Losiru alias Hassan & 5 others v Republic (Criminal Miscellaneous Application E005 of 2020 & Miscellaneous Application E031 of 2023 & E008, E006 & E007 of 2020 (Consolidated)) [2025] KEHC 3437 (KLR) (18 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3437 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2020 & MISCELLANEOUS APPLICATION E031 OF 2023 & E008, E006 & E007 OF 2020 (CONSOLIDATED)

RN NYAKUNDI, J

MARCH 18, 2025

BETWEEN

LOLI LOUYONGOROT LOSIRU ALIAS HASSAN ..... 1ST APPLICANT

EJEM ELEMAN LOPOKIO ..... 2ND APPLICANT

LOSIKE MARIAAO ALOTO ..... 3RD APPLICANT

ALEX EKIRU LOTIANGA ..... 4TH APPLICANT

PHILIP LOKAALE AKOPE ..... 5TH APPLICANT

ESEKON KUYA EDUKAN ..... 6TH APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicants herein namely Loli Louyongorot Losiru, Ejem Eleman Lopokio, Losike Mario Aloto, Alex Ekiru Lotianga, Philip Lokaale Akope And Esekon Kuya Edukan were jointly charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* as per the amended charge sheet of 30th January 2018.

2. The first applicant herein namely Loli Louyongorot Losiru alias Hassan faced an alternative charge for count 1 namely handling stolen property contrary to section 322(2) of the penal code.

3. The second applicant herein namely Ejem Eleman Lopokio faced an alternative charge for count 1 namely handling stolen property contrary to section 322(2) of the penal code.

4. The fourth applicant herein namely Alex Ekiru Lotianga faced an alternative charge for count 1 namely handling stolen property contrary to section 322(2) of the penal code.

5. The fifth accused herein namely Philip Lokaale Akope faced an alternative charge for count 1 namely handling stolen property contrary to section 322(2) of the penal code.

6. They also jointly faced a second count of robbery with violence contrary to section 296(2) of the penal code.

7. The first applicant herein namely Loli Louyongorot Losiru alias Hassan faced an alternative charge to count 11 namely handling stolen property contrary to section 322(2) of the penal code.

8. The third applicant herein namely Losike Mariao Aloto faces an alternative charge to count 11 namely handling stolen property contrary to section 322(2) of the penal code.

9. They also jointly faced a third count of robbery with violence contrary to section 296(2) of the penal code.

10. The first applicant herein namely Loli Louyongorot Losiru alias Hassan also faced and a fourth count of gang rape contrary to section 10 of the Sexual Offenses *Act No 3 of 2006*.

11. The second applicant herein namely Ejem Eleman Lopokio also faced a fifth count of gang rape contrary to section 10 of the Sexual Offenses *Act No 3 of 2006*.

12. The first applicant herein namely Loli Louyongorot Losiru alias Hassan also faces a sixth count of being in possession of a firearm without a firearm certificate contrary to section 89(1) of the penal code.

13. The first applicant herein namely Loli Louyongorot Losiru alias Hassan also faced a seventh count of being in possession of ammunition without a firearm certificate contrary to section 4(3)(b) of the Firearm Act Cap 114 Laws of Kenya.

14. The applicants were convicted of the said charges and a death sentence was imposed for the offence of Robbery with violence. The applicants being aggrieved preferred an appeal to this court which was summarily rejected under section 352(2) of the Criminal procedure code.

15. The present applications arise out of that that rejection, seeking re-sentencing.

16. Section 352(2), aforesaid, provides as follows:

> " Where an appeal is brought on the ground that the conviction is against the weight of the evidence , or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the Judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint."

17. This court having issued a certificate under Section 352(2) above, the applicants contend that the sentence was harsh and the court did consider the mitigating circumstances considering facts such as they were first offenders.

Analysis and determination

18. It is trite law that a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. (See Samuel Kamau Macharia & Another V. KCB & 2 Others App. No. 2/2011).

19. The High Court possesses the constitutional authority under Article 165(3) to adjudicate matters concerning the enforcement of rights and fundamental freedoms enshrined in *the Constitution*. A further leapfrog development exists under Article 50(2)(p) of *the Constitution*, which enhances the protection of these freedoms through additional procedural safeguards.

> " 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

20. In Philip Mueke Maingi & Others Vs Rep, Petition No E17 of 2021 specifically outlawed mandatory minimum sentence. It stated;

> " 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."

21. 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".

22. Further, the Court of Appeal sitting in Malindi in Manyeso v Republic Criminal Appeal No. 12 of 2021 [2023] kECA 827 (KLR) held that mandatory life sentences are unconstitutional and are "an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the constitution*. The said decision is supported by the case of Vinter and others v UK, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.

23. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in Thomas Mwambu Wenyi v Republic [2017] eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> " Sentencing is an important task in the matter 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 straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and

circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. 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."

24. An examination of the applicants' applications clearly demonstrates a request for reconsideration of the imposed sentence. Article 50(2)(p) of *the Constitution* explicitly states: 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; and

25. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms:

"(6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -

a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and

b. New and compelling evidence has become available."

26. The aforementioned provisions offer clear guidance in matters presented before the High Court for a new trial. The applications currently before me specifically seek a new trial limited to sentencing considerations. Therefore, my responsibility is to evaluate this application through the framework established by Article 50(2)(p) and (6) and determine whether the circumstances warrant granting a new trial exclusively on the matter of sentence.

27. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicants have demonstrated that his appeal was indeed dismissed by a higher court, with that court being mindful of the developments in our current jurisprudence regarding mandatory sentences, specifically the Muruatetu case. It therefore follows that the applicant should rightfully benefit from the least prescribed punishment in accordance with the provisions of Article 50(2)(p).

28. There exist specific circumstances under which the court may modify or refuse to alter a previously imposed sentence, a matter that falls entirely within judicial discretion. Having meticulously reviewed the court's decision from the criminal trial, including both judgment and sentencing, I have carefully considered the contextual circumstances of the offense. The applicants provided mitigating factors which the court acknowledged before ultimately imposing the death sentence. This procedural reality rendered the mitigation exercise effectively meaningless. Precisely the scenario the Supreme Court characterized as constituting an unfair trial, as the death penalty would have been mandated regardless of any mitigating circumstances presented.

29. I am of the considered view that even if the sentence would have been commuted to life imprisonment, the same constitutes an indeterminate sentence that deprives an individual of humane treatment, and courts are increasingly adopting sentencing approaches that better fulfill the fundamental objectives

of criminal punishment. The Court of Appeal in the case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR)

> " 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.

30. On the other hand, Kenya entrenched its obligations with the norms of customary international law which expression is indeed stated in Article 2(5) & (6) of *the constitution*. Some of the key instruments which are significant for purposes of this discussion fall within the provisions of the Universal declaration of Human Rights where article 1 states that all human beings are born free and equal indignity and rights. Whereas in Article 5 it provides no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (see also Article 25 of *the Constitution* of Kenya. What this means that although Kenya has not abolished the death penalty it remains a lawful sentence to be imposed by trial courts on a case to case basis. Kenya also in promulgating the 2010 constitution provided for in Article 26 on guarantees and protection of the right to life. The country is also a party to the convention against torture and other cruel, or inhuman or degrading treatment or punishment which it acceded to 23.3.1997. In Article 1 of this convention it defines torture as involving the intentional infliction by public official of severe pain or suffering, whether physical or mental per person for such purposes as punishing him for an act he has committed or intimidating or coercing him. The import of a constitutional imperatives and the provisions of International Law is that death row conflicts in the mode of execution of the punishment are known to be subjected to acts of torture, cruel, and inhuman treatment and therefore concerns on the provisions in our penal law with regard to imposition of the death penalty. The penal code under Section 296(2) and 204 provides for the death penalty once an offender is convicted of Robbery with violence or murder as defined in Section 203 of the *Penal Code*. The jurisdiction of the High Court in trying murder suspects following the dicta by the Apex court in Muruatetu rarely impose the death penalty for the mandatoriness of it was rendered unconstitutional. The above decision has been cited extensively by the various courts to underscore the fact that any mandatory sentence which gives no room for the exercise of discretion of a trial court is unconstitutional. The foregoing statements clearly show that when the petitioners were convicted and sentenced to death for the offence of Robbery with violence, the description of it may follow within the framework of a sentence which may amount to cruel, inhuman, degrading treatment or punishment. It is to be noted that the death penalty so imposed was commuted by the state to life imprisonment. As the records indicates there was no mitigation from the petitioners in relation to the commutation of sentence from that of death to life imprisonment. This can be considered to be a forced sentence upon the petitioners incompatible with fair trial standards prescribed in Article 50 of *the constitution*. The imposition of these two sentences initially by the trial and an Appeals court and later on the executive order of commutation to life imprisonment ignored that there may be

individualized circumstances to call upon judicial discretion to weigh in on the issues at stake before the final verdict. The Royal commission in United Kingdom once observed in the context of sentencing in murder cases. "Convicted people may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane, and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood"

31. The former UN Secretary General Ban Ki-moon once observed that a mandatory sentence fails to take into account the defendant's personal circumstances and the circumstances of the offence. Consequently, it does not permit distinctions to be made between degrees of serious of the particular crime for which the penalty is imposed. Hence it is not compatible with the limitation of capital punishment to the most serious crimes

32. In respect of mandatory death penalty and life imprisonment the trend in jurisprudential position by the Kenya Legal System is that which echos the observations made by the former UN Secretary General Ban Ki-moon the conservative approach to legal interpretation on minimum mandatory sentences that prevailed before the 2010 constitution, as significantly occasioned a paradigm shift and steps been taken tailored towards mitigation and consideration of other key factors in sentencing an offender. These principles on sentencing explain why mandatory sentences are now impermissible under our domestic law. It is within this legal lens that the life imprisonment commuted by the state in substituting the mandatory death penalty should receive jurisdictional intervention by this court.

33. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

34. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

35. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

36. I have considered the application and all the information available. I find no fault in the sentences imposed at the trial court for other charges. My focus shall only be on the death penalty as imposed for the first count. The trial magistrate imposed sentences the other counts as follows:

> " for the alternative charge to count I in respect of the first, second, fourth and fifth accused persons herein, I hereby sentence each one of them to serve seven (7) years imprisonment.
>
> For the alternative charge to count II herein in respect of the first and third accused persons herein, I hereby sentence each one of them to serve 7 years' imprisonment.

The first accused is sentenced in respect of the fourth count against him to serve 15 years in jail.

The second accused is sentenced to serve 15 years in Jail in repsect of the fifth count against him.

The first accused is sentenced to serve 7 years in jail in respect of the sixth count against him.

The first accused is sentenced to serve 7 years in respect of the seventh count against him."

37. As for the first count, given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the death sentence imposed. Taking into consideration the recovery of the stolen items as a significant mitigating factor that demonstrates some level of restoration to the victims, and in line with the principles of proportionality and rehabilitation outlined in our sentencing guidelines, I hereby substitute the commuted life imprisonment from that of death penalty with a terminable custodial sentence of 25 years for the charge of Robbery with violence contrary to Section 296(2) of the *Penal Code*. I take judicial notice from the record petitioners had been in pre-trial remand custody pending the hearing and determination of their respective offences. Given that background the letter and spirit of Section 333(2) of the *Criminal Procedure Code* applies in discounting the credit period so spent in line with constitutional imperatives under the Bill of Rights. As a consequence, the sentence so imposed shall be computed in line with Section 333(2) of the CPC with a commencement date of 3.8.2017. For clarity purposes the petitioners had also been sentenced on other counts summarized as follows by the trial magistrate.

> " for the alternative charge to count I in respect of the first, second, fourth and fifth accused persons herein, I hereby sentence each one of them to serve seven (7) years imprisonment.
>
> For the alternative charge to count II herein in respect of the first and third accused persons herein, I hereby sentence each one of them to serve 7 years' imprisonment.
>
> The first accused is sentenced in respect of the fourth count against him to serve 15 years in jail.
>
> The second accused is sentenced to serve 15 years in Jail in respect of the fifth count against him.
>
> The first accused is sentenced to serve 7 years in jail in respect of the sixth count against him.
>
> The first accused is sentenced to serve 7 years in respect of the seventh count against him."

38. For those reasons structuring judicial discretion the sentences so imposed shall run concurrently within the sentencing regime prescribed in our legal system.

39. Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 18TH DAY OF MARCH, 2025

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R. NYAKUNDI

JUDGE