



**Dadu v Republic (Petition 8 of 2022)
[2023] KEHC 23214 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 8 OF 2022
OA SEWE, J
SEPTEMBER 28, 2023
IN THE MATTER OF RE-SENTENSING HEARING UNDER
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ARTICLE 2, 19, 20, 21, 23, 24, 25, 27,
28, 29, 45, 50, 51, 157 OF THE CONSTITUTION**

BETWEEN

MOSES KADENGE DADU PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner, Moses Kadenge Dadu, is a convict serving life sentence at Shimo La Tewa correctional facility. He had been arraigned before the High Court at Malindi, charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Chapter 63 of the Laws of Kenya. The particulars thereof were that on the January 12, 2010 at Migondomane area within Ganze District within the then Coast Province, he murdered the deceased, who was then aged about 3 years. Upon trial, he was found guilty of the offence of murder and sentenced to life imprisonment.
2. In his supporting affidavit sworn on May 9, 2022, the petitioner deposed that, being aggrieved by his conviction and sentence, he filed an appeal to the Court of Appeal, but the same was dismissed. He thereafter decided to serve his sentence and to submit to the objectives of sentencing such that he is now fully reformed and ready to be reintegrated back into the society. He further averred that the crime was committed in the heat of passion and that he regrets the crime; and particularly the fact that the



- incident occurred within the family set up. He added that he has since been forgiven by members of his family who often visit him in prison.
3. Accordingly, the petitioner filed this petition in the hope of having his sentence reviewed. In particular, the petitioner contended that:
 - (a) The life sentence meted on him goes against the objectives of rehabilitation as contextually, rehabilitation implies the process of helping an offender or prisoner to readjust to his former roles and responsibilities and to re-adapt to the society.
 - (b) Rehabilitation must be perceived as a continuum of a total unit working towards reformation, rehabilitation and reintegration of prisoners.
 - (c) Rehabilitation should be modeled as a ray of hope for prisoners as opposed to punishment.
 - (d) That serving a life sentence without any prospects of release is dehumanizing, degrading and amounts to torture thus going against article 25 of the *Constitution* of Kenya.
 - (e) That all convicted persons have a right to know what is happening outside the prisons.
 - (f) That all convicted prisoners should be treated with respect due to their inherent dignity pursuant to article 28 of the *Constitution*.
 - (g) That it is in the interest of justice that crime should be punished, but imposing a life sentence is over-punishing an individual.
 4. In the premises, the petitioner prayed that the sentence meted on him be reviewed to a sentence that meets the objective of sentencing so as to give him a sense of dignity as a human being. He also prayed that a probation officer's report be called for to give the court the current position of his home situation to accord him a successful reintegration, in addition to any other order the court may deem fit and just to grant.
 5. Upon the presentation of the petition, an order was made for the original record of Malindi High Court Criminal Case No 3 of 2010 to be availed for perusal. That primary record is yet to be availed. In the course of time, it came to light that, in addition to an appeal to the Court of Appeal, the petitioner filed two other petitions of a similar kind; one of them being Malindi High Court Petition No. 36 of 2018, seeking similar orders as the orders prayed for herein. Accordingly, the Petition was fixed for hearing on the basis of the decision of the Court of Appeal in Mombasa Criminal Appeal No 2 of 2016: *Moses Kadenge Dadu v Republic*, reported as *Moses Kadenge Dadu v Republic* [2017] eKLR, and the decision of Hon Nyakundi, J. in Malindi High Court Petition No 36 of 2018: *Moses Kadenge Dadu v Republic reported as Moses Kadenge Dadu v Republic* [2020] eKLR.
 6. The petitioner urged the petition by way of written submissions and relied on his affidavit evidence and the averments set out in the body of the petition. Ms Anyumba for the respondent addressed the court orally on July 6, 2023. She urged for the dismissal of the petition, contending that the petitioner has already filed two similar petitions which were both dismissed prior to the filing of the instant petition.
 7. Thus, the single issue for determination in this petition is whether, in the circumstances, the petitioner's prayer for re-sentencing is tenable. This is because, it is plain that the petitioner appealed his conviction and sentence by the High Court at Malindi (Hon Meoli, J.); and that his appeal was heard and dismissed on both conviction and sentence in Malindi Criminal Appeal No 2 of 2016. The Court of Appeal noted that the offence of murder entailed the sentence of death, thereby impliedly acknowledging that the petitioner was not subjected to the maximum sentence envisaged for the offence. Regarding the gruesome nature of the offence committed by the petitioner as a relevant factor



to the petitioner's sentence, the Court of Appeal agreed with the findings of the High Court as quoted at paragraph 17 of its judgment thus:

The injuries described are severe and multiple. They could not have been sustained in the kind of scenario painted by the accused. One deflecting a blow with a panga could not possibly inflict so many severe injuries on the child. The ferocity of the attacks reveals the mental state of the assailant...The accused claims he was very angry at the time of the incident. If that be the case the source of his irritation could only have been the adults with whom he exchanged words but not the four year old child. His attack on the child was deliberate and calculated to cause the severest harm if not to kill. The child's skull was open and the neck literally truncated in the attack."

8. Thus, the Court of Appeal was convinced that the sentence of life imprisonment imposed on the petitioner was commensurate with the gravity of the crime. Undeterred, the petitioner filed petition No 36 of 2018 at the Malindi High Court for re-sentencing following the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. The petition was likewise heard and determined by the High Court at Malindi (Hon Nyakundi, J) on the May 14, 2020. The court held that there was no justification for interference with the sentence meted by the trial court and noted the aggravated nature of the crime thus:

In aggravation, the murder was quite brutal. The Petitioner came out of his house with a panga and grabbed S threw her onto the ground and slit her throat and cut her head using the panga. The sacrosanct life of an innocent minor was unnecessarily lost. Apparently, the aggravating factors in the instant case outweigh the mitigating circumstances raised by the petitioner. The sentencing principle applicable herein is that of deterrence. There is no evidence to interfere with life imprisonment."

9. Accordingly, the issue of re-sentencing having been considered by a court of concurrent jurisdiction on the basis of *Francis Karioko Muruatetu* (supra), it is not open to this court to entertain another petition on that ground as it would amount to sitting on appeal in respect of a decision by a judge of contemporaneous jurisdiction. In this connection, I agree entirely with the expressions of Hon Aburili, J. in constitutional petition No 5 of 2018 *Daniel Otieno Oracha v Republic* [2019] eKLR, that:

" 14. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.

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16.The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under article 163(3) cannot be dealt with by the High Court.

9. On that account I would have had no hesitation in dismissing the petition without further ado. I however note that, in his petition, the petitioner also raised the issue that indeterminate life imprisonment is dehumanizing and therefore amounts to a violation of articles 25 and 28 of the



Constitution. By the time the petition was reserved for judgment, the Court of Appeal had already pronounced itself on the matter in Malindi criminal appeal No 12 of 2021: Julius Kitsao Manyeso v Republic

“.... . 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 and others v The United Kingdom* (Application nos 66069/09, 130/10 and 3896/10) [2016] III 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.”

10. The Court of Appeal quoted from the decision of the European Court of Human Rights aforementioned in which it was held:

“ 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.

112. 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...”

11. It is plain therefore that the petitioner’s prayer that his life sentence be converted into a determinate period of imprisonment is valid. It is consequently my finding that a justification has been made for review of the petitioner’s sentence in the light of the Court of Appeal decision aforementioned. I say so because the petitioner has approached the court under article 165 of the Constitution, and I entertain no doubt that the court has jurisdiction to entertain the petition, notwithstanding that the applicant has exhausted his options of appeal.

12. A similar situation arose in Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) and was resolved in favour of equality before the law



as opposed to procedural technicalities. In particular, Hon Odunga, J (as he then was) held thus in connection with a re-sentencing application under section 333(2) of the Criminal Procedure Code:

“What then is the position where as a result of the failure to apply the said provisions, a person has exhausted his appellate options? In my view, unless the sentence was substituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of / the Constitution from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court’s supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed...”

13. In terms of what would be an appropriate determinate sentence, I note that in the case of *Julius Kitsao Manyeso v Republic* (supra), the appellant had been charged with defilement of a minor then aged 3 years and 7 months. Upon reviewing the objectives of sentencing and balancing the respective mitigating and aggravating circumstances at play in that appeal, the sentence of life imprisonment was set aside and substituted with a sentence of 40 years’ imprisonment to run from the date of the appellant’s conviction. Considering that in this case the minor’s life was nipped in the bud as it were, my considered view is that imprisonment for a determinate period of 60 years would serve the ends of justice in the matter. Accordingly, the sentence of life imprisonment imposed on the petitioner is hereby set aside and substituted with imprisonment for 60 years to be reckoned from the date of the petitioner’s conviction.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KWALE THIS 28TH DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE

