



**Olutende v Republic (Miscellaneous Criminal Application
292 of 2018) [2024] KEHC 460 (KLR) (22 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION 292 OF 2018
SM MOHOCHI, J
JANUARY 22, 2024**

BETWEEN

DANIEL OMA YA OLUTENDE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is an application by a Notice of Motion filed on the 22nd November 2018, that invites the court to rehear his sentence and is grounded on the Applicants undated and uncommission sworn affidavit filed on the same day
2. That the Appellant was charged with the offence of Robbery with Violence contrary to section 296 (2) and sentenced to Death.
3. He makes this application in regard to the above-mentioned articles in reliance of article 165(3) (b) of the constitution which empowers this court to handle application of this nature.
4. That he has exhausted all appeals and was not accorded fair trial of sentencing from the trial court to the last court of appeal thus contravening article 50(2)(q) of the *Constitution* while relying on the case of *Douglas Muthaura Ntoribi* Misc.App. No.4 of 2015 at Meru High Court and in the case of murder of John Nganga Gacheru and another in HCCR. Case No. 31/016 at Kiambu High Court and *William Okungu Kittiny v Rep* 2018 eKLR criminal appeal no.56/2013 court of appeal Kisumu.
5. The Applicant herein relies on the case of: - *Francis Karioko Muruatetu and another v Rep* (supreme Court Petition N0.15 of 2015) that mandatory Death penalty is unconstitutional thus seeking for appropriate sentence.



Respondent's Case

6. The Respondent opposed the Application that the Applicant had filed an Appeal which Appeal was dismissed and that the Francis Karioko Muruatetu decision was inapplicable as the decision related to Murder cases and not Robbery cases.
7. The Respondent relied on the case of *Shadrack Kipkoeb Kogo v R* HCRA 253 of 2003 where the court set out factors to consider before disturbing the exercise of discretion;
 - a. Sentence is an exercise of discretion
 - b. Sentence can only be interfered with if the subordinate court considered irrelevant factor(s) or applied the wrong principles or was excessive.
8. The Respondent contends that the Applicant has not satisfied any of the factors that would warrant interference with the exercise of judicial discretion and that sentence should be retributive and deterrent and this was an appropriate case.
9. That the aggravating factors included being armed with crude and offensive weapons namely "stones" and threatened to use violence on the complainant and that the court had a role to play in administering justice to consider the impact of the crime on the complainant and society at large.
10. That the Sentence imposed by the trial court was lawful and appropriate and as such the court should dismiss the Application.

Analysis and Determination

11. The Power of High Court to call for records is provided for under Section 362 of the [Criminal Procedure Code](#).

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.
12. Section 364 of the [Criminal Procedure Code](#) provide for the Powers of High Court on revision as follows;
 - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (c) in proceedings under section 203 or 296(2) of the [Penal Code](#), the [Prevention of Terrorism Act](#), the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#), the [Prevention of Organized Crimes Act](#), the [Proceeds of Crime and Anti-Money Laundering Act](#), the [Sexual Offences Act](#) and the [Counter-Trafficking in Persons Act](#), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of



the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
13. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -
- a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record; and
 - d. Where the material evidence on the parties is not considered;
14. The Supreme Court clarified that their decision in the Muruatetu case only related to the mandatory death sentence for murder cases under section 203 and 204 of the *Penal Code*, and did not apply to any other statutory mandatory death sentences or minimum sentences.
15. Specifically, the Supreme Court issued the following guidelines.
- “18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
 - a. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.
 - b. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
 - c. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.



- d. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
- e. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code as well as those of the victim before deciding on the suitable sentence.
- f. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- g. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
 - i. Age of the offender
 - ii. Being a first offender
 - iii. Whether the offender pleaded guilty.
 - iv. Character and record of the offender
 - v. Commission of the offence in respect of gender based violence.
 - vi. The manner in which the offence was committed on the victim.
 - vii. The physical and psychological effect of the offence on the victim's family.
 - viii. Remorsefulness of the offender.
 - ix. Possibility of reform and social adaptation of the offender.
 - x. Any other factor the court considers relevant.
- h. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
- i. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in *Muruatetu*.

16. This Court is guided by the finding in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) where the Court of Appeal held that;

“The reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applied to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denied a convict facing life imprisonment the opportunity to be heard in



mitigation when those facing lesser sentences were allowed to be heard in mitigation. That was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution”.

“An indeterminate life sentence was inhumane treatment and violated the right to dignity under article 28 of the Constitution. An indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. It was a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved”.

17. This Court in reviewing the sentence examined the court proceedings by Hon G.M Ndeda (CM), for the 30th October 2003 where after judgment was delivered, the Prosecutor indicated that, “the accused be dealt with as first time offenders”. When asked to mitigate the Applicant stated “I have six children and my parents died”. The Court on its part recorded that “the the accused are first time offenders but the court “feels the offence should be discouraged”
18. This Court’s evaluation of the Proceedings reveals that the Applicant was never accorded any leniency as a first time offender and no reason was offered by the Court why a stiff punishment was preferred
19. The Exercise of discretion by the trial magistrate in sentencing was not judicious and that the Applicant was denied the benefit of a first-time offender without reason.
20. The Court ought to have clearly recorded reason(s) why the Applicant was undeserving of any sympathy.
21. The Applicant has been in Prison custody for almost thirteen (20) years a period which he has achieved remarkable qualifications and with good conduct as above, the Applicant will soon qualify under section 46; (1) (Cap 90), the *Prisons Act* earn a remission of one-third of his sentence.
22. From the foregoing therefore, this court shall interfere with the sentence imposed by Hon G.M Ndeda (CM) as he then was, of Life Imprisonment, by setting it aside and substituting therewith a term imprisonment.
23. In the upshot this court finds this Application to of merit and allow the same is accordingly.
 - i. The Sentence of Death imposed on the Applicant on the 30th October 2003 is hereby set aside.
 - ii. The Applicant shall serve a Twenty (25) Years imprisonment sentence to run from the 22nd March 2003.

It is so Ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 22ND JANUARY 2024

MOHOCHI S.M

JUDGE

