



**Mathu v Republic (Miscellaneous Criminal Application E001 of 2021)
[2023] KEHC 2607 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2021**

**F GIKONYO, J
MARCH 29, 2023**

BETWEEN

PETER MUGO MATHU PETITIONER

AND

REPUBLIC RESPONDENT

(Revision from Original Conviction and Sentence in Narok CMCR No. 1138 of 2013 by T.A.Sitati – SRM and Naivasha HCCRA NO. 27 of 2015 by JJ M.A. Odero, and C. Meoli)

JUDGMENT

Sentence Re-hearing

1. Before me is a chamber summons forwarded vide letter dated September 17, 2020 and received in court on February 26, 2021. In the said application the applicant is urging this court to revise his current sentence and accord him a lenient sentence.
2. The application is brought pursuant to articles 21(1),22(1),25(1), 50(2) and 165(3) of the constitution, petition no 15 and 16 of 2015 of the supreme court by Francis Muruatetu and another, section 216, and 329 of the Criminal Procedure Code and section 296(2) of the Penal Code.
3. The petitioner also filed a petition on October 7, 2021. The petition is premised on articles 22(1), 23(3) (f), 25(c), 26, 27(1)(2), 28 and 29, and 165 of the constitution. The petitioner is seeking this court to exercise its inherent powers to come up with a different inference rather than the earlier one taking into account the period spent in custody.

Brief Background of this Case

4. The petitioner was charged together with More Ole Sarite and Musa Ikote Nkurruna with two counts of robbery with violence contrary to section 296(2) of the penal code, and the petitioner faced an



alternative count of handling stolen goods contrary to section 322(1) as read with section 322(20 of the [penal code](#). They were charged in Narok CMCR No 1138 of 2013. The trial court found the petitioner and his co-accused guilty and convicted them to a sentence of death by Hon T A sitati (SRM). The appellants denied the charges. Following a full trial, the petitioner was acquitted while the 2nd accused, More Ole Sarite, and 3rd accused- Musa Ikote Nkurruna were found guilty and convicted on the 1st count. On the 2nd count the 2nd and 3rd accused were acquitted while the petitioner was found guilty and convicted. The court correctly treated the 3rd count as an alternative charge. The appellants were sentenced accordingly.

5. Being dissatisfied with the conviction and sentence, they individually filed appeals at the high court at Nakuru vide Nakuru HCCRA Nos 194, 195, and 196 of 2014. The files were transferred to Naivasha. The three files were consolidated in Naivasha in Naivasha HCCRA No 27 of 2015. See Peter Mugo Mathu & 2 Others V Republic [2015] eKLR.
6. The court (JJ MA Odera and C Meoli) quashed the conviction of the 2nd appellant-More Ole Sarite and 3rd appellant- Musa Ikote Nkurruna on the 1st count. The court upheld the conviction and sentence of the 1st appellant on the 2nd count.
7. The court ordered a retrial on the 1st count for More Ole Sarite and Musa Ikote Nkurruna before a different magistrate at Narok
8. The petitioner subsequently did not seek a further appeal at the court of appeal as provided by law. The petitioner has instead filed the current petition and chamber summons.
9. More Ole Sarite and Musa Ikote Nkurruna went for a retrial before Hon W Juma on 4/8/2017, they were found guilty and sentenced to death.
10. Being dissatisfied with the trial court's judgment on retrial they separate appeals which were later consolidated, heard and determined in [More Ole Sarite & Another V Republic](#) [2019] eKLR.
11. On appeal, Bwonong'a J quashed the sentence of death passed and ordered for a resentence hearing under Muruatetu case. On resentencing, they were sentenced to 20 years imprisonment. More Ole Sarite then filed another appeal no 14 of 2019 before this court. The appeal was dismissed.

Directions of the Court.

12. The application and petition were canvassed by way of written submissions.

Petitioner's Submission

13. The petitioner urged this court to consider an appropriate non- custodial sentence, time already served, plight of his family, his advancing age and the fact the sentence imposed on him is not beneficial to the society.
14. The petitioner submitted that he is already rehabilitated, remorseful and ready to rejoin the community under any supervisory orders this court may be pleased to grant.
15. The petitioner has relied on the following authorities;
 - i. [S Vs Mchunu and Another](#) (AR 24/2011) (2012) ZAKPHC 6 Kwa Zulu Natal High Court
 - ii. Section 364 of the [CPC](#)
 - iii. Article 159, 23 and 24 of the [constitution](#)



Respondent's Submission

16. The prosecution opposed the application.
17. The prosecution submitted that this court does not have jurisdiction to determine this application and ought to down its tools. The applicant filed his appeal to the High court at Nakuru and the matter was determined by a two-judge bench in Naivasha high court. The applicant failed to move to the Court of Appeal as per section 361 of the *CPC*. According to the DPP, the application is couched as resentence hearings but the prayer sought ought to be raised in the Court of Appeal. Therefore, this court should disregard the current application as it offends Article 165(6) of the *constitution*.
18. The prosecution submitted that article 50(2)(q) of the *constitution* does not create a loop hole for an applicant to move back and forth between an appeal then a review then back to an appeal again and vice versa. The article gives the applicant the choice of choosing one of the two. This is meant to ensure litigation comes to an end not engage in forum shopping. The applicant has misinterpreted the article and sought a resentencing hearing on its strength.
19. The prosecution submitted that the application filed by the applicant herein is misguided as he is yet to exhaust the appeal process. They pray that it is dismissed in its entirety.
20. The prosecution has relied on the case of *Peter Nganga Muiruri V Credit Bank Limited & 2 Others* [2008] eKLR.

Analysis And Determination

21. The applications herein and the rival parties' written submissions raise the following issues on: -
 - i. Court's jurisdiction to adjudicate upon these applications; and
 - ii. Imposition of mandatory death sentence without exercising any discretion.

Nature and Scope of Re-sentencing

22. The applications before me are brought as resentence requests. Re-sentence is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not therefore consider conviction. Ordinarily, in re-sentencing, the court will check on the legality or propriety or appropriateness of the sentence. Thus, resentence will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
23. The challenge on the jurisdiction of this court to conduct a re-sentencing will, therefore, be treated within the scope curved above.

Of Jurisdiction

24. Jurisdiction is given by the *Constitution* or legislation or both (The Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others*, Application No 2 of 2011,) Jurisdiction is therefore *sine qua non* adjudication of a dispute by the court- which makes it a matter of great preliminary significance (Nyarangi, JA in The *Owners of Motor Vessel Lilian "S" vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page 14)
25. In this case, the Applicant filed appeal number HCCRA No 194 of 2014 which was consolidated with HCCRA No 195 & 196 of 2014. His appeal was dismissed. The Applicant has filed the application herein before me for resentencing. The prosecution counsel argued that this lacks jurisdiction court.



26. Does this court have jurisdiction to hear the application?
27. The court is guided by the observation of the Court of Appeal in the case of *William Okungu Kittiny -v- R* (2018) eKLR that:

“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 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”.

28. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made on the basis of unconstitutionality of mandatory sentence.

Alleged Violation

29. The applicant is challenging the mandatory nature of death sentence in section 296(2) of the *Penal Code* for denying the court discretion to impose appropriate sentence. He prays for the death sentence to be set aside and he be given a lenient sentence. He says that he is rehabilitated and has learnt new skill which makes him fit for re-integration in society. In addition, he submitted that he is advanced in age and hopes to get a sentence that will give him an opportunity to support his family.
30. In reacting to these submissions, the prosecution counsel has submitted that this court does not have jurisdiction to try these applications for it already has pronounced itself in the appeal. According to the prosecution counsel, any further relief lie in the Court of Appeal. He also accused the applicant of forum shopping and abuse of court process. The prosecution counsel further argued that the applicant is not entitled to seek relief on the basis of the resentencing of his co-accused More Ole Sarite who was sentenced under the erroneous application of Muruatetu as precedent. On those reasons, they sought for dismissal of these applications.

Nature of application

31. It is worth mentioning that, this proceeding is premised upon inter alia article 22(1), 23(3) and 165 (3) of the *Constitution*. Therefore, an application for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. And, I will deal with them as such.
32. They claimed violation of article 50(2)(p) of the *Constitution* which provides: -

"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"

33. The most potent argument is that mandatory sentences deprived courts of discretion to impose appropriate sentence. As discretion in sentencing pertains to fair trial, persons who suffer this deprivation may claim violation of right to appropriate or less severe sentence- a principle embodied in the *Constitution* including article 50(2)(p) of the *Constitution*.



34 Section 296(2) of the *Penal Code* provides: -

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death." [Underlining mine and for emphasis]

35. The use of the term shall in Section 296(2) of the *Penal Code* discharges a mandatory command giving no room for any discretion by court in sentencing. Discretion in sentencing pertains to fair trial and justice. Therefore, the section, to the extent that it provides for a mandatory sentence of death, takes away the discretion of the court in sentencing, thus, inconsistent with the *Constitution*.

36. However, the *Constitution* provided the courts with new tools- read-in, red-out or read-down techniques- in construing existing law with such modifications, exceptions, adaptations and alterations necessary to bring it in conformity with *Constitution* (Section 7 of the Transitional Provisions, Sixth Schedule of the *Constitution*). There is therefore, no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the *Penal Code* for being inconsistent with the *Constitution* unless it is totally irreconcilable with the *Constitution*. These techniques were specially designed to avoid paralysis and confusion in application of law which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning it to the *Constitution*.

37. In this case, I interpret section 296(2) of the *Constitution* to prescribe death as the maximum sentence- this brings it into conformity with the *Constitution*.

38. Having stated that, the purport of re-sentencing is to provide effective remedy to such injustice arising from a violation of a right or fundamental freedom as was aptly explained by Majanja J in *Michael Kathewa Laichena & Another -v- Republic* (2018) eKLR that:

"...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".

39. I should however, add that the authority of the court in article 165(3) and 23 of the *Constitution* is inter alia, to uphold and enforce the Bill of rights. The authority also formally and actually gives the court power of consistently structuring, developing and deploying progressive jurisprudence on enforcement of rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of the *Constitution*, that: -

"In applying a provision of the Bill of Rights, a court shall—

- a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

Sentence

40. Applying the test, does the sentence herein violate the rights of the applicant?

41. I have perused the decision by this court (Odero & Meoli JJ). The decision was delivered on November 6, 2015 before Muruatetu decision. Apparently, the death penalty was the only sentence prescribed in



law at the time. I should think that every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. I am aware that the President commuted the death sentence to life imprisonment. But, I will consider the circumstances of the case and impose appropriate sentence.

42. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?
43. In the case before me, the evidence shows that the applicants were armed with a dangerous weapon, namely pangas, rungas and simis, they robbed Samwel Kamau Njenga of cash and other valuables, and during the robbery threatened to use actual violence on him.
44. The manner the offence is committed is a relevant consideration. In this case, it was cruel. Security of the society from criminals is also quite relevant consideration in this case.
45. The offence is also serious; robbery with violence. And, the weapons used were also dangerous; rungas, pangas and simis.
46. I have also taken into account the mitigating factors; his age, rehabilitation as well as his family needs. Nevertheless, in the circumstances of this case, deterrent sentence is most appropriate. I therefore set aside the death sentence and sentence the applicant to life imprisonment.
47. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF MARCH 2023

F. GIKONYO M.

JUDGE

In the Presence of:

1. CA - Mr. Kasaso
2. Ms. Mwaniki for DPP
3. The Petitioner

