



**Otieno v Republic (Criminal Petition 66 of 2020)  
[2022] KEHC 13126 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13126 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL PETITION 66 OF 2020  
JN KAMAU, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**JOSEPH ODHIAMBO OTIENO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein was tried and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He was sentenced to death. This was later commuted to life imprisonment by the President in the year 2016.
2. On August 20, 2020, he filed the petition for review of the sentence herein. In the affidavit that he swore in support thereof, he stated that based on the Supreme Court ruling that was made on December 14, 2017, the mandatory death sentence that was meted on him was unconstitutional, inhumane and degrading.
3. In his written submissions that were filed on November 26, 2020, he placed reliance on the case of *Kenneth Mabungu v Republic* No 25 of 2016 (eKLR citation not given) where the court held that the Judiciary Sentencing Policy Guidelines provided guidance on how to arrive at a custodial and a non-custodial sentence where the court has discretion. It added that the court may consider the gravity of the offence, the absence of aggravating factors, criminal history of the appellant, character of the offender, protection of the community, congestion in prisons, cost of maintaining prisoners, need for social justice and the availability of a non-custodial sentence such as fines, probation and community service.
4. He pointed out that he was only twenty (20) years of age at the time he committed the offence and if the death sentence was allowed to stand, he would get old in prison which would deny him the chance



- to make good of himself and/or the community. He further contended that the said sentence was manifestly excessive contrary to article 19(2) and 26(2) of the Constitution of Kenya, 2010.
5. It was his further submission that this court was alive to article 23, 50(2)(p), 24(1)(e) of the Constitution of Kenya and section 26(2) of the Penal Code that urged to grant an appropriate relief to him.
  6. In addition, he asserted that he had already spent seven (7) years in custody and that between the year 2014 to 2020, he was rehabilitated, reformed and socio-re-adopted and was therefore not in a position to re-offend and hence not dangerous to the community. He added that he was a first offender and remorseful of the events that led to the offence. He pleaded for leniency and asked this court to grant him a chance to practice the skills that he had acquired and learnt in prison. He thus urged this court to grant him a non-custodial sentence.
  7. On its part, the respondent opposed his petition for review of sentence. In its written submissions that were dated and filed on November 12, 2021, it argued that in the case of Francis Karioko Muruatetu & Another v Republic Petition No 15 of 2015 (eKLR citation not given), the Supreme Court set out guidelines with regard to mitigating factors with respect to sentencing which included, age of the offender, whether he was a first offender, whether he pleaded guilty, his character and record, commission of the offence in response to gender-based violence, his remorsefulness, the possibility of his reform and social re-adaptation and any other factor that the court considered relevant.
  8. It referred this court to the case of Dahir Hussein vs Republic [2015] eKLR where the court held that the objectives of sentencing included deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.
  9. It contended that the petitioner had not demonstrated to this court how he would benefit from the reduction and whether he had done anything during the custody years to better himself.
  10. It was emphatic that there was overwhelming evidence against him and that in view of the manner in which he executed the murder was gruesome and premeditated, the sentence was commensurate with his acts. It thus urged this court to dismiss his petition and uphold his conviction and sentence.

### Legal Analysis

11. On July 6, 2021, the Supreme Court gave guidelines in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR to the effect that the said decision applied to sentences of murder under sections 203 and 204 of the Penal Code.
12. Bearing in mind the case of Francis Karioko Muruatetu & another vs Republic (Supra) and The Sentencing Policy Guidelines, 2016 of the Judiciary, this court was satisfied that this was a suitable case for it to exercise its discretion to review the life sentence. Notably, in the case of William Obondo Ochola vs Republic [2021] eKLR, this very court found and held that the commutation of the death sentence to life imprisonment by the President in 2016 was an executive order and was not as a result of a judicial function.
13. It was the considered view of this court that the petitioner herein was thus entitled to the benefit of re-sentencing by this court as failure to review his sentence would be discriminatory and contrary to the provisions of article 27(4) of the Constitution of Kenya, 2010 that prohibits any form of discrimination.
14. This court took cognisance of the fact that one of the objectives of punishment is retribution. Indeed, justice must not only be done for the deceased's family but it must also be seen to be done. Be that as it may, while there was need to send a strong message to the society that violence against other persons



was strongly condemned, convicts who had reformed and were remorseful ought to be given a second chance and have a new lease of life where appropriate.

15. Notably, the petitioner herein attacked the deceased with a panga. The deceased suffered greatly before she died. The murder could only have been said to have been gruesome. It was so pre-meditated and malicious.
16. Having said so, the petitioner herein had already spent about five (5) years behind bars from the date of his sentencing. He had obviously had sufficient time to reflect on his actions. He furnished the court with his KCPE Certificate showing that he had bettered his education while in prison and scored very good grades.
17. Taking all the factors into consideration, this court came to the firm view that a sentence of thirty (30) years imprisonment was fair in the circumstances of the case herein.
18. Notably, section 333 (2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) was previously inapplicable in the circumstances of the case herein as the petitioner herein was serving a life imprisonment that was an indeterminate sentence.
19. However, as the sentence of thirty (30) years this court meted upon him was now determinate, the provisions of section 333(2) of the *Criminal Procedure Code* were now applicable herein.
20. Indeed, in the case of *Abamad Abolfathi Mohammed & another vs Republic* [2018] eKLR, the Court of Appeal held that the court was obliged to take into account the period that a convicted person had spent in custody before they were sentenced as provided in section 333(2) of the *Criminal Procedure Code*.
21. The petitioner was arraigned in court on February 27, 2014. He was convicted and sentenced on May 30, 2017. He had therefore stayed in custody for about three (3) years and three (3) months before he was convicted, a period which ought to be taken into account at the time of computing his sentence.

### **Disposition**

22. For the foregoing reasons, the upshot of this court's decision was that the petitioners' petition for review of the sentence that was filed on August 20, 2020 was merited and the same be and is hereby allowed. Accordingly, the court hereby upholds the conviction of the petitioner for the offence of murder but hereby reviews the mandatory death sentence that was imposed upon him and later commuted to life imprisonment and replaces the same with thirty (30) years imprisonment.
23. It is hereby ordered and directed that the period the petitioner spent in custody between February 27, 2014 and May 30, 2017 being the date of arrest and the date he was sentenced respectively be taken into account when computing his sentence in accordance with section 333(2) of the Criminal Procedure Code cap 75 (Laws of Kenya).
24. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF SEPTEMBER 2022**

**J. KAMAU**

**JUDGE**

