



**Njue v Republic (Constitutional Petition E029 of 2023)
[2024] KEHC 2519 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E029 OF 2023**

LM NJUGUNA, J

MARCH 13, 2024

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 25(A)&(C), 27(1), 28, 29(A),(D)&(F), 48, 50(1)(2(L)&(P))ARTICLE
23(1) AS READ TOGETHER WITH ARTICLE 165 OF THE CONSTITUTION OF
KENYA 2010ANDIN THE MATTER OF SECTIONS 216 AND 329 OF THE CRIMINAL
PROCEDURE CODEANDIN THE MATTER OF SECTION 296(2) OF THE PENAL CODE**

BETWEEN

LABAN NYAGA NJUE PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner has filed a petition dated 30th November 2023 seeking the intervention of this court on the sentence imposed. He stated that he was sentenced to death following conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code, in Chuka Criminal Case Number 1516 of 2002. That the decision was upheld on appeal both at the Embu High Court and the Court of Appeal in Nyeri. The petitioner filed a petition 10 of 2019 which was dismissed and the file closed. At the trial, the petitioner was convicted and sentenced to death, which sentence was later commuted to life imprisonment through a Presidential directive. The orders sought through the petition are as follows:
 - a. A declaration that the sentence of life imprisonment is inconsistent with Article 50(2)(b)&(p) of *the Constitution* and Section 329 of the Criminal Procedure Code;
 - b. A declaration that section 296(2) of the Penal Code is inconsistent with Articles 26(1)(2), 28, 48, 50(1)(2)(p) of *the Constitution*; and
 - c. A declaration that the Constitutional rights of the petitioner have been violated.



2. The petition is unopposed.
3. The parties herein filed their written submissions.
4. The petitioner submitted that at the point of imposing the sentence, the trial court had no option but to apply the mandatory death sentence. That through a Presidential directive, the sentence was commuted to life imprisonment, which is indeterminate and the courts have since held the same to be unconstitutional. That this court is clothed with the relevant jurisdiction to reconsider this sentence and review it.
5. He placed reliance on the cases of Nelson Mwitikiri Gikunda & 2 others v Republic [2018] eKLR and Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR). That the trial court did not take into account the mitigating factors at the time of sentencing. That he has since served 22 years in prison and has surely reformed through various prison rehabilitation programs. He argued that the indeterminate nature of life imprisonment sentence is discriminatory and urged the court to consider section 333(2) of the Criminal Procedure Code and include time served in its review of the sentence.
6. The respondent submitted that indeed the court has jurisdiction to determine the petition under Article 165 of *the Constitution* on matters relating to violation of fundamental freedoms under the Bill of Rights. That the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR (Muruatetu 1) should guide the court where the petitioner seeks resentencing where mandatory sentences were applied by the trial court. That the petitioner committed a heinous crime for which the death sentence was commensurate. That according to the Judiciary Sentencing Guidelines 2023, sentences imposed must be fair and at the same time, where necessary, they must be deterrent. That the death sentence meets both requirements and it should be upheld.
7. The issue for determination is whether the court should review the sentence meted out to the petitioner.
8. The petitioner was sentenced to death by the trial court in 2004. The Supreme Court of Kenya declared the death sentence unconstitutional in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR (Muruatetu 1). In the course of time, the death sentence was commuted to life imprisonment through a Presidential directive. The petitioner is now serving the sentence of life imprisonment, which he is challenging through this petition. He has referred to the Court of Appeal decision in the case of Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) delivered on 07th July 2023, arguing that the mitigating factors were not considered because the law prescribed a mandatory sentence, which the trial magistrate applied.
9. The petition herein is rightly before this court because the High Court has jurisdiction under Article 165(3) of *the Constitution* to determine cases where the rights and fundamental freedoms of citizens under the Bill of Rights have been violated. Further, this court has jurisdiction to entertain matters of resentencing as donated to it through recent jurisprudence, particularly in the Court of Appeal decision in the case of Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023). In this case, it was held thus:

“...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*”.

10. Article 48 of *the Constitution* guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which includes the right to downward review of sentence. The death sentence was imposed by the trial court but the same was commuted to life imprisonment through a Presidential directive. With regards to mandatory sentences, the Supreme Court had this to say in the case of Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (supra) (Muruatetu 1):

“Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right.... We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute”

11. I am guided by the Superior courts in the above-cited decisions to the extent that mandatory or minimum sentences curtail the trial court’s discretion on sentencing. The Supreme Court offered further guidance on the issue of re-sentencing and warned against haphazard use of the “Muruatetu 1” principles. This was stated in the case of Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the Supreme Court stated;

“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*”

12. In light of the foregoing, the mandatory sentence can be reviewed purely on the strength of stare decisis. However, since the mandatory death sentence was commuted the indeterminate life imprisonment sentence, this court is still obliged to review the same as well because a superior court has since guided this court in that regard. The Court of Appeal in the case of Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (supra) rendered the indeterminate nature of life imprisonment discriminatory. The court also reviewed the life imprisonment sentence downwards to 40 years imprisonment to run from the date of conviction.

13. In light of this decision, the life imprisonment sentence imposed on the petitioner should be defined. Further, the Court of Appeal sitting in Kisumu rendered itself on 08th December 2023 in the case of Evans Nyamari Ayako v. Republic Criminal Appeal No. 22 of 2018 defining the life imprisonment sentence to mean 30 years imprisonment. It was held thus:

“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.”

14. I have considered the circumstances of the case and the findings of the various courts at the different stages, as well as the Probation Officer's report. Consequently, and being guided by the Superior Court's decisions, I find that the petition has merit and is hereby allowed. The sentence of life imprisonment is hereby set aside and is substituted with a sentence of 30 years imprisonment, to run from the date of conviction.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the **Petitioner**

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

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