



**Tanui v Republic (Miscellaneous Criminal Application E028 of 2022)  
[2023] KEHC 22623 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22623 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION E028 OF 2022  
F GIKONYO, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**VINCENT LANGAT TANUI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision from Original Conviction/Sentence) in Narok  
CMCR No. 828 of 2013 and Narok HCCRA No. 17 OF 201)*

**JUDGMENT**

**Sentence re-hearing**

1. In an undated application received in court on 06.09.2022, the applicant is seeking for:-
  - i. A lenient definite sentence 'as provided under articles 50(2)(p) and (q) of *the Constitution*';
  - ii. An order that the sentences to run from the date of arrest since the offences emanated from the same transaction; and
  - iii. The court to invoke the provisions of section 333(2) of the Criminal Procedure Code and factor the period spent in remand.
2. The applicant averred in his supporting affidavit that he was charged and convicted of the offence of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. He was sentenced to suffer death.

**Applicant's Submission**

3. The applicant submitted that the death sentence imposed on him is inconsistent with articles 50(2)(h) (p), 26(1), 27(1)(2), 28, 48, of *the Constitution* and section 329 of Criminal Procedure Code.



4. The applicant submitted that the death sentence is unconstitutional when imposed without any exercise of discretion. The applicant relied on articles 2(5)(6), 25© and 50 of *the Constitution*, articles of the universal declaration of human rights, articles 20(1) (2) (3) (4), 19(3) (a) sentencing guidelines 2016, Edwin Otieno Odhiambo Vs Republic [2009]eKLR, Godfrey Ngotho Mutiso Vs Republic Criminal Appeal No. 17 Of 2008 .Susan Kigula And 416 Others Vs AG(2005) Constitutional Number 6 Of 2003, Malawi In Francis Kafantayeni And 5 Others vs AG(2007) MWNCI 9, Roberts vs Louisiana, 431 US633(1977) Louisiana, Mithu Vs State Of Punjab Criminal Appeal No. 745 of 1980, exersley Thomas vs St Vincent Communication Number 806/1998 UN DOC CCPR/70/806/1998(2000), Thomas Mwambu Wenyi Vs Republic [2017] eKLR cited the decision of the supreme court of India In Alister Anthony Pereira Vs State Of Maharashtra at paragraphs 70-71.
5. The applicant submitted that under article 50(1)(2) (p)(q) entitles an accused person to the benefit of a less severe of the prescribed punishment for an offence. That in the instant matter the least severe of the prescribed punishment for the offence of robbery is 14 years. He urged this court to settle the ambiguity in his favour. The applicant relied on article 50(2)(p), Francis Opondo v Rep [2017] eKLR, Daniel Gichimu & Another v Rep [2018] eKLR, Paul Njoroge Ndungu V Republic [2021] eKLR.
6. The applicant submitted that this court has jurisdiction to hear and determine this matter. He relied on the cases of the owners of Motor Vessel Lilian 'S' Vs Caltex Oil (Kenya) Ltd (1989) eKLR, Samuel Macharia & Another Vs Kenya Commercial Bank Ltd & 32 Others, application no. 2 of 2011, article 23(1), 25(a) and (c) of *the constitution*.
7. The applicant submitted further that he is reformed and has undergone rehabilitation programs that have transformed his life dimensions. The applicant relied on the case of Francis Opondo V Republic [2017] eKLR, article 10(3) of the ICCPR.
8. It was the applicant's plea that in the event that the court imposes a custodial sentence that it may consider time spent in custody and offer him the benefit of remission. The applicant relied on the cases of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, Robert Mutashi Auda v Rep. [2018] eKLR, Francis Opondo V Rep.[2017] eKLR.
9. The applicant also emphasized the need for sentence proportionality. The applicant relied on the cases Of Martin Bahati & Another Vs Rep.[2018] eKLR Page 115 Para 2., George Munyinyi Kihuyu V Republic[2018] eKLR Page 98, Michael Kathewa Laichena & Another V A.G. [2018] eklr PAGE 119, John Kathia M'ithobi Vs Rep. [2018] eklr Page 101, Joseph Mwangi Ngige & Another V Rep [2018] eKLR Page 106, Lawrence Nkonge Mwiandi Misc. Cr. App. No. 72 Of 2018 Nakuru (UR) Page 113, Samson Njuguna Njoroge V Republic Hc Cr. App. No. 150 Of 2016 (UR) Delivered On 15<sup>th</sup> February 2018 Pg 130, John Kirema Kaibi V Republic [2018] eKLR Page 133-134.

### **Prosecution's Submission**

10. The prosecution did not file any written submissions.

### **Analysis And Determination**

11. The applicant was convicted for the offence of robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code, and was sentenced to suffer death.
12. His appeal in the High Court Criminal Appeal No 17 of 2016 was dismissed for lack of merit.
13. The applicant has now filed the current application for review of sentence on the basis that the death sentence imposed on him was unconstitutional for, by statute, it is the only sentence that must be



imposed, thus, taking away the discretion of the court in sentencing. It is now generally acceptable that discretion in sentencing pertains to fair trial and justice, and that, any law which precludes exercise of discretion by a court of law in sentencing in particular offences yields two ills; i) a deprivation of an indispensable element of criminal justice; and ii) sets apart those affected for outright discrimination which contrary to article 27 of *the Constitution*. Such deprivation and discrimination will found a cause of action under article 23 and 165(3) of *the Constitution* for redress for violation or threatened violation of a right and or fundamental freedom enshrined in the Bill of Rights.

14. The kind of application before the court is now commonly known as re-sentencing.
15. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.
16. The applicant suffered deprivation of the benefit of exercise of discretion in sentencing- with real possibility of not getting appropriate sentence- which tinctures the right to fair trial. The sentence imposed was therefore inconsistent with *the Constitution*.
17. It is apparent from the decision by Hon. T.A Sitati (SRM) that the death penalty was imposed because it was the only sentence prescribed in law at the time. The trial court did not therefore exercise discretion in passing the sentence, thus, making the sentence amenable to review.

#### **Of dichotomy in opinion on life sentence**

18. Nevertheless, the court is aware that the death sentence was substituted for a less severe sentence of life imprisonment by the President in exercise of his power of mercy in accordance with article 133(1) (c) of *the Constitution*. Although the Court of Appeal in Julius Kitsao Manyeso vs. R [2023] eKLR declared life sentence to be unconstitutional, it appears from later decisions that the opinion is divided on whether life sentence is unconstitutional for it does not provide any prospects for rehabilitation or its indeterminate nature.
19. There are those who hold the opinion that it is unconstitutional; and have based their justification on the theory of punishment- rehabilitation—which postulates that the purpose of punishment is to make the offender capable of returning to society and functioning as a law-abiding member of the community which is a matter of the right to human dignity under article 28 of *the Constitution* and relevant international instruments on human rights.
20. And there are those who posit that, life sentence is, of itself, a lawful sentence; and although it may appear harsh due to its indeterminate nature, it is not immutable or irreducible; and thus, not unconstitutional. And, a corollary argument is that, it is the work of the legislature to prescribe through legislation, what constitutes life sentence.
21. This state of affairs presents a dilemma; whether it is axiomatic that nobody should be condemned or continue to serve life sentence.
22. Be that as it may, what is appropriate sentence given the circumstances of this case?
23. Judicial discretion is exercised upon defined principles of law, facts and circumstances of the case. Appropriate sentence therefore draws upon the facts and the circumstances of the case. See the Court of Appeal in the case of Thomas Mwambu Wenyi vs Republic (2017) eKLR which cited the decision



of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71 that:

“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.”

24. See also Francis Karioko Muruatetu & Another –vs- Republic where the Supreme Court stated the guidelines and mitigating factors in a re-hearing sentence.
25. The Judiciary Sentencing Policy Guidelines lists the relevant factors in sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm.

#### **Applying the test...**

26. In the case before the court, the applicant robbed Kariuki James of his motorcycle KMCU 191N, cash kshs. 800/= and mobile phone X10. and wallet all valued at Kshs. 90,000/=. The applicant was armed with crude weapon. The offence was committed in a cruel and brutal manner to the victim; violence was used on, leaving him unconscious. The offence is also serious; a robbery with violence. And, the weapons used were also dangerous weapons. In the circumstances of this case, deterrent sentence is most appropriate.
27. Is life sentence appropriate sentence?
28. The circumstances of this case; the severity of the offence, the dangerous weapons used, the brutal manner the offence was committed, and the force or violence applied on the victim; justify life sentence.
29. Accordingly, section 333(2) of the Criminal Procedure Code may not apply.
30. In the upshot, the applicant’s application lacks merit and is hereby dismissed.
31. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS APPLICATION, THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

.....

**F. GIKONYO M.**

**JUDGE**

**In the presence of: -**

1. Applicant.



2. M/s Torosi for the Respondent.

3. Muraguri – Court Assistant

