policy Guidelines](#) which provides for resentencing after an applicant has gone through an appeal and conviction upheld.

30. The applicant further relies on the case of [Shaban Salim Ramadhan & Others v Republic](#) Mombasa HC Constitutional Petition No.5 of 2022 where the court declared the mandatory sentence of death in the offence of robbery and attempted robbery as unconstitutional.

Following on the arguments presented by the applicant, this court is aware of several other cases determined by Superior Courts on the issue of unconstitutionality of death sentence and of life imprisonment in capital offences as well as in sexual offences which include and are not limited to the following.

- i. *Manyeso v Republic* Criminal Appeal No.12 of 2021, Mombasa.
- ii. *Evan Nyamari Ayako v Republic* Kisumu Criminal No.22.
- iii. *James Kariuki Wagana v Republic* (2018) eKLR.

31. The facts in the foregoing cases enunciate the principle that mandatory death sentence is unconstitutional for capital offences and that the courts have discretion in sentencing whereas a lesser sentence may be imposed.

32. The applicant says he is now serving life imprisonment after his sentence was commuted by the President. The evolved jurisprudence has declared life imprisonment sentence as unconstitutional on the basis that it is indeterminate and is against the objectives of criminal law of rehabilitation of offenders. As such, a prisoner who has been sentenced to life imprisonment is entitled to determinate sentence. The applicant herein is entitled to determinate or to a lesser sentence.

33. The sentence on the second count was held in abeyance by the trial court after the applicant was sentenced to death in respect to Count I which was in order since a convict cannot be sentenced to death and to an imprisonment sentence at the same time. Count II was of the offence of rape contrary to Section 3(1) of the [Sexual Offences Act](#) and carries a sentence of not less than ten (10) years imprisonment. The law requires that if this court reviews the sentence imposed on the applicant in Count I, it must sentence him in Count II whose sentence has remained suspended since 16th February 2010 when he was sentenced on the first Count.

34. The applicant also calls upon the court to consider the time he spent in custody during the trial which was disregarded by the trial court. Section 333(2) requires that time spent in custody during trial be taken into account during sentencing. I have perused the record of the trial court, the judgments of the two appeal courts and note that the period spent in custody was not taken into account. The record shows that the applicant was arrested on 26/02/2008 and was convicted and sentenced on 16/02/2010. During this period of pre-2010 Constitution, the offence of robbery was not bailable. The accused spent two (2) years in custody pending trial. This period was not considered during sentencing by the trial court. It falls within the duty of this court to deal with this issue in the process of resentencing the applicant.

35. The application, before me is one of resentencing. It is not a Constitutional petition on violation of rights and freedoms of the applicant as brought out in his submissions. As such this court restricts itself to the application for resentencing which seeks only one relief, that of resentencing.



36. I have considered all the issues raised in this petition the law and the submissions of the applicant. I am of the considered view that this application is successful and it is hereby allowed in the following terms:-
- a. That the death sentence imposed by the magistrate in Count I on 6th February 2010 is hereby set aside and substituted with thirty (30) years imprisonment.
 - b. That the applicant is hereby sentenced to serve ten (10) years imprisonment in Count II to run from the date of arrest.
 - c. That the sentences shall run concurrently and shall commence on 26th February 2008 being the date of arrest.
37. The applicant has fully served the sentence in Count II having been in prison for over fourteen (14) years.
38. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28TH DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE

