Victor v Republic (Miscellaneous Criminal Application E223 of 2024)
[2025] KEHC 7973 (KLR) (Crim) (13 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E223 OF 2024

AB MWAMUYE, J

MAY 13, 2025

BETWEEN

VINCENT ASHABA VICTOR ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Vincent Ashaba Victor, the Applicant herein, was charged with the offence of Robbery with violence contrary to Section 296 (2) of the *Penal Code*.

2. He was tried, convicted and consequently sentenced to suffer death on 31st December, 2009. The Applicant appealed against the said conviction and sentence but his appeal was dismissed in its entirety and the sentence upheld by the High Court vide Criminal Appeal No. 02 of 2010. He then filed a second appeal to the Court of Appeal at Nairobi *vide Appeal No. 04 of 2017* but the same was equally dismissed.

3. The Application is based on the ground that the Applicant withdrew a second appeal to the Court Appeal at Nairobi *vide Criminal Appeal Number 04 of 2017*.

4. The Applicant further states that he made a resentencing application at Makadara vide Application *number 62 of 2020* which was neither heard nor determined due to change in jurisprudence that Muruatetu 1 only applied to persons convicted for murder and serving the mandatory death sentence.

5. The applicant contends that he has already served fifteen (15) years in prison and seeks to have the sentence commuted to time served as he believes that the death sentence imposed by the trial courts, confirmed by the high court, which was later commuted to life imprisonment by the President is inconsistent with Articles 50(2) (h) and (p) and Article 25(a) and (c) of *the Constitution* of Kenya, 2010.

6. The Applicant prays that this Honourable Court reviews his sentence to a lenient sentence putting into account the time he spent in custody prior to being sentenced.

7. The Application was canvassed by way of written submissions however, the Respondent did not file any submissions.

8. The Applicant filed submissions dated 7th November, 2024 to which he averred that this application is premised on the legal footing and principle of Natural Justice and that the wider decision under common law remarks that mandatory death sentence does not give the appellant a second chance to rehabilitate and reintegrate back to the society. Reliance was placed on the case of KNN v Republic [2020] eKLR.

9. The Applicant submitted that the mandatory minimum sentence deprives judges of the flexibility to tailor punishment to the particular fats of the case and can result in an unduly harsh sentence. He relied on the following cases Mithu v State of Punjab [1983] 2 SCR 690 (MITHU), S v. Toms 1990 (2) SA 802 (A) at 806(h) – 807(b).

10. The Applicant further submitted that under legal gazette notice No. 2970 on the Sentencing Policy Guidelines promulgate that Judicial Officers have discretion to look at sentencing in accordance with the following: the sentence impact on the society, its impact on the family and the entire justice system. The sentencing policy must promote restorative justice and values of rehabilitation. Reliance was placed on Petition No. 5 of 2022 Consolidated with Petition No. 6 of 2022 Shaban Salim Ramadhan & 8 others v the Attorney General & Another, Evans Nyamaria Ayako Criminal Appeal No. 22 of 2018, Republic v SOM [2018] eKLR and Francis Karioko Muruatetu v Republic [2017] eKLR.

11. The Applicant contends that the sentence of life Imprisonment offends his right to fair trial and rights against inhuman treatment since he was arrested at 22 years of age and there is a possibility that serving life sentence will be beyond his possible lifespan that was placed at the age of 66 years by the World Health Organization in 2018. The Applicant cited the following cases in support: Ali Abdalla Mwanza v Republic (2018) eKLR, the South African Case of Oscar Pistorius, Sammy Musembi Mbugua & 4 others v Attorney General & Another [2019] eKLR cited with approval in the case of KNN V Republic [2020] eKLR the UK Case of Vinter and Others v The UK (Application Nos. 66069/09, 130/10 and 3896/10), Mulamba Ali Mabanda Criminal Appeal No. 12 of 2013, John Chidia Lwaina v Republic *CA 29 of 2020*.

12. The Applicant further submitted that since he was a first-time offender, he has spent substantial number of years behind bars and have used that time productively to engage in various rehabilitation programs and the fact that he is suffering from Chronic illness, he be given a second chance to spend his sunset days with his family.

13. Finally, the Applicant submitted that with the recent change of tide following the Muruatetu decision, it is the ratio decidendi that the mandatory death penalty is out of sync with the progressive Bill of Rights in the 2010 Constitution hence applies to cases beyond murder. He stated that the Supreme Court reasons in the Muruatetu Case that the mandatory nature of sentences deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases thus it applies in equal force to all cases where the death penalty is imposed including this matter. The Applicant relied on Woolcock Street Investment Pty Ltd [2004] HCA and Petition No. 5 of 2022 Shaban Salim Ramadhan & 8 others v the Attorney General.

14. Having considered the Application, and both parties' written submissions, I find that the only issue for determination is "whether this Court should review the sentence imposed by the trial court."

1. The offence or robbery is defined under Section 295 of the *Penal Code* as follows;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

16. Section 296(2) of the Code then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows;

> (2) 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.

17. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "robbery with violence" as per the provisions of Section 296(2) of the *Penal Code* is therefore the death sentence.

18. In the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR), the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down Section 204 of the *Penal Code* to the extent that it prescribed mandatory death sentence upon conviction for murder.

19. The Supreme Court in the famous case of Muruatetu & another v Republic (Supra) held as follows:

> " Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of *the Constitution*; an absolute right.
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> ...Consequently, we find that Section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides the mandatory death sentence for murder. For avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum sentence."

20. The reasoning in Muruatetu & another v Republic (Supra) only applies with respect to Section 204 of the *Penal Code* which is the penalty section for the offence of murder.

21. Recently, the Supreme Court has guided on the issue of sentencing and held that if a sentence prescribed in statute is to be struck down, it must be based on evidence and sound legal principles.

22. In the Supreme Court case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae). (Petition E018 of 2023) [2024] KESC 34 (KLR), it was held:

> " We must also reaffirm that, although sentencing is an exercising of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based

on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

23. The Supreme Court further indicated that in the Muruatetu case, it was keen to still defer to the legislature as the proper body mandated to legislate. It held that while the courts had the mandate to interpret the law and where necessary strike out a law for being unconstitutional, that mandate did not extend to legislation or repeal of statutory provisions.

24. In Katana & another v Republic Cr. Appeal 8 of 2019 [2022] KECA 1160 (KLR) the Court of Appeal invoked the doctrine of stare decisis, holding that the Muruatetu decision had not invalidated the mandatory or minimum sentences on the *Penal Code*, the *Sexual Offences Act* or any other statute.

25. The binding nature of precedents and the place of certainty in law was explained by the Supreme Court in the case of Munya v Kithinji & 2 others (Petition 2B of 2014) [2014] KESC 38 (KLR) (30 May 2014) (Judgment) was categorical that precedents set by the Supreme Court are binding on all other Courts in the land. It is also imperative for all courts bound by these decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

26. I am therefore guided by the Supreme Court decision in the case of Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) which held that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence. The court stated:

> " 67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 (3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.
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> 68. Courts cannot therefore extend their determination to rectify or amend their determination to rectify or amending the statute in question, as this would contravene the doctrine of separation of powers which delineates the functions of the judiciary, legislature and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption.

70. Our findings hereinabove effectively lead us to the conclusion that the Judgment of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the first appellate court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*."

27. The Applicant states that the death sentence issued by the trial court was commuted to life imprisonment by the Former President His Excellency President Uhuru Kenyatta.

28. It is trite law that the Court does not alter sentence unless the trial judge has acted upon wrong principles or overlooked some material factors which in this case the right principles were applied by the trial court to impose life sentence on the applicant.

29. The Supreme Court held in the case of Republic v Manyeso (Supra) held that the decision in the Muruatetu case did not invalidate mandatory sentence or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute and that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

30. Further, the Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition No. E018 of 2023) [2024] KESC 34 (KLR) held that, whilst sentencing is an exercise of judicial discretion, Parliament sets the parameters for sentencing for each crime in statute. They proceeded to state as follows:

> "66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of a declaration of unconstitutionality, the process is reversed."

31. It is therefore abundantly clear that it is not open to this court to apply the ratio decidendi in Muruatetu in the instant matter and in upholding the principle of stare decisis, this Court is bound by the Supreme Court decision in Republic v Manyeso (supra) and is inclined to uphold the life imprisonment sentence meted to the Applicant.

32. Consequently, and for the reasons aforesaid, the Application herein is hereby dismissed.

33. Parties shall bear their own costs. It is hereby so ordered.

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

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BAHATI MWAMUYE

JUDGE