



Anaya alias Kibito v Republic (Criminal Miscellaneous Application E049 of 2024) [2025] KEHC 7484 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E049 OF 2024**

JN KAMAU, J

MAY 26, 2025

BETWEEN

GEOFFREY ANAYA ALIAS KIBITO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* on Count I with an alternative charge of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*. He was also charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006 on Count II.
2. He was convicted and was sentenced to death for the offence of robbery with violence. The sentences for the other offences were held in abeyance.
3. Being aggrieved by the said decision, he lodged an appeal at Kakamega High Court, HCCRA No 70 of 2014, which was dismissed in its entirety and his conviction and sentence upheld.
4. Being aggrieved by the said decision, he lodged a second appeal at the Court of Appeal, Kisumu in Criminal Appeal No 187 of 2016 which was also dismissed in its entirety and the first appellate court's decision on sentence upheld.
5. On 13th March 2024, he filed a Notice of Motion application dated 7th September 2023 seeking to have his death sentence reduced to least severe sentence pursuant to Article 50(2)(p)(q) of *the Constitution*.
6. He averred that he was a first offender, remorseful and had reformed, rehabilitated and was socially re-adapted.



7. His Written Submissions were dated on 21st May 2024. They did not bear a court stamp. However, in view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood that the Registry may have omitted to stamp the same. The Respondent's Written Submissions were dated 14th January 2025 and filed on 16th January 2025. This Ruling is based on the said Written Submissions that parties relied on in their entirety.

Legal Analysis

8. The Applicant invoked Section 329, 323, 216, 361(7), 363, 364, 366, 333(2) and 362 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), Paragraph 4.8.14, 5.1.21, 4.8.22, 4.8.16 and 4.8.4.5.6 of the Sentencing Policy Guidelines, 2023, Section 26(2) of the *Penal Code* Cap 63 (Laws of Kenya) and placed reliance on several cases among them the case of Julius Kitsao Manyeso vs Republic (2023) (eKLR citation not given) where it was held that life sentence was unconstitutional.
9. He also relied on the case of Shaban Salim Ramadhan & 8 Others vs Republic (eKLR citation not given) where the death sentence under Section 296(2) and 297(2) was declared unconstitutional. He further invoked Article 50(2)(p), 24(1)(e), 22, 23(1)(3); 2(6) of *the Constitution* of Kenya, 2010.
10. He contended that he was a relatively young man of forty-nine (49) years old, married and blessed with one child but that due to his incarceration, his wife re-married and her daughter was now being taken care of by his aged grandmother. He stated that he was remorseful, reformed, rehabilitated and socially re-adapted.
11. He argued that what seemed to be the primary justification for detention at the start of his sentence was not so after twelve (12) years into service of the said sentence and that it was only by carrying out a review of justification for continued detention that the factors and shifts could be properly evaluated. He added that if a prisoner was incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there was risk that he could never atone of his offence.
12. He further asserted that the reasoning in Francis Karioko Muruatetu & Another vs Republic[2017]eKLR applied to the imposition of a mandatory indeterminate life sentence. He added that such sentence denied a convict facing life imprisonment the opportunity to be heard on mitigation when those facing lesser sentences were allowed to be heard on mitigation. He pointed out that that was unjustifiable discrimination and repugnant to the principle of equality before the law under Article 27 and the right to dignity under Article 28 of *the Constitution* of Kenya, 2010.
13. He contended that the maximum punishment must be reserved for the worst of the offenders in the worst of cases. He further relied on the case of *Republic vs Anderson Mabvuto Criminal Case No 66 of 2009* (UR) and *Republic vs Jamuson White, Criminal Case No 74 of 2008* (UR) without expressly highlighting the holding he relied on therein.
14. On its part, the Respondent submitted that the offence of robbery with violence attracted a death penalty and that the sentence meted upon the Applicant was commensurate to the offence committed and this court should not interfere with it. It invoked Section 329 of the *Criminal Procedure Code* and contended that the court took into account the evidence, the nature of the offence, the circumstances of the case, the relevant factors and the legal principles of the law in arriving at the appropriate sentence.
15. It placed reliance on the cases of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No 253 of 2003 (eKLR citation not given) and Benard Kimani Gacheru vs Republic[2002]eKLR where the common thread was that an appellate court would not interfere with sentence unless that sentence was manifestly excessive or that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle. It also cited the case of Republic vs Jagani & Another



- (2001)KLR 590 where it was held that the purpose of sentence was to assist in rehabilitation of the offenders.
16. It asserted that the decision in Muruatetu Case only faulted the mandatory nature of the death sentence but did not outlaw the death sentence. It relied on the case of John Kagunda Kariuki vs Republic [2019]eKLR, where it was held that as the appellant’s appeal had already been heard by the High Court, he could not return to the said court for review of sentence but had the liberty to approach the Court of Appeal for review of his sentence. It pointed out that the Applicant’s sentence that had been upheld by appellate courts was lawful and he had not demonstrated to this court as to why it should interfere with the same. It urged this court to dismiss the Applicant’s application.
 17. Notably, in the case of Mbugua & 9 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment), this very court held that it was 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.
 18. It observed that 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 had a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.
 19. The court’s decision was in line with the directions of the Supreme Court on 6th July 2021 in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR (commonly now known as Muruatetu II) that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the High Court and thereafter escalated to the Court of Appeal, if necessary. It rendered itself as follows:-
 - “46. 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 (emphasis court).”
 20. Sewe J also reached a similar conclusion as this court in the case of Ramadhan *8 others v General & another (Petition 5 of 2022* & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024) (Judgment) when she declared the mandatory nature of the death penalty as provided for under Section 296(2) and 297(2) of the *Penal Code* unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications
 21. This court noted the Applicant’s arguments and submissions on the review of his sentence of death on the offence of robbery with violence. However, it found it prudent that the Applicant files his documents in support of his mitigating factors such as the certificates on programmes he had undergone in prison leading to his rehabilitation and his respective officer’ in-charge prisons recommendation letter as this court had stated were necessary before an application for re-sentencing



could be considered. Although, he had filed some of the documents, he did not file his respective officer's in-charge prisons recommendation letter.

22. In Constitutional Petition No E002 of 2024 Mbugua & 6 Others vs The Hon Attorney General as consolidated with Constitutional Petition No E003 Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others, this court rendered itself as follows:-

“67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a person to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.

The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of *the Constitution* of Kenya....

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.”

23. In this regard, it found that applicants seeking re-sentencing ought to file documents to support their mitigating factors. These documents could include certificates of programmes they had undergone in prison leading to their rehabilitation and recommendation letters from the In charges of prisons.

1. While considering the present application for re-sentencing, this court was alive to the fact that the Court of Appeal upheld the death sentence that was meted out against the Petitioner herein. It was the mandatory nature of the death sentence that this court found to have been unconstitutional and found that persons who had been convicted for the offence of robbery with violence and attempted robbery ought to be allowed to mitigate and be re-sentenced.
2. This court noted that Appellants who included Francis Karioko Muruatetu in the Court of Appeal case of Gachanja & 7 Others (Criminal Appeal 51 of 2004) [2011] KECA 402 (KLR) (20 May 2011) Judgment were re-sentenced by the High Court on 16th December 2019 in Misc Criminal No 394 of 2017 consolidated with Misc Criminal Applications Nos 614, 28, 560, 589, 590 and 586 of 2018.



3. In the same vein, as the Court of Appeal had not yet dealt with the constitutionality of the mandatory nature of death sentence in respect of the Applicant herein, this court therefore found and held that it would not be violating the doctrine of stare decisis if it determined that it could allow him to mitigate and then re-sentence him in line with the case of Mbugua & 6 Others vs The Hon Attorney General (Supra) as consolidated with Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others (Supra) and Ramadhan & 8 others v General & another (Supra) despite the Court of Appeal having upheld his death sentence on appeal.
4. In this regard therefore, it recognised that as it had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of *the Constitution* of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q) of *the Constitution* of Kenya, it did not have to send the lower court file back to the lower court for re-sentencing.
5. To avoid further delays in this matter, this court found it prudent to consider the mitigation and re-sentencing of the Petitioner herein.

Disposition

29. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 7th September 2023 and filed on 13th March 2024 be and is hereby allowed in the following terms:-
 - a. That the conviction of the offence of robbery with violence against the Applicant be and is hereby upheld as the same was safe.
 - b. That the conviction of the gang rape against the Applicant be and is hereby upheld as the same was safe.
 - c. That the Applicant do provide documents to support his mitigation by 26th June 2025.
 - d. That the Probation Office file Pre-Sentence Report in respect of the Applicant by 26th June 2025.
 - e. That the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 15th July 2025.
30. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF MAY 2025

J. KAMAU

JUDGE

