



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kosgei v Republic (Constitutional Petition E008 of 2023)  
[2023] KEHC 27058 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27058 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION E008 OF 2023  
RN NYAKUNDI, J  
DECEMBER 20, 2023**

**BETWEEN**

**PAUL KIBET KOSGEI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being the Resentencing Application in HCR NO. 29/2007 delivered on 14.4.2011)*

**JUDGMENT**

1. The Petitioner, Paul Kosgei Kibet, was initially charged, convicted and sentenced to death for the offence of murder contrary to section 203 as read as read with 204 of the *Penal Code*. He was aggrieved by the decision of the trial Court and subsequently he appealed to the Court of Appeal where the said appeal was dismissed. Later the verdict of the death was commuted to life imprisonment through Presidential pardon.
2. The Petitioner is now before this Court seeking to vary the life imprisonment sentence. The Petitioner alleges a violation of his Constitutional rights under Articles 27(1), 28 , 29 (d)(f) and 50 (2)of the *Constitution*. The Petitioner maintains that life sentence is unconstitutional as it infringes on his right to human dignity. The Petitioner also maintains that the said sentence is punitive.
3. The Petitioner further submitted that he has been in custody for 16 years and that while in custody he has undergone various rehabilitative programs. The Petitioner maintains that he is now reformed and his now ready to be reintegrated into society.
4. The Petitioner is thus asking this Court to admit the petition for re-sentencing, notwithstanding the order commuting the death sentence to life as provided. To buttress his arguments the Petitioner relied on the case of *Francis Kariuki Muruatetu & Another v Republic* (2017) eKLR.



## Determination

5. In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See *Ambani v R*). The Court of Appeal *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing:-

“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.”

6. In *Francis Kariuki Muruatetu & Another v Republic* Petition No. 15 and 16 of 2015, the Learned Judges of the Supreme Court held that Section 204 of the *Penal code* was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial Court’s exercise of discretion while sentencing. The Court while remitting the matter to the high court for re- hearing on sentence held that: -

“The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.....”

7. The Court proceeded to give the guidelines to be considered by the court while considering an application for re-sentencing and held inter alia: -

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge: -

- a) age of the offender;
- b) being a first offender;
- c) whether the offender pleaded guilty;
- d) character and record of the offender;



- e) commission of the offence in response to gender-based violence;
- f) remorsefulness of the offender;
- g) the possibility of reform and social re-adaptation of the offender;
- h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process ...”

8. In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See *Ambani v R*). The Court of Appeal *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing: -

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9. The Courts now can exercise discretion when considering and passing sentence. The said discretion however should only be exercised in the deserving cases. (See *Republic v Ruth Wanjiku Kamande* [2018] eKLR).
10. In exercising discretion in sentencing, the Court must further have in mind the objectives of sentencing as laid down in the *Sentencing Policy Guidelines*, 2023 published by the Kenya Judiciary and which includes: -
- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
  - iv. 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 demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

- v. Community protection: To protect the community by incapacitating the offender.
  - vi. Denunciation: To communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society.
11. In the directions issued by the Supreme Court on 6.07.2021 in Petition No. 15 & 16 (Consolidated)- *Francis Karioko Muruatetu & Another v Republic*, the Court directed that in re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the Court;
- (a) Age of the offender;
  - (b) Being a first offender;
  - (c) Whether the offender pleaded guilty;
  - (d) Character and record of the offender;
  - (e) Commission of the offence in response to gender-based violence;
  - (f) The manner in which the offence was committed on the victim;
  - (g) The physical and psychological effect of the offence on the victim's family;
  - (h) Remorsefulness of the offender;
  - (i) The possibility of reform and social re-adaptation of the offender;
  - (j) Any other factor that the Court considers relevant.
- The Supreme Court proceeded to hold that; -
- viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
  - ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the *Penal Code* before the decision in Muruatetu..."
12. As such, taking into consideration the principles set out in *Muruatetu case* as to the exercise of discretion in sentencing in murder cases and the guidelines in sentencing, and considering the objectives of sentencing as laid down in the *Judiciary Sentencing Policy Guidelines, 2023* and further taking into consideration the circumstances under which the offence was committed, the seriousness of the said offence as well as the mitigation by the petitioners herein, it is my considered view that the Petitioner still deserve a deterrent sentence.
13. The Petitioner has been behind bars for approximately (16) years for the offence of murder. I have had occasion to go through the several cases reviewed by several judges of the high court on sentencing and re-sentencing in murder cases, which affords meaningful guidance as to the sentencing trends in cases such as the one at hand.



14. In *Nelson Mwiti Gikunda & 2 others v Republic* [2018] eKLR where the Petitioners were a gang that assaulted the deceased before kidnapping her and killing her by beating her to death with sticks, rungs and whips, Majanja J. substituted the death sentence with 25 years' imprisonment. In *Republic v Muema Makali* [2019] eKLR the Petitioner killed three people before burning their bodies and attempting to commit suicide Odunga J. substituted the death sentence with 40 years.
15. In *Benson Ochieng & France Kibe v R* (2018) eKLR, Joel Ngugi J. re-sentenced the Petitioners to 20 years imprisonment upon considering that the offence was aggravated by the use of multiple guns by an organized gang to commit armed robbery. The correct approach in my view while exercising discretion properly on issues of life imprisonment to a more terminable term is to look at the weight of a number of factors. i.e what is the range of sentence likely to be fair and proportionate to the offence. What is the appropriate starting point within which the custodial sentence applicable to the circumstance of the offence. Are there any relevant aggravating and mitigating factors in the whole scheme of the case? Is there any credit to be given for pre-trial detention if applicable? Whether the Social inquiry Report is responsive and potential for rehabilitating the convict. There must be a reference point in any particular case considered along the setting and context of these parameters. The court should also consider among other things whether the reduction of life imprisonment would be so disproportionate to the seriousness of the offence also in appropriate that it would shock the public when they hear of it as a punishment for the offence.
16. Having said so, I recognized that there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. I also take judicial notice of the severity of the offence vice vis the number of years already spent in custody by the Petitioner and hereby set aside the life imprisonment and substitute it with (30) years' imprisonment with effect from 20.7.2007. As a consequence, the committal warrant shall be amended to factor the period under section 333(2) of the *Criminal Procedure Code*. 14 days Right of Appeal.

It is ordered so.

**SIGNED DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2023**

**In the presence of:**

**Mr. Mugun for the State**

**Petitioner**

.....

**R. NYAKUNDI**

**JUDGE**

