



**Ochieng v Republic (Miscellaneous Criminal Application
E077 of 2023) [2024] KEHC 226 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E077 OF 2023**

**A. ONG'INJO, J
JANUARY 18, 2024**

BETWEEN

ERICK OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged, convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* Cap 63 laws of Kenya in Mombasa Chief Magistrates Court Criminal Case No. 2157 of 2007.
2. The Applicant appealed the decision in Mombasa High Court Criminal Appeal No. 338 of 2008 but the appeal was disallowed on grounds of applicability of the doctrine of recent possession. The sentence was later commuted to life imprisonment.
3. The Applicant therefore prays that his sentence be reviewed in consideration of the 16-year period spent in custody, that he has reformed and can make a positive contribution in society, and that he has a widowed ailing mother who needs him.
4. The Sentence Review Report in respect of the Applicant filed on 14th December 2023 indicates the Applicant meets the threshold for supervision under non-custodial sentence and that should the court consider such, Migori Probation Station will supervise him. That the Applicant has gained skills in welding and carpentry to help him earn a living, and that his immediate family members are looking forward to helping him back to the community.
5. Factors applicable in re-sentencing for the offence of robbery with violence was held in the case of *Francis Karioko Muruatetu & Another - Vs- Republic* Petition No. 15 of 2015 (2017) eKLR where the Supreme Court stated guidelines for mitigating factors to include the following: -



- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the court considers relevant.
6. In *Julius Kisau Manyeso v Republic*, the Court of Appeal in Malindi Criminal Appeal No. 12 of 2021 declared that the reasoning in *Francis Karioko Muruatetu & Others v Republic* equally applies to the imposition of a mandatory life sentence namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution* and it is also inhuman treatment and violates the right to dignity under Article 28. The court of appeal was persuaded by the reasoning in the European Court of Human Rights in *Vinter & Others v The United Kingdom* that an indeterminate life sentence without any prospect of release or a possibility of review is a degrading punishment and that it is now a principle in international law that all prisoners including those serving life sentences be offered the possibility of rehabilitation and the prospects of release if that rehabilitation is achieved.
7. This court has considered the Nairobi Court of Appeal case of *Johnstone Barasa Mulongo & another v Republic* (2019) eKLR where the courts imposed 30 years sentence to serve the ends of justice.
8. In consideration of the decisions in the above cases, this court sets aside the life imprisonment sentence and substitutes it with a 25 years sentence from the date the applicant was arraigned in court on 27.7.2007 to be confirmed by prison authorities.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
18TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Mr. Ngiri for the Respondent

Mr. Otieno Advocate for the Applicant

Applicant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

