



Kago v Republic (Petition E008 of 2022) [2024] KEHC 5031 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
PETITION E008 OF 2022
RM MWONGO, J
MAY 8, 2024**

BETWEEN

JOSEPH MUTHEE KAGO PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. On 1st August, 2022 the petitioner filed this petition seeking only resentencing as he is serving a life sentence. This language is often used to mean than an applicant is challenging the sentence of life imprisonment.
2. The petitioner was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was tried, convicted and sentenced to death in 2013. The death sentence was later commuted to a sentence of life imprisonment by H.E the President of Kenya.
3. On 3rd December, 2014 being dissatisfied with the court decision he filed an appeal to High Court vide HCCR Appeal No. 62 of 2014, which was dismissed on 2nd November 2017. He further appealed to the court of appeal vide C.O.A.CR. Appeal No. 121 of 2019, but later withdrew the appeal and decided to pursue resentencing through this petition.
4. The brief facts are that on the night of 23rd January, 2013 at 9.45 pm at Kambedoso village, Kirinyaga County, the petitioner and three other men jointly robbed one Roman Kariuki, of four mobile phones make Nokia 1100; Nokia 2300; Nokia CCIT and Motorola C13 all valued at Kshs 51,000/= and cash of Kshs 20,000/=; and that they used physical violence on the complainant Roman Kariuki. The evidence was that the petitioner and his accomplices were armed with axes, panga and bright torches. They beat the victim up demanding money while threatening to kill him.



Petitioner Submissions

5. The petitioner asserts that the death sentence was commuted to life sentence. He seeks to review of the life sentence in the interest of justice. He relies on Article 50(2)(q) and 165 (6) of *the Constitution* 2010, and Section 327(2) of the C.P.C. He has served a term of 11 years since the date of his arrest on 27th January, 2013.
6. The petitioner submits that the life sentence is a truly harsh, excessive, humiliating punishment as it is indefinite. Its nature does not grant him any chance to rehabilitate and reintegrate into the society, contrary to the primary purpose of a sentence of imprisonment as enshrined under United Nations minimum standard rules as read with Articles 2(5)(6) of *the Constitution*.
7. The petitioner submits that during the sentencing by the lower court, the trial magistrate failed to consider his mitigation factors as provided by Sections 216 and 329 of the C.P.C. He urges this court to allow him to bring further mitigation in support of his application for review of life sentence.

8 In his submissions, he says he has been of exemplary conduct and character whilst serving his sentence, that he has been rehabilitated and changed his attitude towards crime. In addition, that he participated in some courses in prison as the way of rehabilitation and acquired skills and knowledge and was awarded some certificate as follows:
 - i. Certificate of Carpentry/Joiner Grade(II)
 - ii. Certificate of Recognition in Imarisha Mradi.
 - iii. Certificate of Resources Oriented Development Initiatives (Rodi) Kenya.
9. The petitioner says he is very remorseful and regrets his irresponsible action, while relatively old, 32 years, at the time of commission of the offence and did not fully appreciate the repercussions of his irresponsibility for which he seek forgiveness. He is a first offender, married and God blessed them with 2 children who need his support.

Analysis

10. It is not disputed that the High Court has powers to review criminal cases as part of its supervisory and revisionary jurisdiction under Article 169 (6) of *the Constitution* and Section 362 of the Criminal Procedure Code.
11. In the petition at hand, the offence was committed in aggravating circumstances as the petitioner and his accomplices attacked their victims with pangas as they robbed them. However, the violence did not result in the death of any of the victims.
12. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 are as follows:
 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 4. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs



and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
13. Clearly, sentencing guidelines require that when courts mete sentences, an accused person can expect that he could be rehabilitated; that he could recompense the victim (s) amongst other things. This suggests that a sentence should, at the very least be definitive, and dependant on the aggravating and mitigating circumstances.
14. There have been rapid developments on the issue of the life sentence in Kenya. The key view has been that a life sentence should be definite in its term. There is also a view in the Court of Appeal that a life sentence is equivalent to 30 years' imprisonment. This was stated in *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.”

15. In the Court of Appeal Case of Julius Kitsao Manyeso v Republic [2003] eKLR delivered on 7th July 2023, it was held that imposition of a [mandatory] indeterminate life sentence constitutes unjustifiable discrimination, and is unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. Thus, life imprisonment is unconstitutional.
16. In light of the Manyeso case, the petitioner's life sentence is unconstitutional, and this court is obliged to substitute the said life sentence with a determinate sentence. In this exercise, the court takes into account the mitigating and aggravating circumstance surrounding the crime.
17. Accordingly, the petitioner's life sentence is substituted with a sentence of twenty-eight (28) years and shall, subject to the provisions of Section 333(2) CPC to take into account the period that the petitioner has spent in prison custody.
18. Orders accordingly.

DATED AT KERUGOYA THIS 8TH DAY OF MAY 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Joseph Muthee Kago - Applicant present in Nyeri Maximum



Maari - for State

Murage - Court Assistant

