



**Yano v Republic (Miscellaneous Criminal Application
88 of 2020) [2025] KEHC 10220 (KLR) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION 88 OF 2020
RN NYAKUNDI, J
JULY 15, 2025**

BETWEEN

YUSUF KIBOR YANO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is before this court for determination is an undated Notice of Motion Application in which the Applicant is seeking the following orders:
 - a. Spent
 - b. That the honorable court be pleased to grant a re-hearing of the sentence in CM'S Court Eldoret criminal case number 1562 of 2010
 - c. That the honorable court be pleased to receive mitigation from the applicant herein for consideration of an appropriate sentence devoid of the mandatory death sentence which has since declared unconstitutional by supreme court of Kenya.
 - d. That, the honorable court be pleased to issue any other order it may deem fit for interest of justice.
2. The Application is supported by the annexed Affidavit sworn by the Applicant who avers as follows;
 - a. That, I was the accused person in CM's Court Eldoret criminal case number 1562 of 2010
 - b. That I was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the penal code on 2nd February 2012.
 - c. That I appealed before High Court Eldoret in criminal appeal number 22 of 2012 but my appeal was found lacking in merit and consequentially dismissed on 4th December 2014.



- d. That the finding of the supreme court at Nairobi petition No. 15 Of 2015 At Nairobi Francis Karioko Muruatetu and Wilson Thirimbu Mwangi has since declared the mandatory nature of death sentence unconstitutional.
- e. That this honorable court is bound by the decision of the supreme court under article 163 (7) of the constitution
- f. That, the order of the supreme court in the case of Muruatetu did not bar the courts below from conducting sentence review in already concluded capital cases.
- g. That this honorable court has jurisdiction to hear re-sentencing and met out appropriate sentence in line with the recent decision in William Kittiny v R (2018) eKLR.
- h. That, this court will be discharging its constitutional obligation pursuant to article 20(3) (a) (b) of the constitution as read with the principles in Muruatetu and the guidelines relative active case monuments of cases in the magistrate court and High Court as gazette in the gazette No. 1340 dated the 29th day of February 2016 by retired chief Justice Mutunga.
- i. That I will be relying on the following law and authority in persuading this honorable court to conduct a sentence re-hearing.
 - a. Francis Karioko Muruatetu and Another v Republic (2017) eKLR.
 - b. William Kittiny v Rep (2018) eKLR.
 - c. Douglas Muthaura Ntobiri in Misc. No.04 Of 2015 At Meru
- j. That I the applicant is a pauper and unable to pay the cost.
- k. That, the facts deponed herein above is true to the best of my knowledge, belief and understanding.

Decision

3. From the assessment of the record it shows that the applicant filed an appeal to the High court on both conviction and sentence which was dismissed on 4th December 2014. A further appeal was filed to the Court of Appeal which pronounce itself as follows:
 - a. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand
 - b. Accordingly, it is now settled that sentence which are couched in mandatory terms shall be construed as the maximum penalty that can be handed down
 - c. In the light of the current jurisprudence on sentencing, we find that the following by the High court cannot be sustained;

“The mandatory sentence is death. There is no discretion. See Joseph Njuguna Mwaura & 2 others v Republic, Nairobi Court of Appeal, Criminal Appeal No. 5 of 2008 [2013] eKLR.”
 - d. Having so determined, and after giving due consideration to the circumstances in which the offences were committed, we are persuaded that an appropriate sentence for the offence of



robbery with violence is 30 years' imprisonment. The said sentence shall run from 1st February 2012, when the trial court first handed down the original sentences

- e. The said sentence shall run concurrently with the sentence of 15 years' imprisonment, which was in respect of the offences of gang rape.
4. Ideally any punishment imposed by the court is justified either its purpose or goal. On careful analysis punishment imposed by the trial court or an appeal against an offender are for achieving any of the following purposes. Retribution - to satisfy the feeling of vengeance in the mind of victim and the large number of people who share the agony of the victim Prevention – to take away from the offender the power of offending Deterrence – to make the offender afraid of consequence, if the similar act is repeated (intimidation) and to create awe in the minds of the persons who are disposed to commit similar offences Reformation – to remove the desire of punishment from the mind of wrongdoer
5. The applicant in this case was charged with serious offences as affirmed by the two superior court. The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person per se. no such protection in this case has been invaded.
6. According to the judicial process the applicant committed crimes of such gravity that he forfeit his liberty to the state for the rest of his days which form part of the incarceration in prison. The presumption is therefore that the applicant should remain in custody and until or unless the President of Kenya under Art 133 of the constitution concludes that the public interest would better served by his release than by his continued detention.
7. The court in Palling v Corfield (1970) 123 CLR 52 made the following observations that is:

It is Both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavor to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such discretion shall be given to the court in relation to a statutory offence is for the decision of the parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the constitution, not to confide any discretion to the court as to the penalty to be imposed.
8. This application is worthy mentioning that the facts have not qualified or by the provisions of Art 50 (6) (a) (b) on existence on new and compelling evidence to warrant a re-trial on the formulation of sentencing scheme approaches undertaken by both trial and appellate courts. As a consequence, the application fails and is dismissed of want of merit.

DATED SIGNED AND PUBLISHED VIA CTS AT ELDORET ON THIS 15TH JULY 2025

.....

R. NYAKUNDI

JUDGE

