Wanyama v Republic (Criminal Revision E301 of 2024)
[2025] KEHC 8724 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E301 OF 2024

RN NYAKUNDI, J

JUNE 20, 2025

IN THE MATTER OF ARTICLES 22(1), 23(1), 25(C), 50(P)(Q), 159(2)

AND 165(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE SENTENCING POLICY GUIDELINES SECTION

7.18, 9, 9.1 & 9.2

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE

CODE CAP 75 LAWS OF KENYA

BETWEEN

HUMPHREY WANYAMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Coram : Before Justice R. Nyakundi

Representation:

M/s Kirenge for the state

1. What is pending before me for determination is a Notice of Motion Application dated 26th June 2024 in which the Applicant is seeking the following orders:

    a. That this Court be pleased to order for criminal sentence revision.

b. That the applicant herein is seeking for criminal sentence revision in a case of robbery contrary to section 296(2) of the *Penal Code* in Criminal Case No. 327 of 2010 at CM's Court Eldoret in which the Applicant was sentenced to 20 years upon Appeal *vide* COA Application no 49 of 2017.

2. The Application is based on the grounds on the face of it among others;

a. That the Applicant appealed to the Court of Appeal and was awarded 20 years' imprisonment.

b. That the *Constitution* provides that a convicted person is entitled to a less severe sentence if he is a first offender.

c. That the Applicant has served a substantial No of years in prison since he was convicted and has taken advantage of the rehabilitation Programme offered in prison.

d. That the Applicant prays to be present during the hearing of this application.

3. The Application is supported by the annexed affidavit dated 26th June 2024 sworn by Humphrey Wanyama, the Applicant herein who avers as follows:

a. That I was charged and convicted for the offence of robbery contrary to section 296(2) of the *Penal Code* and sentenced to 20 years *vide* COA Criminal Appeal No 49 of 2010 at Eldoret.

b. That I appealed to the Court of Appeal and was awarded 20 years' imprisonment

c. That I appealed to the Court of Appeal and was awarded a longer sentence, hence the current application on sentence revision only in this matter.

d. That the High Court has competent jurisdiction to hear and determine this application under Article 165(3)(b) of the *Constitution* of Kenya 2010.

e. That this Honourable Court is seized of competent jurisdiction under Article 165(3)(b) of the *Constitution* of Kenya 2010 to hear and determine this matter.

f. That I am a convict hence a pauper who cannot incur any costs for preparation of this application and that such costs be waived.

Analysis and Determination

4. Re-sentencing is a distinct legal proceeding that is neither a fresh hearing or an appeal. The court's authority is limited solely to reviewing the sentence imposed, without reconsidering the underlying conviction. During re-sentencing, the court examines whether the original sentence was legal, proper, and appropriate. This review encompasses several key areas: the applicable penalty laws, any mitigating or aggravating circumstances present in the case, and the fundamental purposes of criminal punishment.

5. Sentencing is part of trial. Discretion in sentencing therefore, pertains to fair trial. Mandatory sentences deprive courts of discretion to impose appropriate sentences. Persons who suffer this kind of deprivation may claim violation of the right to appropriate or less severe sentence- a principle embodied in the *Constitution* including article 50(2)(p) of the *Constitution*.

6. 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."

7. The use of the term shall in Section 296(2) of the *Penal Code* prescribes a mandatory sentence of death. 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*.

8. The purport of re-sentencing is to provide an effective remedy to an 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".

9. The Applicant seeks revision of a sentence of 20 years' imprisonment imposed upon him following his conviction for robbery with violence contrary to section 296(2) of the *Penal Code*. It is pertinent to note that this sentence was imposed by the Court of Appeal after the Applicant had appealed his original conviction and sentence. The Court of Appeal, in its discretion and having considered all relevant factors, deemed 20 years' imprisonment to be an appropriate sentence for the offence committed.

10. The Applicant has argued that he is entitled to a less severe sentence as a first offender and that he has served a substantial number of years in prison while taking advantage of rehabilitation programs offered in prison. While these factors are indeed relevant mitigating circumstances that courts ought to consider during sentencing, they must be weighed against the gravity and seriousness of the offence of robbery with violence.

11. Robbery with violence is among the most serious offences known to our criminal justice system. The legislature, in prescribing severe penalties for this offence, recognized the grave threat it poses to society, the sanctity of life, and the security of persons and property. The offence not only involves the unlawful taking of property belonging to another but also encompasses the use or threat of violence, which traumatizes victims and creates fear in society.

12. The *Judiciary Sentencing Policy Guidelines* emphasize that courts must consider various factors when imposing sentences, including the gravity of the offence, the circumstances under which it was committed, the impact on the victim, and both mitigating and aggravating factors. In the present case, the Court of Appeal would have considered all these factors when imposing the sentence of 20 years' imprisonment.

13. The sentence imposed reflects the seriousness with which our legal system views crimes of robbery with violence. A sentence of 20 years' imprisonment, while substantial, is within the range of sentences typically imposed for such offences and serves the dual purpose of punishment and deterrence.

14. Courts must be cautious not to undermine the appellate process by readily interfering with sentences that have been carefully considered and imposed by superior courts. The Court of Appeal, being seized of the matter on appeal, was better placed to evaluate all relevant factors and impose an appropriate sentence.

15. The application for sentence revision lacks merit as the sentence imposed is neither illegal, improper, nor inappropriate. The sentence serves the objectives of punishment, deterrence, and protection of society, which are fundamental principles in criminal justice.

16. There is need to point out that it is not competent for this court to adjudicate the same issues arising between the state and the Applicant aimed at interfering with valid decisions sustainable within the force of the law. The record shows that the Applicant had advanced his case through the legal process and there is no longer an existing cause of action for this court to entertain. In *Henderson v Henderson* (1843) 3 Hare 100, 114, -115 Sir James Wigram V-C stated " "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." It is seen from this citation of authority that if in any court of competent jurisdiction, a decision is reached, a party is estopped from question it is a new legal proceedings. But the principle also extends to any point, whether of assumption or admission, which was in substance the ration of and fundamental to the decision.

17. Taking a broad approach of this litigation, since the advent of *Muruatetu v R* 2017 (eKLR) in adopting the merit approach this application fails and can easily be described as an abuse of process because the issues at hand were decided by the previous judgements.

18. In the end, the application dated 26th June, 2024 is hereby dismissed with no orders as to costs. The applicant shall serve the imposed sentence to completion. This application is therefore dismissed within the provisions of Section 382 of the *CPC*.

19. Orders accordingly.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF JUNE 2025

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R. NYAKUNDI

JUDGE