



Mutinda v Director of Public Prosecution & another (Criminal Miscellaneous Application E019 of 2023) [2023] KEHC 26489 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION E019 OF 2023**

**FR OLEL, J
DECEMBER 18, 2023**

BETWEEN

PHILIP KAVITA MUTINDA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

A.Introduction

1. The applicant was charged and convicted of the offence of Robbery with violence contrary to Section 296(2) of the Penal code at the Chief Magistrate’s court at Kangundo and was sentenced to death; He appealed against the said conviction and sentence vide Machakos HCCCR No 2019 of 2013 and the said appeal was dismissed. Thereafter the appellant exercised his further right of appeal to the court of appeal on issues of law and his appeal being CA Criminal Appeal No 177 of 2016 was heard on merit. The appeal as against conviction was dismissed, while his appeal against sentence was partially allowed and the life sentence reduced to 25 years from the date of conviction.
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 (25 years) 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 Vrs 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.



B. Analysis of Law

Nature and scope of resentencing

3. 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.
4. 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
5. 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.
6. 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.
7. 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

8. Be that as it may, this application is wholly misconceived and is hopelessly defective as the issue of resentencing of the applicant was extensively considered and determined by the court of Appeal, who in their wisdom reconsidered his sentence and reduced his death sentence and re sentenced him to serve 25 years from the date of conviction.
9. The court of Appeal determination was made on 18th June 2021, and all the new jurisprudence on re sentencing was discussed therein. The applicant cannot then be allowed to raise and regurgitate similar issues before this court or any other court for that matter. The issue of resentencing the applicant is thus res judicata.

D. Determination

10. Having considered all the above factors I do find that this application to be hopelessly devoid of merit. It is dismissed.



11. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of December, 2023.

In the presence of;

Appellant present at Kamiti prisons

No appearance for Respondent

Susan/Sam - Court Assistant

