Karegi v Republic (Miscellaneous Criminal Application E045 of 2024) [2025] KEHC 5695 (KLR) (6 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISCELLANEOUS CRIMINAL APPLICATION E045 OF 2024

DKN MAGARE, J

MAY 6, 2025

BETWEEN

EMPHANTUS MUTAHI KAREGI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an application filed on 24.6.2024 seeking the revision of sentence to be reheard and further mitigation to be taken into consideration, and to consider time spent in custody pursuant to Section 333(2) of the *Criminal Procedure Code*. The Applicant also seeks a more lenient sentence. The applicant had filed cumulatively not less than 6 matters, including the following matters;
    a. HCCRA 323 of 2007
    b. High Court Miscellaneous 15 of 2018
    c. CM petition number 2552 of 2019
    d. CACA 66 of 2014.
    e. High Court Miscellaneous 43 of 2021.
    f. High Court Miscellaneous E045 of 2024, (this matter).
2. The application is supported by the affidavit of the Applicant. He states that he has been in custody for 17 years since 19.6.2007. He stated that he is asthmatic and diabetic. The linchpin of his submission is that he is remorseful, a first offender, and has been rehabilitated.
3. The state opposed the applications and filed submissions. They stated that sentencing is a discretion of the trial court. They relied on the decisions of S v Malgas 2001 (1) SACR 469 (SCA), Mokela v S (135/11) [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) (29 September 2011), Ogolla s/o Owuor

vs. Republic, [1954] EACA 270, Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003 and Bernard Kimani Gacheru vs. Republic [2002] eKLR. In the last decision the court of appeal pronounced itself as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

4. The state also relied on the case of Angoga v Republic [2024] KECA 132 (KLR). In this matter, the Court of Appeal posited as follows:

> The *Penal Code* prescribes the death sentence for the offence of robbery with violence, and that sentence is still legal; and the Supreme Court of Kenya has clarified the position. Consequently, we dismiss the appellant's appeal against conviction and sentence. Ultimately, being cognizant of the position from the apex court, it behoves us to disturb the life imprisonment sentence that was imposed by the High Court, by setting it aside, and substituting it with the proper sentence provided under section 296(2) of the Penal code which is that the appellant is sentenced to death so as to align the penalty meted with the law.

5. They submitted that the Applicant deserved the death penalty. It was their case that a dangerous weapon, that is a pistol, was used in the commission of the offence. This led to the death of the spouse of the surviving victim. To make matters worse, the victims were asleep when they were attacked. They pray that the court equates the years to 50 years.

Analysis.

6. The power to revise a sentence arises from the court's powers under Article 165(6) of *the Constitution* of Kenya, which states that 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.

7. The revisionary powers of this court are for the purposes of satisfying itself as to the correctness, legality or propriety of any finding by the subordinate court as set out under Section 362 and 367 of the *Criminal Procedure Code*, that:

> 362 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.
>
> 367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

8. The Applicant was charged with robbery with violence contrary to Section 296(2) of the penal code. The sentence given in law is the death sentence. The circumstances as read from the file deserved the death sentence. The mitigating factors do not in any way erase the heinousness of the actions of the Applicant, whose sentence was commuted to life sentence. However, the judicial sentence was the death sentence. This sentence was confirmed by the Court of Appeal in Ephantus Mutahi Karegi v Republic [2013] KECA 14 (KLR), where they found as follows regarding this appellant on the 6th day of June, 2013: guilty of simple robbery.

9. The first appeal in the High Court, in Nyeri HCCRA 323 of 2007, was dismissed on 29.09.2017 by the court. The same is reported as Ephantus Mutahi Karegi V Republic [2017] KEHC 3429 (KLR). The appeal was from the original Nyeri CMCR 128 of 2005.

10. There was no record of the decision of the Court of Appeal. In any case, however, having admitted that the Court of Appeal handled the case, the court cannot proceed with the revision. An application for review is anchored in Section 362 of the *Criminal Procedure Code*. This vests the High Court with jurisdiction to revise criminal matters decided by lower courts in the following terms:

> 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.

11. Accordingly, the court's revisional jurisdiction is confined to examining the correctness, legality, and propriety of any findings, sentences, or orders passed by the subordinate court. Section 364 (5) of the *Criminal Procedure Code* restricts the revisional jurisdiction as follows:

> When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

12. Though enacted earlier, the same has roots in Article 165(6) of *the constitution*. It is also subject to limitations within the Act prohibiting supervision of the superior court. This is amplified in Article 165(7) of *the constitution*. The two clauses are as follows:

> 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.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

13. The Applicant had the right to appeal against the sentence and conviction. He exercised that right by filing CACRA No. 66 of 2014, the proper forum for litigating issues raised. He cannot approach this court through an application for revision. The orders of the High Court are only appealable. It would be irregular and illegal for this court to review the High Court's sentence in the circumstances.

14. The court is functus officio as it relates to the decision made by Ngaah J. In this particular matter, the issue of taking into consideration the time spent in custody under Section 333(2) of the *Criminal*

Procedure Code is not discretionary. The court should indicate when a sentence is to begin. The said section provides as follows; -

> (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include 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.

15. However, the section does not apply to indefinite sentences like life and death sentences. In the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), the Supreme Court posited as follows:

> Having so stated, we are aware that mandatory sentences and minimum sentences as punishment in law have been commonly prescribed by legislatures worldwide but recently, various apex courts of several countries such as Canada, USA, Australia, South Africa as well as the European Court of Human Rights have struck down both mandatory life imprisonment as well as minimum sentences in an effort to move towards the approach of proportionality in punishment based on the actual crime committed. That is why the Supreme Court of the United States, which has actively challenged mandatory death sentences since the early twentieth century, ruled in Miller v. Alabama, 132 S. Ct. 2455 (2012) that imposing mandatory life imprisonment without parole for juvenile offenders at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. Similarly, the European Court of Human Rights has on several occasions applied the "grossly disproportionate test," for instance in the cases of Harkins and Edwards v. United Kingdom, 2012 ECHR 45 and Murray v. Netherlands, 2016 ECHR 408 where the court found that mandatory sentences of life imprisonment without the possibility of parole go against Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the prohibition from torture and inhuman and degrading punishment. Canada has also actively struck down minimum mandatory sentences and recently a 9 Judge bench of the Supreme Court of Canada in R. v. Safarzadeh Markhali, 2016 SCC 14, reiterated its Constitutional commitment for proportionality in sentences. In Australia, in the case of Magaming v. The Queen, (2013) 253 CLR 381 the High Court struck down minimum mandatory sentence in the Migration Act finding that the statute usurped judicial power by granting the prosecution office the discretion to determine the minimum penalty to be imposed by allowing them to elect which offences to charge suspects with.
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> 62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below.

16. Whereas that was provided, the Supreme Court categorically stated that a life sentence is still the law. In the case of Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment), the Supreme Court stated as follows:

> In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.

17. It is important to note that the foregoing paragraph departs from my earlier decisions dealing with this question before 11.04.2025 by dint of the doctrine of stare decisis. Hitherto, the decisions were largely based on the Court of Appeal decision that has, from 11.04.2025, been overruled. The matter is still alive and can be properly brought to the High Court in a proper manner and not obliquely. The Supreme Court guided as follows in the case of Republic v Ayako (supra):

> 39. In the circumstances, we agree with the Appellant that the Court of Appeal assumed original jurisdiction over the interpretation and application of *the Constitution*, a mandate of the High Court under Article 165(3)(d) of *the Constitution*. In stating so, we reiterated in the matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application No. 2 of 2011) [2011] KESC 1 (KLR), that the High Court has the mandate to interpret *the Constitution*, while the Court of Appeal and the Supreme Court have appellate jurisdiction over the same matters having been resolved by the High Court at first instance. Equally, in the Republic vs Mwangi Case (supra) we held that before courts can consider the constitutionality or legality of minimum sentences and mandatory sentences, the issue must first have been canvassed and escalated through the proper channels.
>
> 40. Even if we were to agree with the Respondent that the constitutionality of a sentence is a matter of law, in the present context, it would still have been subject to adjudication by the High Court as the court of first instance. To this end, this Court has in a myriad of cases underscored its respect and confidence to the competence of the courts in the judicial hierarchy to resolve disputes.

18. The matter has not reached the threshold demanded by the Supreme Court to enable the court to deal with the constitutionality of the life sentence. The court cannot deal with the same since the same is functus officio. In the circumstances, the application cannot be allowed as it lacks merit. It is accordingly dismissed.

19. To close this matter, the court is of the view that, having exhausted the appellate process, to the Court of Appeal, the Applicant has two options. First, to await his fate and serve sentence as given or petition the President under Article 133 of *the Constitution*, which provides as follows:

> (1) 1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-
>
> (a) granting a free or conditional pardon to a person convicted of an offence;
>
> (b) postponing the carrying out of a punishment, either for a specified or indefinite period;

(c) substituting a less severe form of punishment; or

(d) remitting all or part of a punishment.

(2) .....

(3) ...

(4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.

20. Inasmuch as the court may sympathize with the Applicant's attempt to regain freedom that he recklessly lost, he must move on to more pragmatic administrative decisions available in Article 133 of *the Constitution*.

Determination.

21. I therefore make the following orders: -

a. The undated application filed on 24.06.2024 is dismissed.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MAY, 2025.

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KIZITO MAGARE

JUDGE