



REPUBLIC OF KENYA



KENYA LAW
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**Kamande v Republic (Criminal Revision E137 of 2022)
[2024] KEHC 1089 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E137 OF 2022
MW MUIGAI, J
FEBRUARY 5, 2024**

BETWEEN

JOHN KINUTHIA KAMANDE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The accused person/applicant was charged with the offence of robbery with violence.
2. The information that led to the arraignment of the accused person/Applicant before the trial court was as follows:
Robbery with violence contrary to section 296 (2) of the *Penal Code*.
Particulars of offence were as follows:
John Kinuthia Kamande: On the 22nd day of July,2019 at Matuu Township in Yatta Sub-County within Machakos County, jointly with others not before court robbed Joel Matolo a motor cycle Reg. No. KMEF 968 make Skygo valued at Kshs. 92,000/= Ninety-Two Thousand shillings and at the time such robbery threatened to use actual violence on the said Joel Matolo.
3. On 9/9/2019, the charge was read to the Accused/Applicant and the same explained to him in a language he understood and he pleaded not guilty to the offence and a plea of Not Guilty was entered for the Accused/Applicant.
4. The Prosecution opened its case and anchored its evidence on Three (3) witnesses who gave their sworn testimonies on what transpired.



5. At the close of the Prosecution case, the Trial Court vide its ruling dated 30/11/2021 found that the prosecution had established a case against the Accused/Applicant pursuant to section 211 of the [Criminal Procedure Code](#) and placed Accused/Applicant on his defence.
6. Upon being placed on the defence, the Accused/Applicant did not call any witness but testified in an unsworn statement, terming the evidence from the prosecution witnesses false.

Trial Court's Judgment

7. The Trial Court vide its Judgment dated 2nd February,2022, convicted the Accused/Applicant pursuant to the provisions of section 215 of the [Criminal Procedure Code](#), Chapter 75 Laws of Kenya for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#).

The Revision

8. Dissatisfied by the said Judgment, the Accused/Applicant herein vide a Notice of Motion under Certificate Urgency dated 17th June,2022 and filed in court on 27th June,2022, brought under article 48 of [the Constitution](#) of Kenya and sections 362 and 364 of the [Criminal Procedure Code](#).
9. The Applicant seeks inter alia the following orders that:
 1. He is a Kenyan and a convict at Nairobi Remand and Allocation Maximum Security Prison.
 2. This Court be pleased to call for original records from Kithimani law Court No. 2.
 3. The Honourable Judge be pleased to review his sentence and issue any other orders it may deem fit and just.

Supporting Affidavit

10. The Application was supported by an affidavit dated 17th June,2022 and filed in Court on 27th June,2022, sworn by John Kinuthia Kamande, the Applicant herein, wherein, he deposed inter alia that he was found guilty and sentenced to 10 (ten) years and that he is a father of a school going child and a husband to unemployed wife who both depended on him solely in upkeep and as of now they are deprived in his absence in search of basic needs.
11. Deposing that in prison he was lucky to get basic training in spiritual growth as a Christian and self-discipline in the prison project Philip and coaching skills in prisoner's journey amongst other lessons he learned in prison including the consequences of crime and will never again engage himself in criminal activities and will be an ambassador of crime si poa initiative after prison. (Annexed and marked copy his awarded certificate of training).
12. He deposed that he got saved and was baptized where he was admitted to the Protestant Christ Church by baptism at the Nairobi remand prison. He attached his awarded certificate. Further that his aging mother who is a widow as of now also depended on him for her upkeep and mostly how to get medication making it hard for her in his absence
13. He deposed that with the responsibilities he had before he was arrested, his absence deteriorates the situation of his loved ones making their lives unbearable since they needed his presence for upkeep amongst other needs.



14. He prayed to this Honorable Court to review his sentence he is now a changed man and wishes to go back to the society help the other civilized Kenyans like him build the nation.
15. The matter was canvassed by written submissions.

Submissions

The Applicant's Submissions

16. The Applicant in his submissions filed in court on 3rd October, 2023, wherein the Applicant submitted that he is aware of section 364 (5) of the Criminal Procedure Code which provides the right of a person who has been convicted and sentenced for criminal offence, to appeal or apply for review by a higher court as prescribed in laws. contending the right is part of the larger right to a fair trial as is provided in article 50 (2) (q) of *the Constitution* which provides that:

“Every accused person has the right to a fair trial, which includes the right: -

- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law”

17. It was submitted that is now 19 (nineteen) months since the court found him guilty and sentenced him to serve ten (10) years which he is currently serving at the Nairobi Remand and Allocation Maximum Security Prison.
18. It was the Applicant's case that during his time in custody he has no words to express how much he has been affected by distance between himself and his family, which distance he wishes to make good as soon as he is legally to do so.
19. He contended that he has never been arrested or arraigned before court of law this was the first time he is in conflict with the law which has brought impacted on him and he considers it a great downfall.
20. He averred that he has been in custody from 9th September, 2019 to date and during this entire period of approximately four (4) years he has handled himself to the best of his reasonable expectation by an inmate and prison authority can attest.
21. It was the position of the Applicant that he feels sorry for the victim (complainant) as the court found him to have taken part in the loss of his property. He now knows how it feels as he has lost freedom and almost everything else including the bond between his loved ones. According to the Applicant while in custody he has been rehabilitated in many activities which he listed on the body of his submissions.

Respondent's Submissions

22. The Respondent in its submissions dated and filed in court on 19th September, 2023, wherein the state counsel while relying on the case of Godfrey Ngotho Mutiso Vs Republic Criminal Appeal No. 17 of 2008 and submitted that the Applicant was charged with the offence of robbery with violence. Averring that Section 296 (2) provides a penalty of death sentence. The trial court considered the Applicant's actions of stealing a motorcycle by use of violence it convicted and sentenced the Applicant to server 10 years' imprisonment.
23. On the principles guiding interference with sentencing by the court, counsel quoted the cases of S Vs Malgas 2001(1) SACR 469 and Mokela Vs the State (135/11) [2011] ZASCA 166.



24. Counsel submitted that the Applicant was convicted and sentenced to 10 years imprisonment by the Trial Court. Opining that the sentence imposed is appropriate and sufficient in the circumstances. It was prayed that this application be dismissed in its entirety.

Determination/analysis

25. I have considered the Application, the Supporting Affidavit, the Trial Court proceedings and the submissions of parties.
26. The issue for determination is whether the Application is merited.
27. Before digging into the merit of this Application, this Court's jurisdiction on revision is as follows; Section 362 of the Criminal Procedure Code provides as follows: -

“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”.

28. In addition, Section 364 empowers the Court to exercise the following powers:

- 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.
- (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”.

29. In reading Section 296 (2) of the Penal Code under which the Applicant herein was charged it is provided that:

“(2) 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”

30. In the instant case the Applicant was charged, convicted and sentenced to ten (10) years imprisonment by the Trial Court pursuant to Section 215 of the Criminal Procedure Code which provides that:

“The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

31. I note that section 296 (2) of the *Penal Code* imposes the death Penalty.



32. Hence, in the case of *Daniel Kyalo Muema vs. Republic* [2009] eKLR, the Court of Appeal proffered the following approach to sentencing:

In searching for the intention of the Parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. This principle is contained in Section 66 (1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.

The second observation is that the principle of law in Section 66 aforesaid is entrenched in Section 26 of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence of a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment.”

33. It is plain then that where the phrase “shall be liable to” is part of the penal provision, the period prescribed ought to be treated as the maximum penalty beyond which the sentencing court cannot travel. This point was made by the Court of Appeal in *Caroline Auma Majabu vs. Republic* [2014] eKLR, albeit in the context of section 4(a) of the Narcotic *Drugs and Psychotropic Substances Control Act*. Here is what it said:

“Applying the above definition, the use of the word “liable” in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule.”

34. And in *M K vs. Republic* [2015] eKLR, the Court of Appeal held that:

What does “shall be liable” mean in law? The Court of Appeal for East Africa in the case of *Opoya -v- Uganda* (1967) EA 752 had an opportunity to clarify and explain the words “shall be liable on conviction to suffer death”. The Court held that in construction of penal laws, the words “shall be liable on conviction to suffer death” provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James -v- Young* 27 Ch. D. at p.655 where North J. said:

“But when the words are not ‘shall be forfeited’ but ‘shall be liable to be forfeited’ it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced”.

We consider such to be the correct approach to the construction of the words “shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are “shall be sentenced to death”.

35. The Court then proceeded to hold that:

“Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated



in the proviso to Section 20 (1) of the Sexual Offences Act is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.”

36. In the *East African Court of Appeal in Arissol vs. Republic* [1957] EA 449 that:

“It is unusual to impose the maximum sentence on a first offender and it would be wrong to depart from that rule because on the evidence she might have been convicted of a graver offence...” (also see *Otieno vs. Republic* [1983] eKLR).

Conviction

37. From the evidence on record this Court notes with concern the pages of typed proceedings are missing but the Court read the original record; there is evidence of Pw.1 complainant who was subjected to cross-examination and the Trial Court was satisfied that he identified the Applicant as one of the 2 people who accosted him and took off with his motorcycle. He positively identified him at the Identification Parade as evidenced by Pw.3. The Trial Court considered the circumstances of a positive identification in the judgment that the complainant spent time with the Applicant as he finished his drink while they were drinking together and there was sufficient light.
38. The Applicant’s unsworn statement evidence adduced in his defence did not controvert the Prosecution’s case.
39. The Trial Court convicted the Applicant on sound legal grounds and sufficient evidence on identification even if the motor cycle was not recovered.
40. It is not in dispute that the accused/Applicant herein was a first offender, and a married man with children. However, the evidence placed before the lower court revealed that he was in the company of another when the offence was committed. The Accused was rightly identified vide identification parade. After the judgment was delivered the Applicant asked for pardon for being linked with the offence which he did not commit.
41. The Applicant moved this Court in this present application seeking the review of his sentence claiming he has been in custody from 9th September, 2019 to date and during the entire period of approximately four (4) years he has handled himself to the best of his reasonable expectation and that his inmate and prison Authority can attest. The Applicant is sorry for the victim as court found him to have taken part in the loss of his property. He now knows how it feels as he has lost freedom and almost everything including the bond between his loved ones while in custody.
42. In consideration of the above and having perused the Trial Court file, I find that the trial court properly and aptly exercised its discretion on the sentence as it did. The offence under which the Applicant was charged attracts death sentence but, the Applicant was convicted to ten (10) years imprisonment by the Trial Court.
43. I note from the annexed documents that the Applicant has been baptized and even issued with a Diploma certificate on bible course and also certificate to show that he has attained silver and gold level in Prison Project Philip. These programs in my view are important and geared towards transforming and rehabilitating the convicts into better persons which is the ultimate goal of sentencing.



44. In the case *R vs. Scott* (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

45. Further, in *R vs. Harrison* (1997) 93 Crim R 314 it was stated:

“Except in well- defined circumstances such as youth or mental incapacity of the offender... Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may who otherwise would be tempted by the prospect that only light punishment will be imposed.”

46. As appreciated by the Supreme Court in [*Muruatetu Case- Francis Karioko Muruatetu & Anor vs Republic*](#)[2017]eKLR it was stated that:-

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”



The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

47. This Court has considered the circumstances under which the offence was committed.

Sentencing

48. The Judiciary of Kenya Sentencing Policy guidelines lists aggravating and mitigating factors to be considered in Sentencing;

Clause 23:3-7

Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence – Use of weapon, grave impact, multiple victims, serious physical or psychological effect – previous convictions etc.

Clause 23:8 – Mitigating Factors:

Negligible harm or damage Being a 1st offender among others

49. In the instant case, the evidence of Pw1 there was no weapon, PW1 was assaulted but the gravity of the assault was not indicated by official document P3 Form, theft occurred the motor cycle was not recovered. The aggravating circumstances in this case considered against mitigating circumstances that he is a 1st offender and harm was negligible. The sentence meted out is mitigated against.

Disposition

50. The sentence of Ten (10) years is hereby reduced to Eight (8) years imprisonment which shall be computed as follows:

- a. The Applicant has been in custody since 9/09/2019 upto 2/2/2022 when he was sentenced. The said period to be considered under Section 333(2) Criminal Procedure Code.
- b. The Applicant has also served almost Two (2) years imprisonment since 2022.
- c. Remission under the Prison Act.
- d. The Appeal is dismissed on conviction and sentence is reduced to Eight (8) years imprisonment.
- e. Further Mention on 12/02/2024.

JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of:

No Appearance - For The Applicant

Mr. Mwangera - For The Respondent

Patrick/geoffrey -court Assistant(s)

