Rono v Republic (Criminal Petition E017 of 2024)
[2025] KEHC 3239 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3239 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION E017 OF 2024

E OMINDE, J

FEBRUARY 13, 2025

BETWEEN

MARIUS CHERUIYOT RONO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Petitioner was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal code. The particulars of the offence were that on 15/10/2016 at Kaptel village, Kaptel location, within Nandi County, jointly with others not before the court, while armed with dangerous weapons, namely pangas and rungus, the Petitioner robbed Risper Chemai of two mobile phones make Tecno IMEI 860176025065080, LG Touch screen and cash Kshs. 5,300/- all valued at Kshs. 30,300/- and at the time of such robbery used actual violence to Risper Chemutai.

2. The Petitioner pleaded not guilty and the matter proceeded to full hearing. The trial court then sentenced the petitioner to life imprisonment. Being aggrieved with the sentence only, he instituted the present petition vide a Notice of Motion filed on 05/02/2024 seeking to benefit from Article 50(2)(p)(q) of *the Constitution*. The application is premised on the grounds set out on the face of it and the contents of the supporting affidavit.

3. The Petitioner deponed that he seeks to have the court review his life sentence to a definite prison term pursuant to the Court of Appeal decision in Julius Kitsao Manyeso.

Petitioners' Submission

4. The Petitioner filed submissions on 14/09/2024. He submitted that the Petition only touches on the indeterminate sentence of life imprisonment as opposed by *the constitution* under Articles 29(f) and 50(2)(p)(q) of *the Constitution*. He relied on Eldoret High Court Constitutional Petition No. E013 of 2022 - Justine Masolo Nyakundi v Republic whereby, while allowing the petition and substituted

the indeterminate life sentence with a term of 20 years, the court directed that the imprisonment to run from the date of arrest.

5. The petitioner cited article 50(2) (p)(q) of *the Constitution* and invited the court to declare that the life sentence imposed is inconsistent with Article 29 (f) of *the Constitution* and contradicts Sections 216 and 329 of the *Criminal Procedure Code* code. He urged that it also denies the rights guaranteed under Article 50(2)(p) of *the constitution*. He urged the court to find that the indeterminate life sentence without a possibility of review amounts to inhuman, cruel and degrading punishment and violates the spirit of *the constitution* at Article 50(2)(p) and also amounts to discrimination in law as enshrined under Articles 27(1)(2)(4) of *the Constitution*.

6. He urged that the right to a fair trial is fundamental and that Article 50 of *the Constitution* grants every citizen that right. Further, that Article 10 of the Universal Declaration of Human Rights makes it one of the inalienable rights and Article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away.

7. He submitted that it is important to note that Article 20(3)(4) of *the constitution* demands that, when courts are applying a provision of the Bill of Rights, they must adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Further, that in interpreting the bill of rights, a court tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the bill of rights.

8. The petitioner urged that the trial court was not at fault for meting a sentence prescribed by the statue law and further, that the victim has already been served with justice by the trial court imposing the life sentence against the petitioner. He cited Article 19(3)(a) and Article 28 of *the Constitution* urging that the sentence of life imprisonment is discriminatory and denies equal rights and equal benefit of the law. Further, that it denies offenders the benefit of Section 333 (2) of the *Criminal Procedure Code*. Additionally, it also denies offenders the benefit of remission provided under section 46 (2) of the Prison's Act.

9. The petitioner submitted that the life sentence is against international law. He stated that Kenya is a signatory to the International Covenant on Civil and Political Rights (ICCPR) since May 1972. Further, that the constitutional provisions and those of the ICCPR bring to the fore a number of principles being, the rights and fundamental freedoms belong to each individual; the bill of rights applies to all law and binds all persons; all persons have inherent dignity which must be respected and protected; the state must ensure access to justice to all; every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable. He urged that the life sentence does not meet the above international law principles which it a discretionary sentence thus need for its abolition.

10. The petitioner submitted that his mitigation was not considered since under Section 296(2) of the *Penal Code*, a trial magistrate does not possess any discretion, thus he has to award the set sentence, that is life sentence. This prejudiced his trial thus contravening the purposes of mitigation as stipulated under Section 216 and 329 of the *Criminal Procedure Code*. He cited the case of Edwin Otieno Odhiambo vs Republic (2009) eKLR and Article 27(1) of *the Constitution* in support of these submissions.

11. The petitioner submitted that in Godfrey Ngotho Mutiso vs Republic - Criminal Appeal no. 17 of 2008, the court of appeal appreciated that a uniform sentence deprives the courts from considering mitigating circumstances. That it fails to appreciate that sometimes there may be unequal participation in a crime which would result to different charges and sentences on the accused persons. He urged that the criminal justice system agitated for the formulation of Sentencing Policy Guidelines 2016.

12. The petitioner cited the case of Francis Opondo v Republic [2017] eKLR and urged that he was found guilty by the trial court through circumstantial evidence and doctrine of recent possession as per the trial court judgement. From the evidence on record based on the trial proceedings, it is evident that the petitioner was in no way involved in the commission of the crime in question but as a matter of fact the only circumstantial evidence linking the petitioner to this crime in question is that of being in possession of a stolen phone. He urged that the sentence imposed should take account of the need to accord the applicant an opportunity and a chance to be rehabilitated which is in line with Article 10 (3) of the ICCPR on the essential aims of imprisonment as 'shall be to reform the offender and promote social rehabilitation'.

13. The Petitioner submitted that he has been in custody for 9 years and undergone rehabilitation programs which have transformed his life. He is ripe and ready to be re-integrated back to the society and utilize the skills learned while in safe custody. In addition, he urged the Court to appreciate his total behavioural change and gains already made on rehabilitation during the period spent in the correctional facility or rehabilitation centre. He listed his achievements which include;He has undergone paralegal training at kituo cha sheria and acquired certificate of completion. He has been assisting fellow inmates in matters of legal awareness and drafting of appeals and submissions.He has undergone a vocational training and acquired Upholstery Grade Test Ii & Iii National Trade Test Certificateunder NITA.He has gone through various religious training which include; Diploma in theology under discovery bible school, certificate of prisoners' journey from Prison fellowship international.He has recommended by the prison authorities as of the highest discipline inmate and through the commissioner general he has been accorded a special category of (TRUSTEES) , this is to honour his tremendous behavioural change and high degree of discipline at the prison.

14. The petitioner urged that sentencing is a judicial process which must be exercised by judicial officials. He cited the Court of Appeal decision in Thomas Mwambu Wenyi vs. Republic [2017] eKLR and the case of Daniel Gichimu & Another v Rep. [2018] eKLR on sentencing. He cited the case of Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR and submitted that in the eventuality that the Court imposes a custodial sentence, regard be put on the period spent in custody since the date of arrest as per the charge sheet and allow the sentence to run from the day of arrest being 6th December 2016.

15. The petitioner prayed the court grant a declaration of a sentence of time already served in custody from the date of arrest as envisaged in Section 333(2) of the *Criminal Procedure Code* and in the alternative, a sentence that the court deems fair, just and reasonable in the circumstances in promoting and appreciating the applicant's rehabilitation and transformation while in safe custody.

Respondents submissions

16. The state filed submissions through State Counsel S.G Thuo. Counsel submitted that, the petitioner was convicted and sentenced to suffer death and filed a further appeal at the Court of Appeal which were both dismissed. The petitioner now seeks re-sentencing on account jurisprudence arising from the Court of Appeal decision in Julius Kitsao Manyeso vs R CA Malindi *CA No. 12 of 2023* that mirrored the Supreme Court's decision in the case of Francis Muruatetu v Republic [20171eKLR. Further, that this position was overturned on the 12th day of July 2024 by the Supreme Court of Kenya in Pet No. E018 of2023 R vs Joshua Gichuki Mwangi & Others at page 23 where the holding was

> " We reiterate that this court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute",

17. Counsel urged that when considering a matter for resentencing, the court must evaluate the evidence in respect of each case and determine whether there existed aggravating factors. Further, that this was a case where the aggravating factors far outweighed the mitigation the Applicant had offered. The crime committed was heinous and the permissible sentence by law ought to have been the death sentence. Counsel submitted that;

    a. The Court in the case of Muruatetu did not declare the death sentence illegal, just the mandatory nature of it that denies the sentencing court an opportunity to factor in any mitigating circumstances.

    b. A sentence of death is thus, still a lawful sentence where there exist aggravating circumstances.

    c. The petitioner was sentenced to a jail term for life. The sentence under the law for the offence of robbery with violence is death.

    d. The Applicant, together with his accomplice, was armed with dangerous weapons namely pangas and rungus.

    e. The offence was committed in circumstances that truly were heart-wrenching. The masked assailants assaulted and robbed a lone woman at 7:30 pm in the night and led her to the bedroom where they covered her with a heavy blanket, switched off the lights and tortured her relentlessly.

18. Counsel urged that a life sentence was lenient in the circumstances and that this court is clothed with the powers to enhance the same to a death sentence.

Issues for determination

19. The twin issues for determination are whether the life sentence should be set aside and whether the provisions of Section 333(2) of the *Criminal Procedure Code* is applicable and available for the Petitioner's benefit

20. The Judiciary Sentencing Policy Guidelines, 2023 provides as follows on who can apply for re-sentencing.

    8.16 A resentencing application can be made:

    i. After the completion of the trial process and where a sentence has been issued.

    ii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for resentencing upon being satisfied that the appeal has been withdrawn.

    iii. Alternatively, a resentencing application can be made once an applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating and circumstances of the case.

    iv. In regard to the development of the law, it is expected that trial courts shall have considered the current jurisprudence arising from the superior courts under the principle of stare decisis.

Whether the sentence of life imprisonment should be set aside

21. In Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR) the court held;

> We note that the decisions of this court relied on by the appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim App No

93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved. (emphasis mine).

22. In Ayako vs Republic [2023] KECA 1563 [KLR] the Court of Appeal held as follows: -

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

23. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> " Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

24. The Judiciary Sentencing Policy Guidelines (2014) also provides as follows:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

25. The Court of Appeal in the case of Bethwel Wilson Kibor vs. Republic [2009] eKLR, stated as follows:

> " By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told

us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

26. Under Article 165(3)(b) of *the Constitution*, this Court has the jurisdiction to consider constitutional issues that may arise from its own decisions and also the power to review a sentence as provided under Article 50(2)(p) as read with Article 50(2)(q) of *the Constitution* which provides that an accused has the right to the benefit of the least severe of the prescribed punishments for an offence if the prescribed punishment for the offence has changed between the time the offence was committed and the time of sentencing and if convicted to apply for review.

27. I have considered the Petition in its entirety. I have addressed my mind to the submissions by the Petitioner and the submissions by the State. I have taken into account the guidelines set out in The Judiciary Sentencing Policy Guidelines, 2023 herein above cited and I am satisfied that that this Petition is properly before this Court. I have also considered the mitigation by the Petitioner, the courses he has attended as well as the relevant certificates attached.

28. In addressing my mind to the submissions by the State that the sentence that the mandatory sentence for Robbery with Violence under Section 296(2) of the *Penal Code* is the death sentence and that this is the sentence that the Trial Court ought to have imposed upon conviction and not a sentence of life imprisonment, I take cognisance of the fact that after the Supreme Court rendered itself in the case of Francis Karioki Muruatetu v Republic Petition Number 15 &16 of 2015 where it held that the mandatory nature of the death sentence is unconstitutional by dint of the fact that it fetters the mandate of the courts meting out an appropriate sentence to an accused person based on their particular and peculiar mitigating circumstances, this ratio decidendi was applied by court across the board in all cases where mandatory and even minimum sentences were prescribed by statute.

29. Subsequently the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR (commonly referred to as Muruatetu II) and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to Section 204 of the *Penal Code*. I have perused the lower court proceedings and I note from therein that the Petitioner herein was sentenced on 15th February 2018 after the decision in Muruatetu I was delivered. Because the issue of mandatory and minimum sentences was in a state of flux during this period, I will not delve into the issue of the legality or illegality of the sentence. In any event, I also note that the State in their submissions did not press the point further in seeking that the sentence be set aside by dint of this illegality.

30. In light of the fact that the Court of Appeal, in the case of Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR) addressed itself exhaustively on all the issues raised in the said Petition that are patently similar to all the issues that are germane and pertinent to this Petition and held that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved, I will not belabour the issues herein raised by this Petitioner because this court is bound by the decisions of the Court of Appeal by dint of the Doctrine of precedent. In this regard, I find that that the Petition has merit and the same is therefore allowed. The life sentence meted out upon the Accused is now hereby set aside.

Whether the provisions of Section 333(2) of the *Penal Code* are applicable

31. Further I take cognisance of the fact that the provisions of Section 333(2) of the *Criminal Procedure Code* under which the Petitioner seeks that the Court in sentencing him to a determinate sentence also

takes into account the period that he spent in remand is a mandatory provision of the law and the Court is therefore bound to apply the same in during sentencing as was held by the Court of Appeal in Bethwel Wilson Kibor vs. Republic [2009] eKLR (Supra). I therefore find that the application that the period the Petitioner spent in remand before sentence, that being from the date of arraignment in court, to wit 7th February 2016 to the date of judgement and sentencing, to wit 15th February 2018, being 2 years and 8 days has merit and the same is allowed.

32. As was held the Court of Appeal in the case of Ayako vs Republic [2023] KECA 1563 [KLR] (Supra) that life imprisonment translates to thirty (30) years imprisonment, having set aside the sentence of life imprisonment, the Petitioner is now hereby sentenced to 30 years' imprisonment. The sentence is to run from the date of arraignment in court as herein above indicated.

33. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 13TH FEBRUARY 2025

E.OMINDE

JUDGE