



REPUBLIC OF KENYA



**Ngatia v Republic (Criminal Petition E008 of 2022)
[2024] KEHC 429 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E008 OF 2022
F GIKONYO, J
JANUARY 23, 2024**

BETWEEN

BENJAMIN NGATIA PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction and Sentence in Narok CMCR No. 1293 OF 2005,
Nakuru HCCRA NO. 188 of 2006, and Nakuru Court of Appeal case no. 9 of 2011)*

JUDGMENT

Sentence re-hearing

1. In a notice of motion dated 25/08/2022, the petitioner is seeking a review of the current sentence to a lenient sentence.
2. The application is expressed to be brought under articles 22(1)(3)(d), 23(1(f)), 50(2)(p), 159, 165, 259 and the sixth schedule (art.262) rule 7(1) of *the Constitution*.

Brief background of this case

3. The petitioner was charged, convicted, and sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the Penal Code in Narok CMCR No. 1293 of 2005. He filed an appeal in Nakuru HCCRA No. 188 of 2006 which was dismissed in its entirety. He filed a second appeal in the Court of Appeal No. 9 of 2011 which was also dismissed.

Directions of the court.

4. The application was canvassed by way of written submissions. Both parties have filed.



Petitioner's Submission

5. The petitioner submitted that this application is competent and properly before this court which is seized with the jurisdiction to hear and determine the matters herein. The petitioner relied on the cases of owners of Motor Vessel Lilian's' Vs Caltex Oil (Kenya) Ltd [1989] KLR1 at page 14, Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, article 23(1) and 165(3) of *the Constitution*, Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai Estate & 4 Others [2013] eKLR, Protus Buliba Shikuku Vs Attorney General [2012] eKLR.
6. The petitioner submitted that sentences are defined by law but the measure of what is appropriate sentence is left to the discretion of the judges and magistrate however section 296(2) of the penal code takes away the decisional independence of the court. The petitioner relied on Articles 27 and 25, 50(2) (k) and (p) of *the Constitution*, Article 3 of the African Charter on human and people's rights, Dakar declaration, and recommendations on the right to a fair trial in Africa, the supreme court of India in the cases of Natasha Singh Vs CBI {2013} 5 SCC 741, Zahira Habibullah Sheikh & Another Vs State Of Gujarat & Others AIR 2006 SC 1367, state of M.P. V Bablu Natt {2009} 2S CC 272, Alisters Anthony Pereira V State Of Maharastra {2012} 2SCC 648 PARA 69, SV Jansen 1999(2) SACR 368 AT 373 (G) –(H), SV TOMS 1990 (2) SA 802 (A) AT 806(L) -807(B), S V MOFOKENG 199 (1) SACR 502 (W) AT 506 (D), Joseph Kaberia Kahinga & 11 Others V Attorney General [2016] eKLR, and Ismael Ndirangu & Another V Republic [2021] eKLR.
7. The petitioner in his mitigation submitted that he was 26 years old at the time of arrest and is now 42 years old. He has hopes of starting a family and build the nation. He has also benefitted from the rehabilitative programs offered in the prison facilities. He prays that this court passes a lenient sentence than that of life imprisonment that was commuted by the president and take into account the time spent in remand custody as provided for under section 333(2) of the criminal procedure code. He urged this court to find the time already served to be sufficient based on the rehabilitative programs undertaken, the cited case law and mitigating factors.

Respondent's submission.

8. According to the respondent, there is no rational reason why the reasoning of the Supreme Court in the Muruatetu case that mandatory death sentence deprives a court discretion to impose appropriate sentence, and therefore, unconstitutional, should not apply to the mandatory sentence for robbery with violence. The respondent relied on section 296(2), 204 of the Penal Code, Francis Kariko Muruatetu & Another Vs Republic, James Kariuki Wagana Vs Republic [2018] eKLR, S Vs Mchuru & Another (AR 24/11) (2012) ZAKZPHC 6, S Vs Scott Crossely 2008 (1) SACR 223(SCA), Mithu Singh Vs State of Punjab 1983 AIR 473, Kisumu Court of Appeal Criminal Case No. 166 Of 2016 Cyrus Kawai Vs Republic.
9. The respondent submitted that the trial magistrate without any mitigating factors and without putting into consideration that the petitioner did not use excessive force nor did they unnecessarily injure the complainant during the robbery went ahead to pass a death sentence as was prescribed by the law. The violence unleashed on the victim was not sufficiently serious. The mitigating and aggravating factors were not put into consideration and the trial magistrate was tied to the prescribed law that imposed a mandatory death sentence upon the petitioner. The applicant has shown through the filed court documents that he has undergone rehabilitation, has reformed, and if given a second chance could be a productive member of society. The respondent relied on the case of James Kariuki Wagana Vs Republic [2018] eKLR.



10. The respondent submitted that life sentence commuted is inappropriate sentence thus conceded to the petition on review of both the death sentence and life sentence. The respondent relied on the case of Julius Kitsao Manyeso Vs Republic [2023] eKLR.

Analysis And Determination

Issues

11. The application herein and the rival parties' written submissions raise two intertwined issues;
 - i. Constitutionality of mandatory death sentence for robbery with violence; and
 - ii. The appropriate sentence in the circumstances of this case.

Nature and scope of Re-sentencing

12. The application before the court is in the nature of what is now commonly known as resentencing. The remedy is sought on the basis of *the Constitution* as redress for denial or violation of a right and fundamental freedoms in the Bill of Rights. And, its first pragmatic grip in our constitutional jurisprudence was given as a principle of law in the Supreme Court decision in Muruatetu case.
13. The Muruatetu decisional law witnessed distributional consequences as the principle enunciated therein was applied with full force of judicial precedent to penal clauses which prescribed for mandatory sentences, including mandatory minimum sentences other similar situations. See the observation of the Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR that:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of *the Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”
14. But, application of the principle in the case of Muruatetu in similar situation was dogged with ‘controversies’ to the point where the Supreme Court attempted to place a kind of restraint on the application of the principle. The efficacy of the restraint also became a focus of debate. There were other structural dilemmas which also came about as a result of Muruatetu decisional law as to which court should carry out re-sentencing.
15. The foregoing notwithstanding, re-sentencing gained root and is grounded in our jurisprudence.
16. Re-sentencing is, not a hearing de novo nor an appeal. It is a proceeding undertaken within the court’s power to review sentences only. It does not therefore consider conviction. Ordinarily, in re-sentencing, the court will check on the legality or propriety or appropriateness of the sentence. Thus, resentence will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
17. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made on the basis of the unconstitutionality of the mandatory sentence.



Alleged violation

18. The applicant is challenging the mandatory nature of the death sentence in section 296(2) of the Penal Code for denying the court discretion to impose an appropriate sentence. He prays for the life sentence to be set aside and for him to be given a definite lenient sentence. He says that he is rehabilitated and has learned new skills which makes him fit for re-integration in society. In addition, he submitted that he is advanced in age and hopes to get a sentence that will allow him to support his family.
19. In reacting to these submissions, the prosecution counsel has conceded to the application.

Applying the test

20. The application is premised upon inter alia articles 22(1), 23(3), and 165 (3) of *the Constitution*. Therefore, an application for redress of denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
21. The applicant claimed violation of article 50(2)(p) of *the Constitution* which provides: -
50(2) Every accused person has the right to a fair trial, which includes the right—
(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
22. Discretion in sentencing is a matter of justice and pertains to fair trial. Mandatory sentence deprives courts of discretion to impose appropriate sentences. Therefore, mandatory sentence is arbitrary; and unconstitutional. Any person who suffer such deprivation is entitled to redress, and 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*.
23. The impugned penalty clause is Section 296(2) of the Penal Code which 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. [Underlining mine and for emphasis]
24. The word ‘shall’ in Section 296(2) of the Penal Code discharges a mandatory command giving no room for any discretion by court in sentencing. Therefore, to the extent that the section provides for a mandatory sentence of death, thereby, taking away the discretion of the court in sentencing, is inconsistent with *the Constitution*.
25. However, ‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution’ (Section 7(1) of the Transitional Provisions, Sixth Schedule of *the Constitution*). Therefore, there is no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the Penal Code for being inconsistent with *the Constitution* unless it is totally irreconcilable with *the Constitution*. These are tolls and techniques of construction of statute which were specially designed to avoid paralysis and confusion which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning it to *the Constitution*.



26. In this case, section 296(2) of the Penal Code is interpreted to prescribe death as the maximum sentence- this brings it into conformity with *the Constitution*.

27. Having stated that, re-sentencing provides an effective remedy to an injustice arising from a violation of a right or fundamental freedom due to imposition of a mandatory sentence. This 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.”

28. In addition, the authority of the court in articles 165(3) and 23 of *the Constitution* to, inter alia, uphold and enforce the Bill of Rights also formally and actually gives the court power of consistently structuring, developing, and deploying progressive jurisprudence on enforcement of rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of *the Constitution*, that: -

In applying a provision of the Bill of Rights, a court shall—

- a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Sentence

29. Does the sentence herein violate the rights of the applicant?

30. Every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

31. The court has made a finding that mandatory sentence prescribed in section 296(2) of the Penal Code is unconstitutional. The applicant suffered deprivation of exercise of discretion by the trial court to impose appropriate sentence or less severe sentence. Therefore, a denial or violation of his right and fundamental freedoms. The death sentence is therefore set aside. The death sentence is therefore set aside.

32. The court is aware that the President commuted the death sentence to life imprisonment.

33. A solemn debate ensued on whether life sentence is unconstitutional. Or whether it means the natural life of the person. Or whether it is not immutable. Or whether it entails a definite period of imprisonment. And, who should designate the definite period; et al.

34. In a rather bold pronouncement in the case of Evans Nyamari Ayako Vs Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, (Okwengu, Omondi & Joel Ngugi, JJ. A) held that;

‘On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.’

35. But, the circumstances of the case should determine whether life sentence is the appropriate sentence.

36. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing on page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?



37. The court has considered the mitigating factors; his age, rehabilitation as well as family needs. Nevertheless, in the circumstances of this case, a deterrent sentence is most appropriate. Accordingly, the petitioner is sentenced to 30 years imprisonment. For purposes of section 333(2) of the CPC, the sentence herein is lenient, it will, therefore, commence from the date he was sentenced by the trial court.
38. Orders accordingly.
39. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 23RD DAY OF JANUARY, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of:-

C/A Otolo

Ms Rakama for ODP

Applicant

