



**Ochayo v Republic (Criminal Petition E043 of 2021)  
[2022] KEHC 15759 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15759 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL PETITION E043 OF 2021  
JN KAMAU, J  
NOVEMBER 28, 2022**

**BETWEEN**

**JEREMIAH IMBITSI OCHAYO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein was tried and convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* on count I and the offence of grievous harm contrary to section 234 of the *Penal Code* on count II. He was sentenced to fifteen (15) years imprisonment on count I and seven (7) years imprisonment on count II. The trial court ordered that both sentences run concurrently.
2. Being dissatisfied with the said decision, he lodged an appeal in the High Court HCCRA No 93 of 2013. The same was dismissed, the conviction upheld with the sentence of fifteen (15) years being substituted with death sentence for count I while the seven (7) years sentence for count II was upheld.
3. On July 6, 2021, he filed this petition for review of the sentence pursuant to the decision of the *Supreme Court Petition No 15 of 2015*. In his affidavit in support of his application, he stated that the sentences were manifestly excessive and could not stand in light of article 19(2)(3) (sic).
4. In his Written Submissions that were filed on November 17, 2021, he submitted that his rights as envisaged in articles 50(2)(p), 24(1)(e), 27, 26(1), 19(2), 22,23 165 of the *Constitution* of Kenya, 2010 had been contravened by imposing on him a manifestly excessive death sentence.
5. He asserted that death penalty was unconstitutional and untenable. He directed the court to the global events in Philippines where it was found that death sentence was not a deterrence to crime. He also referred to a case from South Africa (proper citation not given) where it was held that a right to fair trial included not to be punished in a cruel, inhuman or degrading manner.



6. He placed reliance on the case of *Joseph Mumo v Republic Criminal Appeal No 19 of 2010* (eKLR citation not given) where in consideration of article 26(1) and 23 of the *Constitution* of Kenya, the court therein set aside death sentence and substituted it with five (5) years imprisonment.
7. He also relied on the case of *Benjamin Amalgamated & Another v Attorney General Nairobi HCCRC Misc Application No 413 of 2005* (eKLR citation not given) where the court held that sentencing a young man to death but to life would be against the realisation of the full potential of such person as he would not be in a position to contribute to the common good of himself and that of his community due to long incarceration. It was not clear which principle in article 19(2) he was referring to.
8. He contended that the appellate court's enhancement of his sentence without listening to his mitigation was unlawful. He invoked section 354(6) and 364(3) of the *Criminal Procedure Code* and argued that nothing shall empower the High Court to impose a greater sentence than might have been imposed by the trial court. He submitted that the trial court that sentenced him was competent and that the prosecution did not make any application against the sentence within a period of three (3) years from the time of commencement as was held in the case of *Mwangi v Republic KLR 375*.
9. He also referred to the case of *Edwin Otieno Odhiambo v Republic CRA No 359* (sic) (eKLR citation not provided) where the court held that if a court did not take into account mitigating factors, the chances of not coming up with an appropriate sentence were enhanced.
10. He pointed out that he had been rehabilitated, reformed and socially re-adapted. He averred that he was remorseful and while in prison he had undergone vocational training, religion courses and educational courses. He sought for the leniency of court. He added that he was forty two (42) years old and an orphan. He pleaded with the court to give him second chance to join the community.
11. He urged the court to consider the time he had spent in remand prior to conviction and sentence pursuant to section 333(2) of the *Criminal Procedure Code*.
12. On its part, the state opposed his petition for the reason that the decision on constitutional validity of mandatory death sentence which was made in *Francis Karioko Muruatetu & Another v Republic* (*supra*) only related to murder cases. It was emphatic that the said decision did not invalidate the mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.
13. It pointed out that the matter at hand was a robbery with violence which did not fall under the ambit of the case of *Francis Karioko Muruatetu & Another v Republic* (*supra*).
14. It was its contention that the petitioner had not supplied this court with any document to show that he was remorseful in any way for his actions. It added that he did not attempt to give this court sufficient reasons as to his ability to benefit from a reduction of the sentence.
15. It urged the court to dismiss the petition and uphold the conviction and sentence.

### **Legal Analysis**

16. On July 6, 2021, the Supreme Court of Kenya gave guidelines in the case of *Francis Karioko Muruatetu & Another v Republic* (*supra*) to the effect that the said decision only applied in respect to sentences of murder under sections 203 and 204 of the *Penal Code* and not to capital offences such as treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the *Penal Code*.



17. Notably, the holding in the case of Francis Karioko Muruatetu & Another v Republic (*supra*) was inapplicable herein as the petitioner had been charged and convicted of the offence of robbery with violence and grievous harm.
18. The fact that he was remorseful could not assist him for the reason that he had not been charged and convicted of the offence of murder.
19. His prayer that the number of years he had spent in custody be considered by virtue of section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) was inapplicable in the circumstances as he had been sentenced to death which was commuted to life imprisonment. section 333(2) of the *Criminal Procedure Code* was in applicable because a life sentence is indeterminate.

### **Disposition**

20. For the foregoing reasons, the upshot of this court's decision was that the petitioner's petition for review of sentence that was lodged on July 6, 2021 was not merited and the same be and is hereby dismissed.
21. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER 2022**

**J KAMAU**

**JUDGE**

