Otana v Republic (Criminal Miscellaneous Application E019 of 2024) [2025] KEHC 9107 (KLR) (23 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E019 OF 2024

JN KAMAU, J

JUNE 23, 2025

BETWEEN

HENRY OTANA .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

Introduction

1. The Applicant herein was charged on three (3) Counts. Count I was in respect to the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*, Count II related to the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006 and on Count III was for the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. He was also charged with the alternative charges of indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No 3 of 2006 and handling stolen property contrary to Section 322(1) as read with Section 322 of the *Penal Code*.

2. He was convicted and sentenced to death on Count I, ten (10) years imprisonment on Count II and two (2) years imprisonment. The sentences for Count II and III were held in abeyance.

3. Being aggrieved by the said decision, he lodged first appeal at Kakamega HCCRA No 25 of 2015. The court dismissed his appeal and upheld his conviction and sentence.

4. Being aggrieved by the said decision, he lodged a second appeal at the Court of Appeal Kisumu (he did not indicate the file number). The court dismissed his appeal and upheld his conviction and sentence.

5. On 25th January 2024, he filed the Notice of Motion application herein dated 27th November 2023 seeking review of his sentence. He relied on the unconstitutionality of the mandatory nature of the

death sentence. He pointed out that one of his mitigating factors was that the stolen items were all recovered.

6. He sought for a second chance to join the community and asserted that his reformation and rehabilitation would not count if he remained on life imprisonment. He added that the life imprisonment was discriminative as it did not allow him to be heard on mitigation while those on lesser sentences were being heard and being given remission of their sentences in prison.

7. His Written Submissions were dated 28th November 2024 and filed on 5th December 2024 while those of the Respondent were dated 15th January 2025 and filed on 16th January 2025. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

8. The Applicant invoked Articles 50(2)(q) and (p), 27(1)(2), 20(3)(a) and (b), 28 and 19(2) of *the Constitution* of Kenya, 2010, Section 26(2) and 35 of the *Penal Code*, Sections 361(7), 362, 363, 364, 365, 363, 323, 329 and 216 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) and paragraph 3.3, 3.3.1, 3.3.5 of the Sentencing Policy Guidelines Revised 2023. He placed reliance on the case of Dohar Orog vs Republic[2007]eKLR where it was held that in sentencing the court ought to take into account, inter alia, the ordinary span of life of a human being and the case of Ali Abdalla Mwanza vs Republic[2018]eKLR where it was held that a sentence which goes beyond the life expectancy in Kenya which it held to be sixty (67) years was manifestly excessive.

9. He also relied on the case of Constitutional Petition No 5 of 2022 as Consolidated with Petition No 6 of 2022 Shaban Ramadhan & 8 Others where it was held that the mandatory nature of the death sentence as provided for under Section 296(2) and 297(2) of the *Penal Code* was unconstitutional.

10. He further cited the case of *Republic vs Anderson Mabvuto Criminal Case No 66 of 2009* (eKLR citation not given) where it was held that the maximum punishment must be reserved for the worst of offenders in the worst cases and that death sentence should not be preferred.

11. In his mitigation, he submitted that he was a first offender and that the property robbed were of a moderate value, ten (10) iron sheets valued at Kshs 8,000/=. He added that the same property was recovered and returned to the owner. He expressed remorse for having committed the offence.

12. He was categorical that he was an old man of fifty-one (51) years old and was only sixteen (16) years below the life expectancy in Kenya. He pointed out that at the time of the incident, he had an infant family and he was the sole bread winner. He asserted that it was peer pressure that led him to that predicament. He added that he had served twelve (12) years in custody and had learned his lesson the hard way.

13. He was emphatic that he was reformed, rehabilitated, socially re-adapted and ready to be re-integrated in the society. He asserted that what may have seemed to be the primary justification for detention at the start of the sentence may not be after a lengthy period of twelve (12) years into the service of the sentence and that it was only by carrying out a review of the justification for continued detention that the factors or shifts could be properly evaluated. He added that if he was incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there was the risk that he could never atone for his offence.

14. On its part, the Respondent submitted that the sentence of life imprisonment was commensurate to the offence committed and this court should not interfere with it.

15. It invoked Section 329 of the *Criminal Procedure Code* and placed reliance on the cases of Shadrack Kipkoech Kogo vs Republic Eldoret Criminal Appeal No 253 of 2003(eKLR citation not given) and Benard Kimani Gacheru vs Republic[2002]eKLR where the common thread was that a court would not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors.

16. It further relied on the case of Republic vs Jagani & Another (2001) KLR 590 where it was held that the purpose of the sentence was deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general. It further submitted that the Applicant had previously appealed to this court which upheld the conviction and reviewed the sentence. In this regard, it placed reliance on the case of John Kagunda Kariuki vs Republic [2019]eKLR where it was held that as the applicant's appeal had already been heard by the High Court, he could not return to the same court for review of his sentence but he was at liberty to make an argument for reduced sentence at the Court of Appeal.

17. It asserted that the Applicant's sentence was lawful and that he had not demonstrated as to why this court should interfere with the same. It was its contention that the applicant's application lacked merit and should be dismissed.

18. In the case of Mbugua & 6 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 enjoyed that right.

    1. It recognised that under 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 had to derive equal benefit from the law as the non- capital offenders.

    2. 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)."

21. 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), Sewe J looked at the mandatory nature of the death sentence under Section 296(2) and 296(2) of the *Penal Code* and

declared it unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

22. In 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), this court looked at the aspect of re-sentencing of persons who had been convicted under Section 296(2) and Section 297(2) of the *Penal Code* and rendered itself as follows:-

> " 67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison 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.

68. 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....

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.

87. 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.

24. 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 Applicant 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.

25. 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.

26. 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.

27. 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.

28. To avoid further delays in this matter, this court found it prudent to consider the mitigation and re-sentencing of the Applicant herein as it already had the lower court file.

Disposition

29. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 27th November 2023 and filed on 25th January 2024 was merited and the same be and is hereby allowed in the following terms:-

    a. That the Applicant do provide documents to support his mitigation by 31st July 2025.

    b. That the Probation Office file a Pre-Sentence Report by 31st July 2025.

    c. That the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 4th November 2025.

30. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF JUNE 2025

J. KAMAU

JUDGE