



**Kimani v Republic (Criminal Miscellaneous Application E014 of 2021)  
[2023] KEHC 26918 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E014 OF 2021**

**FR OLEL, J**

**DECEMBER 18, 2023**

**BETWEEN**

**BEN HADAD KIMANI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant was charged and convicted of the offence of Murder contrary to section 203 as read with section 204 of the *penal Code*. in MACHAKOS HCCR CASE NO 11 of 2004 and on 29<sup>th</sup> September 2008 was sentenced to suffer death on count I, while his sentence with respect to count II was suspended pending any appeal proceedings and/or execution of count I. The applicant appealed to the court of Appeal being CA CRIMINAL APPEAL NO 692 OF 2008, where his appeal was heard on merit against conviction and sentence was dismissed.
2. The applicant did file this application/petition under provision of Article 22, 23, 27(1),(2), 52(2)(q), and 165 of the *constitution of Kenya* and seeks that this Honorable court be pleased to re consider the sentence that he was serving ( death sentence ) and be pleased to resentence him to a lenient definite sentence, premised on rehabilitate sentence rather than retributive punishment. There had been new developments in the law regarding sentencing and specifically in the case of *Francis Karioko Muruatetu & Another & Douglas Muthaura Ntobiri v Republic* MISC APP NO 4 OF 2015, where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.
3. The applicant did urge this court to consider the fact that he had been in custody for the last 22 years and there was need to reconsider the same in line with the new development in law and section 333(2) of the *criminal procedure code* to achieve proportionality and parity in sentencing. Reliance was placed



on *Rep v John Nganga Gacheru & Another* (2018) eKLR, *Lawarence Nkonge Mwiandi v Republic* (2018) Misc Application 72 of 2018 & *Mark Nakitare Simiyu v Rep* Criminal Appeal No 32 of 2011

#### 4. B. Analysis of Law

##### Nature and scope of resentencing

5. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. 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.
6. It bears repeating that, the High Court has the mandate under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the constitution A further leapfrog development; under article 50(2)(p) of the *Constitution*  
50(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
7. The applicant has approached the court on the basis of the decisional law in *Muruatetu (supra)*, which specifically outlawed mandatory minimum sentence. There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence's where appropriate.
8. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga -v- Republic* (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the *Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.
9. In *Michael Kathewa Laichena & Another v Republic* (2018) eKLR Majanja J. stated:  
“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

##### C. Sentencing

10. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. 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."

11. Also See also *Francis Karioko Muruatetu & Another v Republic* (*supra*) where the Supreme Court laid out the guidelines and mitigating factors to guide courts in a re-hearing on sentence. The judiciary has also developed *Judiciary Sentencing Policy Guidelines* lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

#### **D. Determination**

12. The facts of this case, is that the petitioner was sentence to death for causing the death of Irene Ng'endo Kiama and her son Stephen Mwaura chege, though the second death sentence was suspended. This court did order for a probation report, which noted that the applicant was not a first offender, was lazy as he had not gained any skills while in prison and was highly mobile thus could not be considered for a non-custodial sentence . Further the family of the victim and the community in Mtito andei were still grieving and were reluctant to have the appellant granted a lesser sentence.
13. Having considered all the above factors I do find that to the extent that the applicant's sentence was the mandatory sentence provided under law, in line with the *Murauatetu decision*, I do have do find that I do have jurisdiction to review the same.
14. I do review the death sentence handed down upon the applicant vide the judgment dated 29<sup>th</sup> September 2008 in Machakos HCCR NO 11 of 2004 and substitute the same with a sentence of 40 years with effect from 29<sup>th</sup> September 2008.
15. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

In the presence of:

Appellant present from Nairobi prisons

Mr. Mangere for the Respondent

Susan/Sam: Couer Assistant

