Kagotho v Republic (Criminal Application E007 of 2023)
[2024] KEHC 16256 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPLICATION E007 OF 2023

DKN MAGARE, J

DECEMBER 20, 2024

BETWEEN

JOSEPH WAITITU KAGOTHO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an undated application filed on 4.8.2023 seeking rehearing of the sentence of life imprisonment imposed upon the Applicant.
2. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
    a. The Applicant was convicted of murder contrary to section 203 as read with 204 of the *Penal Code*.
    b. The Applicant exhausted all appeals on conviction and sentence.
    c. The Applicant seeks this court to uphold the *Constitution* to do substantial justice.
    d. The Applicant seeks this court to consider his mitigation.
3. The Respondent filed a replying affidavit sworn on 11.10.2024 by David Mwakio, the prosecution counsel as follows:
    a. The Application was vexatious and scandalous.
    b. This court was functus officio.
    c. The Applicant had previously filed two similar applications in Petition No. 1 of 2019 and Petition No. E001 of 2020 grounded on similar principles and seeking the same reliefs and which were dismissed by two courts of concurrent jurisdiction.

d. The application was therefore res judicata.

Submissions

4. The Applicant filed submissions on 12.2.2024. It was submitted that the applicant was highly remorseful and praying for forgiveness. That the sentence of life imprisonment did not consider sentencing guidelines and mitigation. He relied on *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR. He submitted that he had undergone reform programs and had earned certified skills in tailoring.

5. The Respondent did not file submissions.

Analysis

6. The issue is whether the Applicant's life sentence should be reduced. However, before I venture into the issue of life sentence, I understand the Respondent to have extensively submitted that the application is res judicata. I consequently have to establish whether I should down my tools at this juncture.

7. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother Nyarangi JA, as he was then, immortalized these words, in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR as follows: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

8. This means that the court cannot assume jurisdiction that it does not have nor eschew jurisdiction it has. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively *in the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law,

> the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

9. The Supreme Court opined in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR (Muruatetu I) that the mitigation factors that may reduce a sentence imposed by the law by no way replace judicial discretion.

10. The court has noted the applications in Petition No. 1 of 2019 and Petition No. E001 of 2020 previously filed to this court by the Applicant herein. I note that in Petition No. 1 of 2019, the Applicant sought to review the sentence of life imprisonment downwards. The Court, Ngaah J, dismissed the application on the reasoning that the Applicant did not proffer any reason why the sentence should be commuted any further. Subsequently in Petition No. E001 of 2020, the Applicant applied to this court seeking among others, a determinate sentence. This Court, Muchemi J dismissed the application on the ground that the same was res judicata in view of the decision in Petition No. 1 of 2019.

11. In my view, the ruling of this Court in Petition No. E001 of 2020 did not determine the issues raised in the application. Petition No. 1 of 2019 did not equally deal with the issue of a determinate life sentence. The instant application cannot be said to be res judicata. The issue of a determinate sentence in the place of a life sentence remains alive and kicking to be determined by this court. It could be an attempt by a party to fold this court into believing that the entire issue of committal to a definite sentence as opposed to life imprisonment has been settled when on the face of the record the same has never been determined.

12. The purpose of this court is to do justice for both parties. I am unable to look aside and suffocate a clearly demarcated novel and legal issue raised by the Applicant about his mandatory life sentence that should be commuted to a determinate period. This, in our current constitutional dispensation does not mean that the life sentence is reduced as appears to be asserted by the Respondent. It means that a definite period of imprisonment be imposed instead of the life sentence which is significantly and as near as possible equivalent to the life sentence. Therefore, there would be no harm for my intervention to ensure substantive justice in this matter. Where constitutional justice is at stake, my call for intervention is even higher, taller and louder. I proceed to rule out the plea of res judicata and determine the application on its merits.

13. It is a settled principle that mandatory sentences deprive courts of discretion to impose appropriate sentences and are thus arbitrary and unconstitutional.

14. The instant application is premised among others on Article 50(2)(q) of the *Constitution*. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right to appropriate or less severe sentence - a principle embodied in the Constitution including Article 50(2)(p) of the *Constitution* as follows:

> Every accused person has the right to a fair trial which includes the right:
>
> ... 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.

15. The death sentence originally meted out on the Applicant was commuted to life imprisonment pursuant to the presidential decree issued in 2009 by the then President of the Republic, His Excellency Emilio Mwai Kibaki. Re-sentencing merely provides an effective remedy to an injustice that may arise from a violation of a right or fundamental freedom. This was equally the view of this Court in *Michael Kathewa Laichena & Another -v- Republic* (2018) eKLR thus:

> " ...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence.'

16. There is no straight jacket formula for sentencing an accused person on proof of crime. As was held by the Court of Appeal in *Thomas Mwambu Wenyi vs Republic* (2017) eKLR citing the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Mahareshtra* at paragraph 70-71:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

17. The Applicant is serving life imprisonment. As I have established above, this court has jurisdiction to reconsider the indefinite life sentence meted upon the Applicant for the purposes of substitution with a determinate sentence, as was held in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Muruatetu II):

> In respect of other capital offences such as treason under Section 40(3) of the *Penal Code*, robbery with violence under section 296(2) of the *Penal Code*, and attempted robbery with violence under Section 297(2) of the *Penal Code*, 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 the decision in question could be reached.
>
> ... All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.
>
> Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

18. I also note that in Muruatetu II, the Supreme Court was categorical that the guidelines in Muruatetu I applied only with respect to sentences of murder under Sections 203 and 204 of the *Penal Code*.

19. The question of the constitutionality of death sentence is settled with ramifications that death sentence is unconstitutional. Subsequent jurisprudence has also determined that life imprisonment is equally unconstitutional and courts have remitted life sentences to a determinate period of time. This emerging

jurisprudence is a product of a purposive reading of Articles 27 and 28 of the *Constitution* as applied to sentencing. In interpreting these provisions, the Court of Appeal in the Malindi Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso v Republic* (Judgement 7/7/2023) (unreported) stated as follows:

> " ...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. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter & Others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) 120161 Ill ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

20. In Muruatetu I, the Supreme Court referred to the case of *Vinter and others v. the United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that:

> " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
>
> Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.

21. The discretion to sentence permits a balanced and fair sentencing, which is a hallmark of enlightened criminal justice, and proper consideration of the individual circumstances of each accused person is essential for substantive justice. In *State vs. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA,

writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts."

22. A provision of law should not deprive the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence for this can only be regarded as harsh, unjust and unfair. The Court in *Mithu Singh vs. State of Punjab*, 1983 AIR 473 stated as follows:

> "...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

23. It is beyond peradventure that the cardinal duty of this court does not rest until it ensures that the sentences so prescribed are imposed in accordance with the Constitution. In the Constitutional Court

of Uganda's decision in *Susan Kigula & 417 Others vs. Attorney General*, Const. App. No. 3 of 2006, the court observed thus:

> " The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution."

24. The court also notes the purpose and objectives of sentencing as stated in the *Judiciary Sentencing Policy* should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *Sentencing Guidelines* are as follows: -

> " 1. Sentences are imposed to meet the following objectives. There will be instances
> 3.1 in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
>
> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
>
> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
>
> v. Community Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
>
> vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
>
> vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> viii. Reintegration: To facilitate the re-entry of the offender into the society"

25. It is high time this court exercises its full jurisdiction against non-determinate Methuselah sentences. The Supreme Court of Appeal of South Africa in *S v Nkosi & others* 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. The Court stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something

> approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the *Constitution* of the Republic of South Africa Act 108 of 1996.The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

26. Parties to related criminal litigation have to catch up and live to the reality. Under no circumstance does life imprisonment mean the natural life of a convict. Back home, the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) stated as follows:

> On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

12. Based on the above discourse, I find legal basis on which to exercise my discretion in favour of the Applicant for in doing so I uphold the constitution. In the case of *Ramakant Rai vs. Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> "Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

27. The court has considered the probation report by Nicholas Muema dated 25.7.2024 as well as the prison reports. The Applicant is aged 45, first offender, of appraised character, remorseful and has possibility of reform or rehabilitation. The best I can do in the circumstances of our constitutional dispensation is to substitute life imprisonment with a determinate term. In my view, and taking into account the need for deterrence in the premeditated nature of the offence of murder on which he was convicted, and the victim admittedly as his lover; as well as the time spent in custody now 26 years, 35 years imprisonment is in my view appropriate. The prison term shall take into account the need for deterrence in the mediated nature of the offence of murder on which he was convicted, and the time spent in custody since 13.9.1998.

Determination

28. I therefore make the following orders: -

    a. The sentence of life imprisonment is substituted with a sentence of 35 years imprisonment.

    b. The sentence shall take into account the time spent in custody since the arrest of the Applicant on 13.9.1998.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Pro se Applicant

Court Assistant – Jedidah