



**Lokale v Republic (Criminal Miscellaneous Application
E021 of 2019) [2024] KEHC 3223 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL MISCELLANEOUS APPLICATION E021 OF 2019**

RN NYAKUNDI, J

APRIL 4, 2024

BETWEEN

EKITELA NAMI LOKALE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged in the lower court with others with the offence of robbery with violence contrary to section 295 as read with 296(2) of the [Penal code](#).
2. The particulars of the offence were that on the 1st August, 2013 at Kakuma refugee camp in Turkana West district within Turkana County, jointly with two others not before court while armed with dangerous weapons namely knives, robbed John Ekai of his motor bicycle make Nitam valued at Kshs. 4,850/=, five kilograms of beans valued at Kshs. 650/=, 4 kg of Ujimix valued at Kshs. 400/= and five litre cooking oil valued at Kshs. 850/=, all amounting to Kshs 6,750 and at the time of such robbery used actual violence against the said John Ekai causing him actual bodily harm.
3. The applicant was convicted of the said charge and a death sentence was imposed. The applicant filed an application seeking a re-sentencing. I take note that the applicant is not disputing conviction but seeks a lenient sentence.

Analysis and Determination

4. I have considered the application and all the information available. In such circumstances the court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.



5. The offence of robbery with violence is contained in Sections 295 and 296(2) of the [Penal Code](#) as follows:

295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

6. Further, In [Jeremiah Oloo Odira v Republic](#) [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” See *Olouch v Republic* (1985) KLR)

On Sentencing

7. In the case of *Francis Karioko Muruatetu & Another Vs Republic*, Criminal Petition No. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict’s mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”

8. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- (a) age of the offender;
- (b) being a first offender;



- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

9. I have perused through the trial court’s judgment and I have taken note that the court while sentencing, addressed its mind as follows:

“I note the provisions of the Law, prosecution remarks, accused’s remarks in mitigation. This is a serious offence that needs to be a warning to others who may try to attack innocent members of the public. Accused is sentenced to life imprisonment. Right of appeal explained.”

10. It is now the legal position in Kenya that convicts sentenced to mandatory life imprisonment in any particular circumstances offends the constitutional provisions under the bill of rights. Literally prior to these decisions against such life imprisonment the person so convicted are presumed to serve their sentences for their natural lives.

11. In the Canadian case of *R v Big Drug Mart Ltd* [1985] the court observed as follows:

“the meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter’s protection”.

12. In the domestic arena the court of appeal in *Julius Kiso Manyeso v Republic* criminal appeal No. 12 of 2021 had this to say;

“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* “ Further, 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.”



13. Following the decision in Kitsao case the Applicant sought a review of his sentence submitting inter-alia that life imprisonment without parole is punishment which infringes or violates his constitutional rights. As a general principle a court has no authority to leave in place a conviction or sentence that violates a substantive constitutional provision primarily under the bill of rights. In light of the current court of appeal precedent I find no support pursuant to broader protections provided by the Kenyan constitution to arrive at a different view of retaining life imprisonment without parole as it is the case with the impugned sentence being challenged by the applicant. The applicant who has the burden of establishing entitlement to the relief requested has discharged it in the context of the law.
14. On the other hand, It is my considered view that the objectives and guidelines of sentencing were not considered by the trial court. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the ‘standard’ by taking into account a non-exhaustive “check list of aggravating and mitigating factors” which are already largely taken into account by sentencing courts. The offence of robbery with violence attracts a death sentence. I have taken into account the objectives of sentencing and the sentencing guidelines. The life sentence is interfered with and substituted with a sentence of 20 years imprisonment. I have equally considered the provisions of section 333(2) of the *CPC* and the sentence should run from the date of arrest i.e. 6th August, 2013. Whether it be called a jail, a prison, correctional center the purpose of the facilities throughout Kenya is to detain remandees awaiting trial who cannot afford the bail terms under Art. 49 (1) (h) of *the constitution*. Loss of freedom of choice and privacy are inherent incidence of confinement in our prisons facilities and the fact that such detention interferes with the detainees fundamental rights and freedoms at the end of the trial the decision to sentence must take into account that period spent in confinement. All that time spent in pre-trial detention ought to count towards the punishment. The sentencing judge should not even blink at the commensurability of section 333(2) of the *CPC*. If an accused person is denied bail or he cannot afford to meet the terms set by the trial court he or she would be detained pending trial and final determination of his or her case. The law envisaged that upon later conviction this time spent in pre-trial detention is to be credited against the period of incarceration to which the accused would otherwise be sentenced. That is the rationale have invoked section 333(2) of the *CPC* in favor of the Applicant.
15. Orders accordingly.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

In the presence of;

Mr. Onkoba for the state

Applicant present in person

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R. NYAKUNDI

JUDGE

