



REPUBLIC OF KENYA



KENYA LAW
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**Yaile v Republic (Miscellaneous Criminal Application
3 of 2024) [2025] KEHC 4736 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION 3 OF 2024
CM KARIUKI, J
MARCH 13, 2025**

BETWEEN

JULIUS LEMERIAN YAILE APPLICANT

AND

REPUBLIC RESPONDENT

(Being Revision from Original Conviction and Sentence in Narok CMCR No. 551 OF 2014, Narok HCCRA NO. 6 of 2017, and Court of Appeal at Nakuru No. 32 of 2017)

RULING

Sentence re-hearing

1. Before the court this court is an undated notice of motion filed on 20/12/2023. The applicant is seeking a lenient definite sentence.
2. The application is expressed to be brought under articles 22(15), 16,19,20,21,22,23,24,25,26,27,28,29, 48,50,165, 258, and 259 of the Constitution, section 296(2) of the Penal Code, and articles 3 and 10 of the International Covenant on Civil and Political Rights.

Brief background of this case

3. The petitioner was charged, convicted, and sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the Penal Code in Narok CMCR No 551 of 2014. He filed an appeal Narok HCCRA No 6 of 2017, which was dismissed. He also filed a second appeal to the court of appeal in Nakuru No 32 of 2017.

Analysis and Determination.

4. The application herein raises three intertwined issues.



- i. Constitutionality and imposition of mandatory death sentence without exercising any discretion.
- ii. Constitutionality of life sentence; and
- iii. The appropriate sentence in the circumstances of the case.

Nature and scope of Re-sentencing

5. The application before the court is a resentencing request. Re-sentence is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not therefore consider conviction. Ordinarily, in re-sentencing, the court will check on the legality or propriety, or appropriateness of the sentence. Thus, resentence will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishment.
6. The court is guided by the observation of the Court of Appeal in the case of *William Okungu Kittiny v R* (2018) eKLR that:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court, but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By virtual of Article 163 (7) of the *Constitution*, the decision of the Supreme Court has an immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”
7. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is based on the unconstitutionality of the mandatory sentence.

Alleged violation

8. The applicant is challenging the mandatory nature of the death sentence in section 296(2) of the *Penal Code* for denying the court discretion to impose an appropriate sentence. He also prays for the life sentence to be set aside and for him to be given a definite lenient sentence. He claims that the life sentence is too harsh considering the circumstances of the case.

Nature of application

9. It is worth mentioning that this proceeding is premised upon inter alia articles 22(1), 23(3), and 165 (3) of the *Constitution*. Therefore, an application for redress of denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
10. The applicant claimed violation of article 50(2)(p) of the *Constitution* which provides: -

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. It is now a principle that mandatory sentences deprive courts of discretion to impose appropriate sentences. Thus, it is arbitrary and unconstitutional. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right



- to appropriate or less severe sentences- a principle embodied in the Constitution including article 50(2) (p) of the Constitution.
12. Section 296(2) of the Penal Code provides: -

If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
 13. The use of the term shall in Section 296(2) of the Penal Code discharge a mandatory command giving no room for any discretion by court in sentencing. Discretion in sentencing pertains to fair trial and justice. Therefore, the section, to the extent that it provides for a mandatory sentence of death, takes away the discretion of the court in sentencing, thus, inconsistent with the Constitution.
 14. However, the Constitution provided the courts with new tools and techniques- in construing existing law with such modifications, exceptions, adaptations, and alterations necessary to bring it in conformity with the Constitution (Section 7 of the Transitional Provisions, Sixth Schedule of the Constitution). There is therefore no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the Penal Code for being inconsistent with the Constitution unless it is wholly irreconcilable with the Constitution. These techniques were specially designed to avoid paralysis and confusion in the application of law which may ensue upon down-right striking out of provisions of existing law but also giving the legislature time to remove the offending elements aligning it to the Constitution.
 15. In this case, section 296(2) of the Penal Code is interpreted to prescribe death as the maximum sentence- this brings it into conformity with the Constitution.
 16. Having stated that, re-sentencing purports to provide an effective remedy to such injustice arising from a violation of a right or fundamental freedom as was aptly explained by Majanja J in Michael Kathewa Laichena & another v Republic (2018) eKLR that:

“...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.”
 17. In addition, the authority of the court in articles 165(3) and 23 of the Constitution to, inter alia, uphold and enforce the Bill of Rights also formally and gives the court power of consistently structuring, developing, and deploying progressive jurisprudence on enforcement of rights and fundamental freedoms across time and space under the command in article 20(3) of the Constitution, that: -
 18. In applying a provision of the Bill of Rights, a court shall—
 - a. develops the law to the extent that it does not give an effect to a right or fundamental freedom; and
 - b. Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Sentence

19. Applying the test, does the sentence herein violate the rights of the applicant?
20. Every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.



21. The death sentence was imposed because it was mandatory sentence. Nothing shows that the trial court exercised discretion. Therefore, the sentence of death is set aside.
22. The court is aware that the President commuted the death sentence to life imprisonment. The petitioner seems to argue that life sentence is unconstitutional for its indeterminate nature and does not give the convict any prospects of rehabilitation and re-integration into society.
23. Opinion is divided into the unconstitutionality of life sentence. There has been a view that the issue should be what life sentence translates into. But, even here, some hold the view that fixing the determinate period of life imprisonment is the business of legislature.
24. Be that as it may, in a rather bold decision, the Court of Appeal, in the case of *Evans Nyamari Ayako v Republic* Kisumu Court of Appeal Criminal Appeal, No 22 of 2018, Okwengu, Omondi & Joel Ngugi, JJ. A held that.

‘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.’

25. But the circumstances of the case should determine the appropriate sentence.
26. The *Judiciary Sentencing Policy Guidelines* list the objectives of sentencing on page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the petitioner to inflict harm.
27. What are the relevant circumstances of this case?
28. The court has considered the mitigating factors; his rehabilitation as well as family needs. Nevertheless, in the circumstances of this case, a deterrent sentence is most appropriate. However, the court notes that the application does not have inherent merit. However, it is partly allowed in the following terms.
 - i. The death penalty imposed by this court was a proper sentence. However, the President Republic of Kenya, upon the recommendation of the Advisory Committee on the Power of Mercy commuted the death sentence to life imprisonment. The said commuted sentence which is therefore equated to 35 years imprisonment from the date he was first sentenced by the trial court.
 - ii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION THIS
13TH DAY OF MARCH 2025.**

CHARLES KARIUKI

JUDGE

