



REPUBLIC OF KENYA



Kilimo v Republic (Petition 13 of 2019) [2023] KEHC 316 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 13 OF 2019
RN NYAKUNDI, J
JANUARY 27, 2023**

BETWEEN

ISAAC KIPRUTO KILIMO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, Isaac Kipruto Kilimo, together with two others were charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* in Eldoret SPMCR No 2267 of 1999. After hearing the Court found the Applicant together with the two others guilty on three counts of the offence of robbery with violence and were sentenced to suffer death.
2. Dissatisfied by this judgment, the Applicant filed an appeal in the High Court at Eldoret Criminal Appeal No 93 of 2001 and the Court upon re-evaluating the evidence and the grounds of appeal the Court upheld the judgment and sentence of the Chief Magistrate's Court and dismissed the appeal.
3. The Applicant further dissatisfied with the judgment of the High Court appealed to the Court of Appeal at Eldoret Criminal Appeal No 265 of 2003 and the Court upon re-evaluating the evidence and the grounds of appeal the Court upheld the judgment and sentence of the High Court and dismissed the appeal.
4. Aggrieved by the court sentence, vide his undated Petition and Notice of Motion filed on August 18, 2022 and supported by the Applicant's affidavit dated August 17, 2022 the Applicant sought review/revision of the death sentence.
5. The Applicant's case is that death penalty was declared unconstitutional as per the case of *Joseph Kaberia Kabinga & 11 others v Attorney General* [2016] eKLR. The Applicant deposed that he is a first offender and a family man and believes that he has reformed having undergone various rehabilitative programmes while in prison.



6. The Applicant sought for the death sentence to be set aside and a lenient and definite sentence to be imposed. He also asked that the Court considers the time he has served from the time he was arrested. He submitted that he has been in custody for (23) years. The Applicant further deposed that this Court is clothed with the jurisdiction under Articles 50 (2) (p) (q) and 165 to re-sentence him.

Determination

7. The only issue for determination is whether this Court has the requisite jurisdiction to resentence the Applicant herein. The Applicant is subject to the mandatory death penalty and desires to be heard on sentence and should be entitled to resentencing hearing. It goes without saying that Article 50 (6) (a) & (b) is at the heart of this petition and in the following words I quote “.....A person who is convicted of a criminal offence may petition the High Court for a new trial if:-
 - a. The persons Appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal: and
 - b. New and compelling evidence has become available
8. In addition to the above the issue of proportionality must be addressed as elaborated by the court in the case of: *State –vs- Makwanyane* 1995(3) SA 391 where it said at page 433, paragraph 94

..... Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman and degrading...; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparity which exists between accused persons facing similar charges... are also factors that can and should be taken into account in dealing with the issue.”
9. The fundamental purposes of sentencing has been emphasised again and again within statutory framework and policies of this country. What can be deduced from those instruments is that sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of adjust, peaceful and safe society by imposing appropriate sentences. In light of this even in re sentencing of a convict the discretion of the court ought to be exercised judiciously. The important points to bear in mind at that
 - a. The nature of the offence to which the conviction relates and its relevance to the current circumstances. (b) the time that has elapsed since the conviction. (c) Whether in the opinion of the court there are exceptional circumstances relating to the offence all to the convict which justify reduction of sentence. (d) rehabilitation or reformation of the convict.
10. In the present application, the Applicant was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and was sentenced to suffer death.
11. The Supreme Court in 2015 in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] eKLR determined the legal question whether or not mandatory death penalty sentence was /is constitutional or not. The Supreme Court found that the nature of death sentence as provided for under Section 204 of the *Penal Code* is/was hereby declared unconstitutional. Thereafter, *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR the Supreme Court dealt with the lack of harmony in revised sentences by the Courts, where it gave the following directions



12. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows: The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the [Penal Code](#);
- i. the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;
 - ii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
 - iii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
 - iv. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under Section 329 of the [Criminal Procedure Code](#), as well as those of the victims before deciding on the suitable sentence.
 - v. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
 - vi. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;
 - a. Age of the offender;
 - b. Being a first offender;
 - c. Whether the offender pleaded guilty;
 - d. Character and record of the offender;
 - e. Commission of the offence in response to gender-based violence;
 - f. The manner in which the offence was committed on the victim;
 - g. The physical and psychological effect of the offence on the victim's family;
 - h. Remorsefulness of the offender;
 - i. The possibility of reform and social re-adaptation of the offender;
 - j. Any other factor that the Court considers relevant
 - vii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
 - viii. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the [Penal Code](#) before the decision in Muruatetu.
13. These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:
1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
14. The Court of Appeal in *Daniel Kipkosgei Letting vs Republic* [2021] eKLR where, the Court while citing with approval its decision in *Jared Koita Injiri v Republic* [2019] eKLR and guided by the sentiments of the Supreme Court in *Muruatetu 1* observed that:

"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. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment."

15. The Court of Appeal *Thomas Mwambu Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing: -

"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."

16. In the present case, the Applicant was charged and convicted with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* in Eldoret SPMCR No 2267 of 1999 and was sentenced to suffer death. He appealed to the High Court and the Court of appeal where both his sentence and conviction were upheld.
17. Article 50 (2) (p) of the *Constitution of Kenya*, provides that every accused person has 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.

18. Article 50 (6) (a) (b) of the [Constitution of Kenya](#), provides that a person who is convicted of a criminal offence may petition the High Court for a new trial if –

- a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and
- b. new and compelling evidence has become available.

19. In light of the *Muratetu 1 & 2* cases, the mandatory death penalty was/is declared unconstitutional and an aggrieved party is entitled to Resentencing hearing. Both the Applicant’s appeal at the High and the Court of Appeal were dismissed and thus this Court is the only avenue for an Applicant who was sentenced to death to seek resentencing. In exercising discretion I am guided by the principles in the case of : [Republic vs Ferix Madalitso Keke](#) Confirmation Appeal No 3030 of 2010 (Unreported where the court held as follows:

".....Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentencer wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society's continuum."

20. Having said so, I recognized that there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. I also take judicial notice of the severity of the offence vice vis the number of years already spent in custody by the Applicant have to credited as formulated under Section 333 (2) of the [Criminal Procedure Code](#) to the overall sentencing penalty imposed by the court. It is clear from the record that neither the trial court nor the superior court on appeal took into account this provisions in determining the sum period to be served by the Applicant. I am driven firmly to one conclusion that the operative sentence be varied and substituted with a lesser sentence of 28 years in prison custody with effect from 29th day of April 1999. To that extent, the committal warrants of the applicant be amended by the Deputy Registrar of the High Court to reflect the comity of the legal principles in resentencing.

It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY 2023

.....

R. NYAKUNDI

JUDGE

