Ndambuki v Republic (Criminal Revision E815 of 2024)
[2025] KEHC 3284 (KLR) (Crim) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3284 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E815 OF 2024

AB MWAMUYE, J

MARCH 13, 2025

BETWEEN

DAVID MUTUKU NDAMBUKI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Applicant, David Mutuku Ndambuki, through his Notice of Motion Application dated 22nd April, 2024 seeks a sentence re-hearing and revision. His application is premised on the Supreme Court's landmark decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, which declared the mandatory nature of the death sentence unconstitutional.

2. The Applicant was originally convicted of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*, and thereafter sentenced to death in the Chief Magistrate's Court at Thika in CRC No 4748 of 2007.

3. Being dissatisfied with the said conviction and sentence, he filed an appeal, which sentence was upheld by the High Court at Thika in HCCRA No 375 of 2009 and subsequently commuted to life imprisonment by His Excellency the President in 2009.

4. The Application was canvassed by way of written submissions.

5. The Respondent did not file any response or any Written Submissions to the Applicant's Application despite having been given an opportunity to participate in the proceedings herein.

6. In his written submissions, the Applicant urges that the mandatory death penalty under Section 296(2) offends various Articles of the *Constitution*, including Articles 25(c), 26, 27, 28, 48, and 50. He emphasizes that Article 50(2)(p) guarantees an accused person the benefit of the least severe of the

prescribed punishments, and that the mandatory sentence denies courts the ability to individualize sentences, which is a critical facet of fair trial rights.

7. The Applicant points to various jurisdictions such as Uganda, Malawi, the United States, India, and decisions of the Privy Council, all of which have declared the mandatory imposition of the death penalty unconstitutional because it strips courts of the ability to consider individual mitigating factors.

8. The Applicant underscores that he has been incarcerated for over fifteen (15) years, has engaged in rehabilitative programs while in prison, and has transformed his life. He submits that he is a candidate for reintegration into society, if granted a definite sentence.

9. Ultimately, the Applicant implores the Court to order a sentencing re-hearing, which would permit him to present his mitigation and allow the Court to impose a proportionate, definite term of imprisonment if deemed appropriate.

10. The Applicant has cited article (50(2) (p) of the *Constitution* which provides as follows: -

> “ 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.”

11. The application before this court invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law.

12. The above is the import of Section 362 as read with Section 364 of the *Criminal Procedure Code* which provides as follows: -

> “ The High Court may call for 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.”

13. This is a quest for sentence re-hearing. Where does the court draw jurisdiction from to conduct sentence re-hearing? The application seeks redress of a denial, violation or infringement of a right or fundamental freedom in the bill of rights. The fundamental provisions cited on re-sentencing are Article 50 (2) (p) (q) of the *Constitution* as read with Article 50 (6) (a) and (b) of the *Constitution*. The arguments presented also draw upon the dictum in the case of Francis Karioko Muruatetu & another v Republic (supra) that prescription of mandatory sentence takes away the discretion of the court in sentencing, and therefore, is inconsistent with the *Constitution*.

14. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR:-

> “ In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary

jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

15. I have looked at the submissions by the Applicant. He has raised tenable issues of law regarding the cruelty of the sentence meted by the trial court and its unconstitutionality.

16. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the Supreme Court further emphasized that courts must adhere to the jurisdictional limits prescribed by law and cannot entertain matters already conclusively decided unless a substantial issue of law arises. The Court held that revisionary jurisdiction cannot be invoked to re-open or review concluded appeals unless constitutional violations are evident. The court held thus:

> "In addition to the above, the prospectivity or retrospectivity of judicial decisions is also a subject already considered by Courts and the common thread running through local and comparative jurisprudence is that, generally, judicial pronouncements are to have prospective application. For instance, in *A. v The Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 IR88, the Applicant was convicted of an offence under a statutory provision that was, in a subsequent case held to be unconstitutional. On the basis that unconstitutionality in that regard must be viewed backwards in time, the Applicant moved the Court, praying for release from custody. Geoghegan, J . in addressing that issue remarked as follows:"I am of the view that concluded proceedings whether they be criminal or civil, based on an enactment subsequently found to be unconstitutional, cannot normally be reopened... I am prepared to accept that there may possibly be exceptions. But in general, it cannot be done... I am also firmly of the opinion that if the law were otherwise, there would be a grave danger that Judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which... should not happen."In the same case, Murray, CJ, expressed the same concern thus:"In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society."

17. Under Article 165 of the *Constitution*, inter alia, the High Court, has jurisdiction to hear and determine application for redress of a denial, violation or infringement of or threat to, a right or fundamental freedom in the bill of rights. Hence, the application is properly before the court.

18. The Supreme Court in *Francis Karioko Muruatetu & another v Republic*, (Muruatetu's case), (*supra*) held at para 69;

> "Consequently, we find that section 204 of the penal code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

In addition, the Supreme Court said at para 111 of the said judgment;

> "It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For avoidance of doubt, the sentence re-hearing we have allowed applies only to the two petitioners herein …"

19. Section 204 of the *Penal Code* provides that "Any person convicted for murder shall be sentenced to death." Similarly, section 296(2) of the *Penal Code* provides that the offender convicted for robbery with violence in circumstances stipulated therein;

> "Shall be sentenced to death."

20. In *William Okungu Kittiny v Republic*, Court of Appeal, Kisumu Criminal Appeal No 56 of 2013, the Court held that;

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment."

21. The Applicant was convicted by Thika Chief Magistrate's Court, in Criminal Case No 4748 of 2007 with robbery with violence contrary to Section 296(2) of the *Penal Code*. He pleaded not guilty and he was sentenced to death upon hearing.

22. The Applicant appealed to the High Court at Thika, Criminal Appeal No 375 of 2009 whereby the conviction and sentence were upheld. The Applicant states that while in prison, the death sentence was commuted to life sentence by the president. The Applicant has now approached this court to review his sentence based on the jurisprudence recently developed by the superior courts in this country to the effect that mandatory death sentence is unconstitutional and that life sentence normally referred to as "indeterminate sentence" violates his constitutional rights and freedoms.

23. The Applicant relies on *Sentencing Guidelines*, 2016, and avers that sentencing is a judicial function, only to be exercised by judicial officers and thus the death sentence which is at the mercy of the president, and not court is bad law.

24. The *Sentencing Policy Guidelines*, 2016 ("the Guidelines") published by the Kenya Judiciary state (at para. 4.1) that the sentence imposed must meet the following objectives;

    a. Retribution: To punish the offender for his/her criminal conduct in a just manner.

    b. Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

    c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

    d. Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

    e. Community protection: To protect the community by incapacitating the offender.

    f. Denunciation: To communicates the community's condemnation of the criminal conduct.

25. As the Guidelines state at para. 4.2, “These objectives are not mutually exclusive, although there are instances in which they may be in conflict with each other. As much as possible, sentences imposed should be geared towards meeting the above objectives in totality.”

26. The Guidelines provide a four-tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), held considered mitigating factors that would be applicable in re-sentencing in a case of murder as follows;

a. age of the offender;

b. being a first offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant.

27. Those factors would also apply to a case of re-sentencing in a case of robbery with violence. The Supreme Court emphasized that although the Guidelines do not replace judicial discretion, they are intended to promote transparency, consistency and fairness in sentencing. In addition, the court underlined the importance of guideline judgments of superior courts which promote an understanding of the process of sentencing.

28. The Applicant also relied on the case of *Shaban Salim Ramadhan & others v Republic* Mombasa HC Constitutional Petition No 5 of 2022 where the court declared the mandatory sentence of death in the offence of robbery with violence and attempted robbery with violence as unconstitutional. Following on the arguments presented by the Applicant, this court is aware of several other cases determined by Superior Courts on the issue of unconstitutionality of death sentence and of life imprisonment in capital offences as well as in sexual offences which include and are not limited to the following:

i. *Manyeso v Republic* Criminal Appeal No 12 of 2021, Mombasa.

ii. *Evan Nyamari Ayako v Republic* Kisumu Criminal No 22.

iii. *James Kariuki Wagana v Republic* (2018) eKLR.

29. The facts in the foregoing cases enunciate the principle that mandatory death sentence is unconstitutional for capital offences and that the courts have discretion in sentencing whereas a lesser sentence may be imposed.

30. In *Mbugua & 9 others v Attorney General & 3 others* [2025] KEHC 17913 (KLR), the court stated as follows: -

> “ 46. The Supreme Court thereafter gave directions in Muruatetu II as follows: -

"To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other 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*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases."

47. Hence, while there was no gainsaying that Muruatetu I was specific to cases of murder under Section 204 of the *Penal Code*, the directions given by the Supreme Court were clear enough that the validity of the mandatory nature of the death penalty prescribed for other capital offences, including robbery with violence under Section 296(2) of the *Penal Code* could and should be challenged separately.

48. As the Petition herein was a subject of Section 296(1) of the *Penal Code* on the offence of robbery with violence whose mitigating circumstances were impeded by the mandatory nature of sentence under Section 296 (2) of the *Penal Code* which prescribed death sentence as the only punishment, the mandatory nature of the sentence was unconstitutional as it was discriminative in nature. This Petition therefore constituted a valid challenge as contemplated by the Supreme Court in *Muruatetu II*.

49. It was nevertheless imperative to acknowledge the Petitioners' assertion that many other inmates benefited from the window between Muruatetu I and Muruatetu II and had their sentences reviewed and converted into terms of imprisonment.

50. Having taken into consideration the above factors, this court was of the considered view that Sections 296(2) and 297(2) of the *Penal Code* under which the Petitioners herein were charged and convicted, in so far as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, those Sections were deficient as they did not give those administering the justice system unfettered discretion to mete out proportionate sentences depending on the gravity of the offence.

51. Indeed, Sections 296(2) and 297(2) of the Penal Offence limited the trial courts to mete out appropriate sentences due to non-differentiation of the circumstances of the offence. The provisions ought to have allowed the exercise of discretion of the trial courts to mete out the least severe sentence where there were aggravating circumstances.

52. It was therefore the considered view of this court that while the death sentence was not unconstitutional under the Kenyan law, the mandatory nature of the death sentence irrespective of the gravity of the offence rendered Sections 296(2) and Section 297(2) of the *Penal Code* unconstitutional for the reason that the said Sections were discriminatory against persons who had been

convicted of the offence of robbery with violence and attempted robbery with violence.

53. Even so, this court observed that time had reached as a country to re-consider the place of death sentence as a form of punishment. It had not been carried out for years but yet the same continued to be handed down to persons who had been convicted for robbery with violence and attempted robbery with violence causing the convicts to suffer from the death row syndrome. The emotional and psychiatric trauma that those on death row suffer before their sentences are commuted to life imprisonment is immense. It damages the convicts who are maladjusted and unable to be properly reintegrated in the society."

31. The court also said in *William Okungu Kittiny's case* (*supra*) that the decision of the Supreme Court in Muruatetu's case has an immediate and binding effect on all other courts and that the decision did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts.

32. Accordingly, since the Applicant did not appeal to a superior court, this Court has jurisdiction to direct a sentence re-hearing or pass any appropriate sentence that the trial magistrate's court could have lawfully passed.

33. Although the Supreme Court did not outlaw the death sentence, we are of the view that in the circumstances of this case, the death sentence was not warranted. The Appellant gave mitigating circumstances but the trial magistrate considered that the hands of the court were tied.

34. The Applicant says he is now serving life imprisonment after his sentence was commuted by the President. The evolved jurisprudence has declared life imprisonment sentence as unconstitutional on the basis that it is indeterminate and is against the objectives of criminal law of rehabilitation of offenders. As such, a prisoner who has been sentenced to life imprisonment is entitled to determinate sentence. The Applicant herein is entitled to determinate or to a lesser sentence.

35. The Applicant also calls upon the court to consider the time he spent in custody during the trial. Section 333(2) requires that time spent in custody during trial be taken into account during sentencing. In *Mbugua & 9 others v Attorney General & 3 others* [2025] KEHC 17913 (KLR) (*supra*) the court stated thus: –

"

" 85. A right to fair trial was a constitutional requirement for any accused person irrespective of the offence he or she had committed. Every convicted person was entitled to be given an opportunity to present his mitigating circumstances before being sentenced by the trial court.

86. For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of the *Constitution* of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of the *Constitution* of Kenya. Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the

accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction.

It was not uncommon for the appellate court to set aside a sentence imposed by the trial court which was not preceded by a reasoned ruling based on statutorily required pre-sentencing circumstances.

In the premises, this court therefore found and held that mitigation by a convict facing any criminal charge before sentencing was a constitutional imperative of fair trial. It was therefore discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non- capital offenders enjoy that right. In the words of Article 27(1) of the *Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they have a right to be protected before the law and must derive equal benefit from the law as the non-capital offenders.

Going further, under Section 333(2) of the *Criminal Procedure Code*, courts were mandated to take into account the period accused persons had spent in custody before conviction. The implication here was that accused persons who had been convicted of robbery with violence could not benefit from being granted this period if they were sentenced to death. This was also true where their death sentence was commuted to life sentence as they would have to remain in jail for an indeterminate period.

As every accused person was entitled to equal benefit of the law and was equal before the law, it was discriminatory for accused persons who had been convicted of the offence of robbery with violence and attempted robbery with violence not to be granted the benefit of the periods that they stayed in custody while their trial was going on or remission which convicts with determinate sentences enjoyed while their sentences were being computed.

Granting the period under Section 333(2) of the *Criminal Procedure Code* was a statutory duty that was imposed on the trial court or superior courts where the same had not been considered."

36. The application before me is one of sentence re-hearing. It is not a Constitutional petition on violation of rights and freedoms of the Applicant as brought out in his submissions. As such this court restricts itself to the application which seeks only one relief, that of sentence re-hearing.

37. I have considered all the issues raised in this application, the law and the submissions of the Applicant. I am of the considered view that this application is successful.

38. The Applicant is therefore entitled to sentence re-hearing and having taken into account the circumstances of the case, his age, the mitigating factors, come to the conclusion that the death sentence given to the Applicant was excessive in the circumstances.

39. The use of guideline judgments of Superior Courts has also been underlined to ensure consistency and fairness. In *Wycliffe Wangusi Mafura v Republic* ELD CA Criminal Appeal No 22 of 2016 [2018] eKLR.

40. The Court of Appeal imposed a sentence of 20 years where the appellant therein was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. Likewise, in *Paul Ouma Otieno alias Collera and another v Republic* KSM CA Criminal Appeal No 616 of 2010 [2018] eKLR, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm.

41. I therefore allow the application by the Applicant, set aside the life sentence, and substitute the same with a term of twenty (20) years with effect from when he was first in custody under the provisions of Section 333(2) of the *Criminal Procedure Code*, of which the last two (2) years thereof, shall be served on probation for purposes of further rehabilitation to be useful member of society.

42. In view of the foregoing, the court makes the following orders: -

    a. The death sentence is hereby reviewed and substituted with a carceral term sentence.

    b. The accused is sentenced to a twenty (20) years term which shall be served as follows: -

        I. The first eighteen (18) years thereon with effect from when he was first in custody.

        II. The last two (2) years thereon on probation.

    c. The computation of the commence date of the carceral term in (b) above shall run from the date the Applicant was first in custody in line with the provisions of Section 333(2) of the *Criminal Procedure Code*.

    d. Any violation during the probationary period shall result in the two years being served in custody or its remainder.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025.

…………………………………………………

BAHATI MWAMUYE

JUDGE

In the presence of:

Applicant – Unrepresented, David Mutuku at Kisumu Maximum

Prosecution – Mr. Chebii

Court Assistant – Ms. Neema