Ojiambo v Republic (Criminal Petition E007 of 2023)
[2024] KEHC 1350 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL PETITION E007 OF 2023

WM MUSYOKA, J

FEBRUARY 16, 2024

BETWEEN

JAMLAX WANDERA OJIAMBO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The petition and application, dated 17th August 2023, principally seek re-sentencing. The petitioner had been convicted, in Busia HCCRC No. 8 of 2008, of murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, which attracts, upon conviction, the death penalty, and the trial court had imposed that sentence, on 3rd December 2009. There is no evidence of an appeal being preferred at the Court of Appeal, but the sentence of death was commuted to life imprisonment..

2. The petition and the application, no doubt, ride on the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle that all mandatory sentences were unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been imposed, with a view to revising or reviewing them. The Supreme Court re-visited the issue, in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was of application only in murder cases.

3. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of the

Constitution of Kenya of 2010. The offence, that the petitioner was convicted in respect of, attracts a mandatory sentence. The principle laid out in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), declaring mandatory sentences unconstitutional, was boosted by that of the Court of Appeal, in *Julius Kitsao Manyeso vs. Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), with respect to the unconstitutionality of the life sentence. Recently it was held, in *Evans Nyamari Ayako vs. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), that life imprisonment translated to 30 years.

4. The petition and application appear to be informed by *Julius Kitsao Manyeso vs. Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), now that his death sentence was commuted to life imprisonment. As sentences of life imprisonment have been pronounced unjust and unconstitutional, then it stands that the sentence imposed on the petitioner herein is no longer tenable. I hereby set it aside. I shall proceed to consider the appropriate substitute sentence, guided by *Evans Nyamari Ayako vs. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported).

5. The petitioner was convicted of murder, which is a heinous crime. He killed his own father. I shall take that into account. Consequently, I shall, hereby, impose on the petitioner, an imprisonment sentence of 30 years. The time spent in remand custody shall be reckoned in the computation of sentence. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 16TH DAY OF FEBRUARY 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Jamlax Wandera Ojiambo, the petitioner in person.

Advocates

Mrs. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.