Ebenyo v Republic (Criminal Petition 10 of 2019)
[2025] KEHC 12592 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL PETITION 10 OF 2019

RN NYAKUNDI, J

SEPTEMBER 16, 2025

BETWEEN

JOHN EBENYO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant filed multiple applications viz; Misc. Criminal E051/2022, Misc Cr. 158/2019, Petition 10/2019, Misc. Cr. 150/2017, Misc. Cr. 63/2017, Misc. Cr. 63/2017 and Misc. Cr. 4/2018 seeking leave to file an appeal out of time and also resentencing. For purposes of case management all the Miscellaneous Applications be and are hereby consolidated with the lead file being Petition No. 10 of 2019. In the aforesaid application the Petitioner relied on the chamber summons seeking the following order:

    1. That may this Honorable Court be pleased to hear and determine this application pursuant to the Supreme Court directives on sentencing vide Petition No. 15 of 2015 as prayed herein.

        Which is grounded on the following facts:

        Jurisdiction

        1. That pursuant to Article 165(3) (a) of the *Constitution* the High Court has unlimited original jurisdiction in criminal and civil matter and is capable of hearing and determining this petition as prayed herein.

        2. That pursuant to the decision court vide Petition No 15 of 2015 impose an appropriate sentence to be served as prayed herein.

        3. That pursuant to Article 50(i) of the *Constitution* one person is entitled to have his dispute resolved by the application of law.

Facts of the case

a. That I the petitioner herein was charged for an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, hence sentenced to suffer death.

b. That death sentence has been declared by the Supreme Court unconstitutionally and not mandatory vide Petition No. 15 of 2015 dated 14th December 2015.

c. That I am not interfering with conviction but on sentence only.

d. That I do hereby petition the High Court for resentencing pursuant to the Supreme Court judgment vide Petition No. 15 of 2015.

Reliefs soughtThat this Hon. Court be pleased to consider granting an appropriate sentence to be served by me the Petitioner pursuant to the Supreme Court orders dated 14th December 2017 vide Petition No. 15 of 2015.That this Hon. Court be pleased to grant me an appropriate sentence to be served as prayed herein.

Which application is supported by an affidavit sworn by John Ebenyo as follows:

1. That I am a female adult Kenyan citizen of sound mind versed with the fact of this matter and hence competent to swear this affidavit.

2. That I am the Accused person in the High Court Case No. 15 of 2005 Eldoret.

3. That I was convicted on 25/6/2009 for an offence of murder contrary to Section 203 as read with 204 of the Penal Code hence sentenced to suffer death.

4. That after my conviction I appealed against the conviction and sentence within the stipulated time but unfortunately until to date I have not received any signal from the appeal at Court of Appeal.

5. That after the ruling of the Supreme Court on Petition No. 15 of 2015, I have now turned my hope to this honourable High Court for resentencing matter.

6. That I am very remorseful and God fearing man, I am also repentant person.

7. That I have reached a little ingredient which was reached in Petition 15 of 2015 Francis Muruatetu and Paragraph 48.

8. That I have trained and qualified in grade (iii), (ii), and (i) in carpentry.

9. That the above qualification will help and enable them to live with the community in good faith.

10. That pursuant to the decision of the Supreme Court vide Petition 15 of 2015 do hereby petition the High Court for sentencing only upon mitigation.

11. That this petition is solely based on sentence only seeking for the exercise of judicial authority on the matter pursuant to Article 165(3) (a) of the *Constitution*.

12. That the matter of sentence in respect of capital offences was determined by the Supreme Court of Kenya on 14th December 2017 vide Petition No. 15

of 2015 and this Court now has the jurisdiction to determine and impose an appropriate sentence to be served in my case as similar matter.

13. That what I have deponed herein is true correct to the best of my knowledge information and belief.

Submissions by the Applicant

2. The applicant placed reliance on his submissions in which he stated inter alia as follows in mitigation:

> The circumstances of this case emanated from the events that occurred on the night of 7th January 2005 at Baringo estate in Eldoret town where the deceased lost his life. That the events of the day remain very clear in my mind, I had quarreled with my wife and in the ensuing melee the deceased tried to separate us after my wife ran to his house seeking refuge. In the process I stabbed the deceased on the neck and he succumbed to his injuries. I admit that I recall I caused serious pain and loss to the deceased and her family. Personally ask for forgiveness from God, this Hon. Court, the State and the family of the deceased. I believe in the power of forgiveness to allow healing. I have done all what is humanly possible to make good out of this bad situation. I am truly remorseful and my heart bleeds with all the tears and the material loss to the deceased. I hope this Hon. Court, the State and the deceased's family will find it favorable in their hearts to forgive me. I also forgive all parties wholeheartedly.
>
> When this unfortunate incident occurred I was a young person aged 30 years, newly married and school going. I don't have any previous conviction therefore I pray that you treat me as a first offender. Furthermore; I have spent more than 15 years in custody from the time of the arrest. I am 44 years my character and the records of prison prove that I have never violated any prison rules and regulations. I have however spent my time in prison trying to improve on myself and help others in the smallest way I can.

Decision

3. When summoned by this Court the Applicant invited the Court to acknowledge that all other applications stand withdrawn except for the one of resentencing. The facts on record do show that the Applicant was arraigned in court under a trial of the allegations of having committed the offense of murder contrary to Section 203 as punishable under Section 204 of the Penal Code was heard and determined by M. K. Ibrahim J as he then was. The learned Judge made a finding of guilty and conviction against the Applicant proceeding to pronounce himself on sentence as follows:

> "I have considered the mitigation by the Accused. The only mandatory sentence provided by the law under Section 204 of the Penal Code is that of death. Had the Court commuted the charge of manslaughter, he should have been sentenced appropriately due to the brutal and vicious manner the attack on the deceased took place. It was unprovoked and the life of an innocent Kenyan lost. The maximum sentence would have been recommended. I now hereby sentence the Accused to death. Right of appeal within fourteen (14) days."

4. This application is based on the two tangents of the law being the Supreme Court decision of Francis K. Muruatetu vs R [2017] eKLR which in considering Section 204 of the Penal Code ruled that the mandatory death penalty is unconstitutional. As a consequence of the decision, the court gave certain guidelines with regard to resentencing convicts already of death row for each of them to be invited to submit on mitigation including factoring the following aspects before exercising discretion

to review the sentence if need be:Age of the offender;Being a first offender;Whether the offender pleaded guilty;Character and record of the offender;Commission of the offence in response to gender-based violence;Remorsefulness of the offender;The possibility of reform and social re-adaptation of the offender;Any other factor that the Court considers relevant.

5. The persuasive cases of Spence v The Queen and Hughes vs The Queen (unreported) 2 April 2001 (Criminal Appeals Nos 20 of 1998 and 14 of 1997) it was observed inter alia;

> " The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender."

Based on that phrasing of the issue, Byron, CJ, concludes, in part, that;

> " the requirement of humanity in our Constitution does impose a duty for consideration of the individual circumstances of the offence and the offender before a sentence of death could be imposed in accordance with its provisions"

Saunders, JA, in the same decision agreed with Byron CJ, and held that;

> " the dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence".
>
> He went further to hold that-
>
> > " It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate must be imposed on such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman ... I am driven firmly to one conclusion. To the extent that the respective sections of the criminal Codes of the two countries are interpreted as imposing the mandatory death penalty those sections are in violation of Section 5 of the Constitutions.

6. In considering this application I bear in mind the provisions of Article 50 (2) (p) (q) as construed together with Sub Section (6) (a) & (b) of the *Constitution*. Whether on review or on appeal of sentence, the Court of Appeal in Benard Kimani Gacheru vs. Republic [2002] eKLR:

> " 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."

7. The other key factor to be incorporated in sentencing is the doctrine of proportionality in the case of State v Makwanyane 1995(3) SA 391 the Court held:

> " Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman and degrading ...; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparity which exists between accused persons facing similar charges... are also factors that can and should be take into account in dealing with the issue."

8. On the same heritage the Judges in the case of DPP Gauteg v Oscar Pistorius (96/20150 ZASCA 204) also remarked as follows:

> " Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements of play are the crime, the offender, the interest of society with different nuance, prevention, retribution, reformation and deterrence invariably there are over-laps that render the process unscientifically, even a proper exercise of the judicial function allow reasonable people to arrive at different conclusion ... "I am of the view that a non-custodial sentence would send a wrong message to the community. On the other hand, a long sentence would not be appropriate either, as it would lack the element of mercy ....."

9. In my judgment, I concur with other jurists before me who have addressed this issue on the mandatory nature of the death penalty on Section 204 of the Penal Code. I am also of the considered view as did the apex Court in the Muruatetu dicta that the death sentence as prescribed by the Legislature being mandatory is in violation with the constitutional guarantees of the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Art 25(a), right to equality and freedom from discrimination (Art 27(1), right to human dignity (Art 28), right to freedom and security of the person (Art 29), right of access to justice (Art 48) and right to a fair trial (Art 50) of the *Constitution*.

10. The Court also stated in Pistorious Case (supra) that:

> " for a very good reason an appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might take the law into their own hands. On the other hand, the latter might break the accused and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible to become a member of society once more, society cannot always get what they want. Courts do not, except for the popularity contest but only to dispense justice ... the general public may never know the difference between punishment and vengeance.

11. I have reviewed the record of the trial court. The circumstances under which this homicide was committed is very clear and very disturbing that an innocent life was lost in a scene which the deceased was not the perpetrator. Undoubtedly the aggravating factors outweigh the mitigation which has been offered by the Applicant in his submissions. Obviously again the perpetrator committed this offence as a young adult, it is on record he has no previous conviction at the time of committing the offence in question. The record further shows that from the date of arraignment in court until the conclusion

of this case on 25th June 2009 he did not have the opportunity to be released on bail as a consequence of which Section 33(2) of the Criminal Procedure Code on pre-detention trial applies to accord him credit in the event this court's verdict being rendered falls under the terminable custodial sentence.

12. The provisions of Section 333(2) of the Criminal Procedure Code was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR where the Court of Appeal held that: -

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by Section 333(2) of the Criminal Procedure Code. By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned Judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to Section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the Court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate Court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

13. Similarly, the Court in Bethwel Wilson Kibor vs Republic [2009] eKLR expressed itself as follows: -

> " By provision to Section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

14. Pre-trial detention is only legitimate where there is a reasonable suspicion of the person having committed the offence, and where detention is necessary and proportionate to prevent them from absconding, committing another offence, or interfering with the course of justice during pending procedures. This means that pre-trial detention is not legitimate where these objectives can be achieved through other, less intrusive measures. Alternative measures include bail, seizure of travel documents, the condition to appear before the court as and when required and/or not to interfere with witnesses, periodic reporting to police or other authorities, electronic monitoring, or curfews. (see the guidelines in International Covenant in Civil and Political Rights (19660, Articles 9 and 14, Body of Principles for Protection of All Persons under any form of detention or Imprisonment (1988), UN Principles and

Guidelines on Access to Legal Aid in Criminal Justice Systems (2012), UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (1990), Revised UN Standard Minimum Rules for the Treatment of Prisoners 91955) Section C-Prisoners under arrest or waiting trial, Rules 111-120 and UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) (2010), Rules 57 et sqq.

15. The principles in the following authorities resonate well with the facts of this case. In S v Williams 1995 SA 632 the *Constitution* Court of South Africa referring to punishment in general held that the *Constitution* requires that:

> " measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanizing treatment and punishment. the *Constitution* has allocated to the State and its organs a role as the protestors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endevours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilized societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that ... even the vilest criminal remains a human being possessed of common human dignity.

16. In ascribing to this right on human dignity under Article 28 of the Kenyan Constitution the persuasive decision in Ferreira v Levin SA 984 the Constitutional Court had this to say:

> " Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their humanness to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom ..... human dignity is little more than an obstruction. Freedom and dignity are inseparably linked. To deny people freedom is to deny them their dignity."

17. One conceptualization of human dignity does not depend on God but is a value divinely ordained to a human being by the very fact of being human. The issue of overcrowding of our Prison facilities cannot be over emphasized in our society and this attendant negative effect to the provisions of the Bill of Rights as enumerated in this Ruling. Therefore, the letter and spirit of Section 333(2) of the CPC is a legislative scheme for Courts to give effect to the credit period spent in remand custody pending trial and conclusion of an indictment filed against offender by the Director of Public Prosecutions pursuant to Article 157(6) & (7) of the *Constitution*. The presumption of innocence until the contrary is proved is reflected in Article 50 (2) (a) of the *Constitution*. It is also a Constitution imperative in Article 50 (2) (e) that the Accused person has a right to have his or her trial begin and concluded within a reasonable time. This provision on the right of a trial to commence and to conclude in a reasonable time requires the court's interpretation as to what constitutes a reasonable time in the context of the Kenyan justice system. It is not lost with this court to take judicial notice that suspects arraigned in various courts under our penal system have families, who depend on them, by their nature as individuals enjoy variety of rights maybe social or cultural, economic or political as the case maybe. In the event they become persons of concern under our criminal justice system some of the rights enshrined in the corpus of the fundamental rights and freedoms are normally violated, infringed or run the risk of being impaired as they undergo the criminal process.

18. In the case of R v Oakes [1986] 1 SCR 103 the Supreme Court of Canada held as follows on pre-trial jail:

> " At the heat of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty. In the context of the criminal law, this fundamental freedom is embodied generally in the right to be presumed innocent until proven guilty, and further in the specific right to bail. When bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed. This is the context of this appeal, one in which the "golden thread" that runs through our system of criminal law is placed in jeopardy. And this is the context in which laws authorizing pre-trial detention must be scrutinized.

19. Coming to the case at hand, the facts speak for themselves. The Applicant took plea for the offence of murder contrary to Section 203 on 21st February 2005 and his trial was commenced soon thereafter with the final judgment rendered on 25th of June 2009. As the law was then he was sentenced to suffer death. This sentence was later committed to life imprisonment. On the issue of bail, there is prima facie evidence that the Applicant was in remand custody pending the hearing and determination of his case. In the light of all the decisions starting with the Muruatetu there is merit to review the death penalty as now commuted by the Executive to life imprisonment and to have it reduced to a term of 22 years imprisonment. It should also be understood that the custodial sentence in lieu of life imprisonment shall factor in four years and four months in consonant with Section 333(2) of the Criminal Procedure Code which period is to be discounted from the now imposed sentence of 22 years imprisonment. The Applicant has a right of appeal to the Court of Appeal in the event he is aggrieved with this order on sentence. The Committal Warrant to prison be amended to denote the new order on sentence to be served by the Applicant and on the regulation of remission being applied the Officer in Charge in Naivasha Correction Facilities shall be at liberty to set the Applicant free within the scope of the law governing such sentences.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF SEPTEMBER 2025.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Ms Kirenge for the State

The Applicant virtually