



Gatimu v Republic (Petition E037 of 2022) [2024] KEHC 5093 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
PETITION E037 OF 2022
RM MWONGO, J**

MAY 9, 2024

BETWEEN

HARRISON KINYUA GATIMU PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code, and was convicted and sentenced to suffer death on 28th April, 2009. The death sentence was commuted to life imprisonment, by presidential decree in the 2009.
2. This appeal in Criminal Appeal No. 242 of 2012 at Kerugoya High Court the same was dismissed on 8th December, 2016. He appealed to the Court of Appeal vide Criminal Appeal No. 27 of 2017 at Nyeri High Court but later withdrew it.
3. The petitioner moves this Court by way of Petition seeking resentencing of his life sentence to a lenient sentence.
4. The brief facts of the case are that on the 7th December, 2007 at Kiamuthambi village within Kirinyaga, the accused jointly with one Margaret Muthoni Murimi, a co-accused and others not before court while armed with dangerous weapons namely AK 47 rifles and a pistol robbed Paul Kinyua Njeru of a motor vehicle, mobile phone, a pair of black leather shoes, cash Kshs 2000 and a driving licence all valued at Kshs 508, 500. During the robbery, they threatened to use actual violence to the complainant.
- 5 The petitioner submits that the life sentence is truly harsh, excessive, humiliating punishment as it indefinite. He referred the case of Godfrey Ngotho Mutiso v Director of Public Prosecution [2019] eKLR Ogola J held:

“I have carefully considered the foregoing, and I have arrived at the decision that the Petitioner should appropriately be punished for his crime, even after considering all the above factors



and mitigating circumstances. The Petitioner did not mean to kill, but the killing still took place and the deceased's family are still mourning. There is no evidence of any outreach by the family of the Petitioner to that of the deceased to enable the family of the deceased accept their situation. I have also considered that the Petitioner is an active member and official of the Catholic Church. These factors have very considerably in my view reduced the period for which I sentence the Petitioner. I therefore herewith set aside and vacate the death sentence imposed on the Petitioner and substitute therefor a sentence of twenty-seven (27) years from the date of conviction."

6. The petitioner submits that article 22 of the Constitution provides that every person has the right to institute court proceedings claiming denial of a right or fundamental freedom in the bill of right. Article 23 of the Constitution provide that the high court has jurisdiction in accordance with article 165, to hear and determine application for redress of a denial. Also, in articles 27(1)(2)(4) of the Constitution.
7. Further the petitioner submitted that being first offender the trial court ought to grant him a soft sentence. He stated that he has been rehabilitated during the time he has been in prison, added that he 38 years old at the time of his arrest on 6th April, 2008 married and had children. He is now 53 years old. He is remorseful for the offence and seeks forgiveness from the victim's family. Since then, he has participated in some courses in prison as the way of rehabilitation and acquired skills and knowledge and awarded some certificate as follows:
 - i) Certificate of tailoring;
 - ii) Certificate of dressing.
8. The Prison Report dated 16th January, 2023 indicates that the petitioner is industrious and has maintained a clean record for he has never been charged of any offence against prison discipline.
9. The prosecution submits that by virtue of Articles 23 and 165 of the Constitution of Kenya 2010, this court has jurisdiction to deal with the Applicant/Petition before it, including determination of issues of violation of fundamental rights.
10. The respondent submits that the applicant has to demonstrate that he was not afforded the opportunity by the trial Court to mitigate as envisaged under Section 216 and 329 of the Criminal Procedure Code. The prosecution asserts that the provisions of the law that impose the death sentence are still couched in mandatory terms.
11. The respondent submits that the applicant was convicted of a capital offence without the trial court having considered the mitigating factors as such, this Court has jurisdiction to consider the mitigating factor and render itself appropriately.

Analysis

12. There is no dispute that this court is vested with supervisory and revisionary jurisdiction under Article 165 of the Constitution and Section 362 of the CPC.
13. It is also not in dispute that the petitioner was convicted and sentenced to suffer death on 28th April, 2009. The offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The death sentence was commuted to life imprisonment, by presidential decree in the 2009.
14. The Court of Appeal in Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) held that imposition of a mandatory indeterminate life sentence,



is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*. Thus, the sentence now being served by the Petitioner is unconstitutional, and this court is obliged to substitute it.

15. In substituting the said life sentence this court will take into account the aggravating and mitigating circumstance of the offence; the time the Petitioner has spent in custody (15 years) and whether he has been rehabilitated; any prior offence; and the *Judiciary Sentencing Guidelines* 2016.
16. The Prison Report dated 16th January, 2023 indicates that the petitioner is industrious and has maintained a clean record for he has never been charged of any offence against prison discipline. This is also taken into account.
17. In light of the foregoing the Petitioner's Life Sentence is substituted with a sentence of twenty-five (25) years with effect from the date of his arrest but excluding any period the petitioner was not in custody on bail/bond.
18. Orders accordingly.

DATED AT KERUGOYA THIS 9TH DAY OF MAY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

- 1.Harrison Kinyua Gatimu - Applicant Present at Nyeri Maximum
- 2.Mamba for State
- 3.Murage - Court Assistant

