



Wamalwa alias Jakelwa v Republic (Miscellaneous Criminal Application E002 of 2023) [2023] KEHC 24248 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2023
RB NGETICH, J
OCTOBER 26, 2023**

BETWEEN

EVANS WAMALWA ALIAS JAKELWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged before the Principal Magistrates court at Eldama Ravine vide Eldama Ravine vide Criminal Case No. 625 of 2011 with the offence of Robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The Appellant denied the charge and the matter proceeded for full trial. Upon close of prosecution and defence case, the applicant was conviction and sentenced to death penalty. Being dissatisfied with the lower court judgement, the Applicant appealed to the High court but his appeal was dismissed in its entirety.
2. The Applicant submits that due to the thirst for justice and the recent developments of law which declared mandatory minimum nature of sentence unconstitutional for taking away the discretion of the court, the applicant filed re-sentencing application dated 29th November, 2019 before this court article 19(1), 22(1), 24, 25, 27(1) and 50(2) of *the Constitution* of Kenya, 2010 seeking re-hearing of sentence imposed against the Applicant herein.
3. The application is supported by annexed affidavit sworn by the Applicant on the 28th day of November,2019. In his supporting affidavit, the Applicant avers that he was charged for the offence of Robbery with violence in Criminal case No. 625 of 2011 at Eldama Ravine and upon hearing and determination of the matter, he was sentenced to death. The applicant states that after his conviction and sentence, he lodged his appeal at the High court in Eldoret which was dismissed on the 12th June,2014.



4. The applicant submits that he is making this application in reliance on the case of *Francis Karioko Muruatetu & Another* Petition No.15 of 2015 and that this petition will only serve to meet the ends of justice on fair trial under fair trial provisions; that the mitigating grounds upon which the Application is founded is that the Honourable court has got discretion on sentencing following the above decision as stipulated and the provisions of section 364, 379(4), 316, 357 of the *Criminal procedure code* and articles 165, 48, 23(1), 25(c), 27(1) (2)(4), 50(2), (p)(q), 159(2) of *the Constitution* of Kenya.
5. The applicant urged this court to find that the Applicant is a young man whose life has been greatly affected by the imprisonment. That he is suffering from hearing problems and while in prison he has taken full advantage of the rehabilitative programs offered in the correctional facility as is evident in the attached documents. He cited the case of Joseph Kaberia and 11 others Petition No. 618 of 2010 and *William Okungu Kittiny Vs Republic* [2018] eKLR, the provisions of Articles 50(2)(p)(q) and the provisions of section 333(2) of the *Criminal Procedure Code*.

Submissions

6. The Applicant restated grounds in support of the application and added that some of the achievements he has acquired in prison includes, Diploma in Discover Bible School lessons and proficiency certificate and the hearing problem he has made it hard for the Applicant to participate in any reformation and rehabilitation programs offered by the prison authorities and he also suffers from thigh wound which has not healed for the past 10 years; he prayed to be given a second chance on medical grounds for him to go and seek medication and that with the knowledge, experience and information acquired in prison, he believes that he is rehabilitated and ready to be productive in building the nation.
7. He urged this court to find that he was 21 years old at the time he was convicted and he is now 33 years old. He regrets the offence; says he was a first offender and is remorseful and apologizes to the complainant and promises not to commit crime again having learnt that crime does not pay and that he has learnt the consequences of being a law breaker.
8. He submitted that this Honourable court has power to impose an appropriate sentence by exercising its discretionary powers and urged this court to impose a lenient sentence that will enable him re-unite with his family, community and the free world at large and for him to go and seek medication and rebuild his life as well find his family.
9. The state counsel Ms. Ratemo, submitted orally that she has gone through the Applicant's application and the written submissions and the Respondent's argument is that this Court has no jurisdiction to entertain this application on the ground that he had filed an appeal in Eldoret High court which was dismissed.
10. That the fact that Eldoret High court has similar jurisdiction as this court denies this court jurisdiction to review the sentence. That the applicant ought to have filed application in the Court of Appeal and cited the case of *Daniel Otieno Oracha vs Republic* [2019] eKLR.

Analysis and Determination

11. I have considered the application herein and the submissions made by both parties. What I wish to consider is whether this Honourable court has jurisdiction to review sentence.
12. The application before this court invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court is satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to



make appropriate orders to correct the impugned order, decision or sentence and align it with the law as provided in section 362 as read with section 364 of the *Criminal Procedure Code*. The Applicant argues that this Court has jurisdiction under sections 354, 364 and 365 of the C.P.C to hear and determine his application for sentence review. The Respondent on the other hand contends that this Court lacks jurisdiction to handle this matter having earlier on determined the appeal.

13. The jurisdiction of the court flows from *the constitution* and statute. In The Matter of Advisory Opinion of the Court under article 163 of *the constitution* - Application No. 2 of 2011 at paragraph 30, the Supreme Court stated as follows: -

“It is trite law that a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavors to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

14. Further, in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No. 2 of 2011 the supreme court stated as follows:-

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

15. It is not disputed that the Applicant had his appeal heard and determined by a court of a similar status as this Court and he has not filed an appeal to the Court of Appeal. I however note that the appellant’s appeal was heard in the year 2014. The High court in Eldoret upheld death sentence imposed by the trial court. It is worth noting that at the time the High court determined the appellant’s appeal, the supreme court had not pronounced itself on constitutionality of minimum sentence in *Francis Muruatetu & Another v Republic* [2017] eKLR was decided in the year 2017.

16. I take note of the fact even though death is still in statute, the same has not been implemented for many years and practice has been to commute death sentence to life imprisonment. In view of the fact that life sentence has been declared unconstitutional I am inclined to impose determinate sentence against appellant herein.

17. I also take note of the fact that applicant was a first offender and has been rehabilitated while in prison for a period of about 12 years and has health issues. In view of the above, I hereby exercise discretion to revise the applicant’s sentence to 25 years imprisonment.

18. Final Orders: -

1. Death sentence is hereby set aside and applicant sentenced to 25 years imprisonment.
2. Period served in remand to be reduced from sentence above.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 26TH DAY OF OCTOBER 2023.

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RACHEL NGETICH
JUDGE

In the presence of:

Mr. Elvis & Mr. Momanyi – Court Assistants.



Applicant present.

Ms Ratemo for State.

