



REPUBLIC OF KENYA



KENYA LAW
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**Boit v Republic (Criminal Petition 23 of 2018)
[2023] KEHC 21245 (KLR) (7 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 23 OF 2018
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

JOSEPH BOIT PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The applicant approached this court vide a notice of motion filed on April 20, 2023 seeking the following orders;
 1. This honourable court be pleased to order that the petitioner be resented to a term of years that would entitle him to immediate release or to a merciful and/or lenient determinate period of incarceration.
 2. This honourable court be pleased to issue such orders as may be fair and just to secure the petitioner's constitutional rights.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by the petitioner.
3. The applicant was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in Eldoret High Court Criminal Case No 96 of 2003. The matter proceeded to full hearing and the court convicted the petitioner, sentencing him to death on November 29, 2011.
4. The petitioner filed written submissions on the application.

Petitioner's Case

5. It is the petitioner's case that he has advanced in age of 70 years and is suffering from deteriorating health. Further, that he has been incarcerated for a period of 20 years and recognizes the grief and



anguish occasioned by his offence. He is reformed and a trustee within the prison system which recognizes the grief and anguish occasioned by his offence. He also has a good report from the prison officers detailing that he is well behaved and relates well with other prisoners and officers, and that he is of good disposition, nature and character. He urges that he has been rehabilitated and will be a useful addition to the community.

Analysis & Determination

6. What is before this court is a petition for resentencing. This court would ordinarily not interfere with its own sentence as that would amount to sitting on appeal on its own decision. However, this court has jurisdiction to consider constitutional issues that may arise from its own decisions as per the provisions of article 165(3)(b) of the Constitution which provides as follows;

"(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"

7. Further, article 50(2)(p) as read with 50(2)(q) of the Constitution provides this court with jurisdiction to review a sentence as follows;

"(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; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

8. The upshot of the foregoing is that where a lesser punishment has changed between the time of sentencing and appeal, a convict can appeal against the sentence or seek a resentencing hearing. The mandatory death sentence was declared unconstitutional in Francis Karioko Muruatetu & Anor vs Republic (2017) eKLR. That however left the option of the death sentence as punishment legal depending on the circumstances depending on the facts of the case. This court also takes judicial notice of the commutation of all death sentences as of November 21, 2022 to life imprisonment by the President of Kenya. Further, the Court of Appeal in Julius Kitsao Manyeso vs Republic – Criminal Appeal No 12 of 2021 rendered itself on the constitutionality of the life sentence as follows;

"We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence."

9. In the premises, this court is in the position to consider the sentence meted out on the petitioner as at the time of his sentence there was only one punishment available being the mandatory death sentence.
10. I have considered the petitioners' mitigation and I note that he has been trained in various disciplines including as a catechist and an instructor in spiritual matters and has done biblical courses. He has



undergone leadership and vocational courses and has been recommended by the officer in charge of the prisons as a person who can be useful to society.

11. The objectives of sentencing as per the judiciary sentencing guidelines, paragraph 4.1 are 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 demands 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.
12. However, when conducting mitigation hearings for resentencing, the court must also consider the veracity of the crime committed. In fact, the victims of the offence should be in a position to give their views on the resentencing in an ideal world. I have considered the manner in which the offence of murder was committed in this particular case and to say the least, it was very inhumane and brutal. The deceased was tortured and burnt to death under the guise that he was a witch. Does the time the petitioner has spent in prison take away the nature of brutality and pain that was occasioned on the victim and his family? I think not. It is imperative that in such a scenario, the sentence acts as a deterrent to potential offenders.
13. It is therefore my considered view that the petitioner's punishment of having spent 20 years in prison is not enough punishment in the circumstances. However, as his death sentence was commuted to life by virtue of the presidents' directive, in line with the findings in *Julius Kitsao Manyeso vs Republic* – Criminal Appeal No 12 of 2021, I hereby set aside the life imprisonment sentence and substitute it with a terminable period of 45 years imprisonment to run from the date of arraignment in court.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7TH DAY OF AUGUST 2023

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R. NYAKUNDI

JUDGE

