



**Wachira v Republic (Criminal Miscellaneous Application
E003 of 2024) [2025] KEHC 718 (KLR) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E003 OF 2024
SM MOHOCHI, J
FEBRUARY 3, 2025**

BETWEEN

ANTHONY GACHINGU WACHIRA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was on 26th September, 2013 charged alongside his brother before the Nakuru Chief Magistrates' Court in Criminal Case No 3154 of 2013. The charges preferred against the Applicant were:-
Count I and Count II: Robbery with violence contrary to Section 296 (2) of the Penal Code.
Count IV: Defilement contrary to Section 8(1) of the *Sexual Offences Act*
Alternative Count: Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
Count V: Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*
2. He pleaded not guilty to all the charges. The Applicant was found guilty of Count I and II and acquitted Count V because of corroborative medical evidence. Count IV failed because it was preferred against the wrong person an anomaly that could not be cured at the judgement stage. For Count I and II the Applicant was sentenced to serve 40 years imprisonment.
3. An Appeal against the sentence and conviction was preferred in High Court Criminal Appeal 76 and 77 of 2018. The Court delivered its judgement on 25th February, 2021 dismissing the appeal on conviction on all counts. the sentence on Count I and II was reduced to 25 years with sentence in all the other 5 counts running concurrently.



4. What is before this Court for determination is the Applicant's Notice of Motion Application brought under Articles 22(1), 27, 163(7) and 165 of the Constitution seeks the following: -
 - a. Spent
 - b. That the Honourable Court be pleased to receive mitigation from the Applicant herein for consideration of an appropriate sentence
 - c. That the Honourable Court does give leniency in his case and also to grant non-custodial or probation sentence
 - d. That the Honourable Court be pleased to issue any other order it may deem fit for interest of justice.

Applicant's Case

5. The Application was supported by the affidavit of the Applicant wherein he deposed that all through trial, he was remanded in custody a period which was not considered by the trial Court while sentencing him and prays that his sentence runs from the date of arrest. That this Court has the jurisdiction to entertain this Application and seeks to be granted the orders as prayed.

Applicant's Submissions

6. The Applicant submitted first by listing mitigating factors that: he was a first offender; has taken full advantage of rehabilitation programs offered in prison; is a family man whose life is greatly affected by the harsh sentence and that the Court being clothed with jurisdiction pursuant to Article 165 (3) (b) of the Constitution should be guided by the Sentencing Policy Guidelines of 2023 and the jurisprudential development.
7. It was also submitted that the sentence should offer the Applicant an opportunity to be integrated back to society in line with Article 10(3) of the ICCPR. Reliance was placed in Douglas Muthaura Rutobiri v Republic [2014] eKLR where he quoted the Court that:

“A good working prison should be able to reform convicts. There is no legal research which leads to the conclusion that capital offenders cannot be reformed”
8. He submitted to having been in custody for 12 years, having undergone rehabilitation and ought to be awarded a second chance in life. Reference was made to the case of Thomas Mwambu Wenyi v Republic [2017] eKLR where the Court cited the case of Abister Anthony Pereira v State of Maharashtra where at paragraphs 70-71 Supreme Court of India had this to say on sentencing:

“70. Sentencing is an important task in the matters 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 strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.



71. 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.”

9. The Applicant submitted that, the circumstances of the offence were not grievous to warrant a 25-year imprisonment and the sentence does not serve the Objects set out under of paragraph 4:1 of the Judiciary Sentencing Policy Guidelines.

Analysis and Determination

10. This Court is empowered by Article 165(6) of the Constitution review a decision by a subordinate court. Article 165(6) provides:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

11. Section 362 of the Criminal Procedure Code provides that:-

“The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

12. Judiciary Sentencing Policy Guidelines, 2023 at 4.8.18 provides that: -

“Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”

13. In the instant case, the Applicant was charged with two counts of robbery with violence. The Applicant was sentenced by the Trial Court to 40 years imprisonment. On Appeal to the High Court, the Court reduced the sentence to 25 years imprisonment with the sentences running concurrently.

14. Therefore, this Court has the Jurisdiction to entertain the Application being the last Court that sentenced the Applicant. The only question is whether the prayers sought can be issued.

15. Pertaining to prayer 1, I note that the Trial Court provided the Applicant with the opportunity to present submissions on mitigation and the Trial Court considered mitigation. This prayer fails.

16. Prayer 2 raises the question whether the Applicant should be resentenced and whether he is entitled to leniency or a non-custodial sentence as prayed.

17. The Applicant has submitted that the circumstances of the offence and as a first offender were not grievous to warrant 25-year imprisonment. That it was manifestly excessive and would render him unproductive to the society at the time of release.



18. From the evidence, the Applicant and others committed heinous crimes with a certain degree of violence. They left behind unfathomable damage alongside physical and emotional trauma to the victims. The Trial Court was lenient to give the Applicant 40 years bearing in mind that the offence or robbery with violence attracted a death penalty at the time and the jurisprudence on constitutionality of the death penalty had not evolved as is right now.
19. The High Court on Appeal considered the gravity of the offence, the impact to the victims, exercised leniency and discretion and reduced the sentence. For the Applicant to come and claim that the offence was not grievous to warrant the sentence is a mockery to the victims. The Applicant has also not shown remorse for his actions or what levels of rehabilitation he has undertaken in prison.
20. The fact that the Applicant was a first offender, I am of the view that the sentence gave the Applicant an opportunity be purposefully re-integrated back to society and get re-habilitation while in custody. I am therefore unable to find any material for re-consideration of the sentence imposed by the High Court and the prayer thus fails.
21. I find the Application devoid of merit and subsequently dismissed. The Applicant having been denied bail and was in custody during his trial, the sentence shall run from the date of arrest 25th September, 2013 pursuant to Section 333(2) of the *Criminal Procedure Code*.

It is so ordered.

DATED SIGNED AND DELIVERED ON THIS 3RD DAY OF FEBRUARY 2025

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Mohochi S.M

JUDGE

