



**Manunga v Republic (Criminal Revision E303 of 2023)
[2024] KEHC 2332 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E303 OF 2023
LM NJUGUNA, J
MARCH 6, 2024**

BETWEEN

JONATHAN NJERU MANUNGA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant has filed a notice of motion dated 14th December 2023 seeking review of the judgment of the court in Embu High Court Criminal Case Number 5 of 1997 where he was sentenced to death, which sentence was commuted to life imprisonment through a presidential directive. The applicant seeks review in light of the Court of Appeal decision in *Julius Kitsao Manyeso v. Republic*, Malindi Court of Appeal Criminal Appeal No. 12 of 2021 delivered on 07th July 2023. The orders sought are as follows:
 - a. A declaration that the indeterminate nature of life sentences is unconstitutional and inconsistent and should be substituted with a lesser sentence;
 - b. A declaration that the indeterminate life sentence is inconsistent with Article 28 of *the Constitution* as it limits the applicant's prospects of being released and should therefore be reviewed to an appropriate sentence; and
 - c. Any other order as the honourable court may deem just in the circumstances of this application.
2. The brief background of the matter is that the applicant was charged and convicted for the offence of Murder contrary to sections 203 as read together with 204 of the *Penal Code* in Embu High Court Criminal Case Number 5 of 1997. He was sentenced to death; which sentence was later commuted to life imprisonment through a presidential directive. He appealed against the said decision to the Court of Appeal Nyeri vide Criminal Appeal No. 8 of 2000 and the appeal was dismissed. The



- applicant (together with another) filed a consolidated petition numbers Embu High Court Petition 1 of 2018, seeking resentencing in light of the Supreme Court's decision in the case of *Francis Karioko Muruatetu & Another v. Republic* Petition No. 15 & 16 of 2015. The petition was dismissed for want of jurisdiction.
3. Once again, the applicant filed a criminal revision vide Embu High Court Criminal Revision Number E026 of 2019, seeking review of the sentence in Embu High Court Criminal Case Number 5 of 1997. The revision was once again dismissed for want of jurisdiction, the court noting that the issue had already been determined. The applicant together with another, filed consolidated criminal revisions in Embu High Court Criminal Revision Numbers E015 & E020 seeking resentencing again and the court dismissed the revisions for lack of jurisdiction. Through the present application, the applicant is seeking the abovementioned orders in light of the decision in *Julius Kitsao Manyeso v Republic Malindi Court of Appeal Criminal Appeal No. 12 of 2021*.
 4. The respondent filed grounds of opposition dated 31st January 2024, opposing the said application on the grounds that, based on its previous pronouncements on similar issues, this court lacks jurisdiction to determine the revision herein.
 5. The revision herein was canvassed by way of written submissions.
 6. The applicant, in his submissions, urged the court to consider his re-sentencing by defining the number of years as guided by the case of *Julius Kitsao Manyeso v. Republic*, Malindi Court of Appeal Criminal Appeal No. 12 of 2021. He placed reliance on the case of *Nelson Mwiti Gikunda & other v. Republic*, Meru High Court Petition No. 47 of 2018 and stated that this court should review his sentence by defining life imprisonment. It was his case that by now he has learnt to be a better citizen in prison given that he has been incarcerated for 27 years. That he has surely been adequately corrected through the corrections systems and is ready to begin a new life outside prison. That he has learnt meaningful crafts that are beneficial to the community once he is released.
 7. The respondent relied on the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) and argued that resentencing can only be done by the trial court and that the issues herein were already determined by a court of concurrent jurisdiction. That this court still lacks jurisdiction to review the sentence imposed on the applicant. It was its argument that section 362 of the *Criminal Procedure Code* provides for supervisory jurisdiction with the view of the High Court supervising subordinate courts and not itself.
 8. That the determination in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023), was the Court of Appeal resented the petitioner while sitting as an appellate court and so this court cannot resentence the applicant as it is not sitting as an appellate court. That the issues herein can only be addressed by the Court of Appeal.
 9. From the foregoing, the issue for determination is whether this court has the power to review the sentence meted out to the applicant.
 10. The High Court's supervisory jurisdiction in criminal cases is established under Section 362 of the Criminal Procedure Code 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.”



11. In the Malaysian case of *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was held:

“The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

12. The kind of supervisory jurisdiction to be applied under section 362 of the *Criminal Procedure Code* is limited to the subordinate court’s findings, sentences, orders and regularity of any proceedings and can only be exercised by the High Court. This revision arises from a murder trial conducted at the High Court, which has original jurisdiction in that regard. There is no provision allowing or prohibiting the High Court from revising its own findings. Further, the respondent submitted that the resentencing sought herein should be given audience in the Court of Appeal. The respondent is intimating that the Court of Appeal has supervisory jurisdiction over the High Court in light of section 362 of the *Criminal Procedure Code*. From a reading of the section, that is not the case and should not be taken as such.
13. The Court of Appeal decision in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) was delivered on 07th July 2023 and the court left review of sentences to the trial court because sentencing is done discretionarily and that the Court of Appeal had no business reviewing sentences. Ideally, this decision put the High Court at liberty to review its findings where it sat as a court of original jurisdiction. This means that before the said date, the High Court did not have jurisdiction to resentence and therefore, it had no choice but to dismiss the applicant’s previous attempts for resentencing. Jurisdiction has since been donated to the High Court through this jurisprudence. This court is bound by the doctrine of stare decisis and can therefore exercise its jurisdiction as provided in the said Court of Appeal decision.
14. In this guiding decision in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (*supra*) the court held thus:

“...This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate 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*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman 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 prospect of release if that rehabilitation is achieved.”

15. The applicant is serving a sentence of life imprisonment as a result of commutation of his death sentence through a presidential directive. The said sentence of life imprisonment has since been adjudged discriminatory through the guiding Court of Appeal decision herein. The Court of Appeal has recently pronounced itself further on the issue in the case of *Evans Nyamari Ayako v. Republic* Criminal Appeal No. 22 of 2018 where it held thus, on 08th December 2023 while sitting in Kisumu:

“This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

16. Consequently, and being guided by the Superior Court’s decisions, I find that the application has merit and is hereby allowed. The life imprisonment imposed on the applicant is hereby set aside and it is hereby reduced to the term already served. He is set free forthwith unless otherwise lawfully held.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**

