



**Kulei v ODPP (Criminal Petition E001 of 2023)
[2024] KEHC 3032 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL PETITION E001 OF 2023
RB NGETICH, J
MARCH 14, 2024**

BETWEEN

MATHEW KIPSEMON KULEI PETITIONER

AND

ODPP RESPONDENT

JUDGMENT

1. By application dated 14th September, 2023, brought under the provisions of articles 50(2)(q), 53 (I) (f) of *the Constitution* of Kenya of Kenya, 2010 and Section 362 as read with Section 364 of the Penal Code, the Petitioner moved this Honourable court seeking the following orders: -
 - i. That the sentence the Petitioner is being subjected to is unconstitutional sentence and should be declared null and void.
 - ii. A declaration that his rights to a fair trial was violated contrary to Articles 50(2)(e) as the court took about 9 years to conclude the matter.
 - iii. The petitioner is seeking for orders to substitute his presidential pleasure sentence to the time already served to make it short and appropriate period.
 - iv. The Petitioner is seeking for orders for reduction of his sentence on time spent in remand custody under section 333(2) of the *Criminal Procedure Code* Cap 75 Laws of Kenya.
 - v. That the petitioner is seeking a relief that on contravention of Article 53 of *the Constitution* of Kenya, 2010, and section 191 of the Children’s Act on sentencing him excessively for 10 years during presidential pleasure.
 - vi. The petitioner is seeking for any other orders or relief the court may deem fair and just in the interest of justice.



2. The application is supported by an affidavit sworn by the Petitioner. He avers that he was charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal code. He was convicted and sentenced to serve 10 years under the presidential pleasure at Kabarnet High Court by Hon. J.M Bwonwonga (judge) in case no. 6 of 2017 delivered on 24th May,2021 and he did not appeal the decision of the Judge.
3. That he is petitioning this honourable court to consider his petition on the following grounds: -
 - i. The petitioner is approaching the court to entertain his petition under article 52 (2) (q) and section 362 as read with section 364 of the *criminal procedure code*.
 - ii. That the petitioner is serving an unconstitutional sentence under section 25 (2) of the *penal code* which had been declared unconstitutional by the courts.
 - iii. That the petitioner is faulting the judgement for procedural impropriety where the petitioner's age was not considered as a factor in sentencing him in contravention of the *children act* section 191 and article 53 of *the constitution* 2010.
 - iv. That the petitioner's right to a fair trial was violated in violation of article 50 (2)(e).
 - v. That section 333 (2) of the *criminal procedure code* had not been complied with while sentencing him as during the sentencing the time spent in remand custody was not factored in, which was One (1) year and 13 days, (5th December,2013(Arrest) -22nd November, 2013 (Went on bond)
4. When the matter came up for hearing, the applicant informed the court that he is 27 years old and was 17 years old when he was convicted of the offence of murder and sentenced to serve 10 years under presidential. That he has been in prison for 2 years 5 Months and thus prayed that the period he was in remand be factored in his sentence.
5. The prosecution counsel Mr. Abwajo submitted that they oppose the prayers made by the Applicant as sentence under presidential pleasure is not definite sentence but in this case the Applicant was given a definite/determinate sentence of 10 years. Counsel submitted that the unconstitutionality is that someone cannot be sentenced to serve determinate sentence under presidential pleasure.
6. On the 21st November, 2023 the court directed that social inquiry be done by the probation officer. The report filed revealed that the applicant did his KCSE at Bartolimo Secondary School in the year 2012 and in the year 2013, he was at Eldoret Juvenile remand. He was released on bond in the year 2014 and he relocated to his sister's residence in Kitale. He returned home in the year 2015 and stayed up to 2021 when he was convicted. He married in the year 2016 and they are blessed with two children. Between 2015 to 2021 the petitioner was doing casual jobs within the community. While in custody he has been involved in carpentry work, farming and schooling.
7. Home report indicate that the petitioner together with the deceased were drinking Chang'aa within the community when the deceased warned the inmate to stop disturbing his elder daughter. The petitioner replied to him that he is raising a prostitute. Out of anger they both started exchanging words leading to the petitioner hitting the deceased with a stone on his head. The petitioner admits the offence but says he did not intend to kill the deceased but acted due to anger and he was under the influence of alcohol. He further stated that the deceased delayed in seeking treatment. He prays for non-custodial sentence so that he can continue with his parental responsibility; that he also plans to start a business or he enroll for college.



8. The petitioner further states that while out on bond, his family tried reconciliation but it failed due to hard stand from the deceased's mother. This was confirmed by his mother who was interviewed. She said after petitioner's arrest, a second reconciliation has not taken place as it seemed the deceased family were satisfied with the sentence. she further stated that the petitioner related well with community members and the deceased's family while out on bond and prayed that he be granted a non-custodial sentence so that he can restart his life and continue with his family responsibility.
9. The petitioner's brother who works as a nurse, stated that the petitioner has been in custody for a period of two years and prayed for his release, that he be granted non-custodial sentence so that he can continue taking care of his young family. The brother is willing facilitate his resettlement at Talai area where he is offering to give him his land.
10. The petitioner's wife prayed for non-custodial sentence so that the petitioner can assist her in parenting and other family responsibilities. She said she is currently receiving support from her parents in law but the support is very minimal. She is agreeable to being relocated to Talai area within Baringo North Sub- County. she says she does casual jobs within the community.
11. The deceased's father said as a family, they are still in pain for losing their kin who was the main family bread winner. He added that the deceased was a police officer who met his death while on leave. He is opposed to the petitioner being released at the moment as the family is still bitter and hostile towards the petitioner. The father added that reconciliation has never taken place and said they had a meeting but never had an agreement since the petitioner's father only wanted his son to be released on bond but never wanted to be involved in compensation process towards them.
12. The deceased's wife is currently working as a support staff in a neighboring school within the community. She said upon the demise of her husband, life has been very difficult as she is struggling economically and has been educating her children through community harambee. She is opposed to petitioner being released as his family have never asked for forgiveness and are not willing to participate in reconciliation process. She said the petitioner's life might be in danger since reconciliation has not taken place.
13. The local administration and the village elder said that the petitioner can be granted non-custodial sentence once the two families have done reconciliation. He said there is hostility towards the petitioner at the moment and if released, his life might be at danger. He said there were attempts to reconciliation but the petitioner's family were not willing to compensate the victim's family.
14. The petitioner who is 27 years old now said his family is willing to relocate him to Talai in Baringo North if released to serve non-custodial sentence. The social inquiry report reveal that the victim and petitioner are cousins. The inmate has been in custody for a period of two years.

Determination

15. I have considered grounds in support of prayers sought and submissions by parties herein and wish to consider this court has jurisdiction to grant reliefs sought by the applicant herein.
16. The Applicant argue that under article 165(3) (d) (i) and (ii) of *the constitution*, this court has jurisdiction to hear and determine any question in respect to interpretation of *the Constitution*



including determining whether or not any law is inconsistent or is in contravention of the Constitution. Article 165 (3) (b) & (d) (i) (ii) provides: -

“(b) Jurisdiction to determine the question whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

“(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of

(i) the question whether any law is inconsistent with or in contravention of this Constitution.

(ii) the question whether anything said to be done under the authority of this Constitution or any other law is inconsistent with, or in contravention with this Constitution.”

17. The issue of jurisdiction raised by the applicant was determined by the Supreme Court in the case of Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate & Others [2013] where the court stated as follows:-

“.....The Kenya Constitution has given the High Court the exclusive jurisdiction to deal with matters of violation of fundamental rights (article 23 as read with article 165 of the Constitution). The High Court on this point has correctly pronounced itself in a judgement by Justice Nambuye & Aroni in Protus vs Republic Constitutional Reference No. 11 of 2011, [2012] eKLR. The Shikuku case fell within the criminal justice system; it involved a claim of the Applicant’s fundamental right by the Court of Appeal, in a final appeal. The trial court failed to impose against the Applicant the least sentence available in law at the time of sentencing.

On the issue of jurisdiction, the learned judges relying on articles 20, 22, 23 and 165 of the Constitution rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the courts, even if the case had gone through the appellate level...”

18. I do agree with the above decisions that this court has jurisdiction to redress violation from operation of law. However, in my view, this petition is appeal or review against sentence imposed by a court of concurrent jurisdiction. No circumstances have been raised to warrant review of decision by my colleague now retired judge Bwonwonga. The right forum to address issues raised by the petitioner in my view is the court of appeal.

19. Final Orders: -

1. This petition is hereby dismissed.
2. Petitioner to seek redress from the court of appeal.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14TH DAY OF MARCH 2024.

.....
RACHEL NGETICH



JUDGE

In the presence of:

Petitioner present.

Ms Ratemo for State.

Elvis, Court Assistant.

