



**Ngari v Republic (Criminal Petition E016 of 2023)
[2024] KEHC 5059 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL PETITION E016 OF 2023
RM MWONGO, J
MAY 8, 2024**

BETWEEN

ISAIAH WANGAI NGARI 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. He was convicted and sentenced to death on 30th June, 2015. He appealed in the High Court Appeal No. 29 of 2015 and the same was dismissed.
2. The death sentence was commuted to life sentence imprisonment, by Presidential decree in the year 2016. He then moved to Court of Appeal under Court of Appel Criminal Case No. 37 of 2017 at Nyeri.
3. The Petitioner has since withdrawn the appeal and now moves this Court for review of his sentence. He does not challenge the conviction but seeks a definite sentence.
4. Briefly, the particulars of the offence are that on the 3rd May, 2013 at Muragara village in Kirinyaga West District within Kirinyaga County jointly with another not before court being armed with dangerous weapon namely panga, robbed Charles Githae his mobile phone make Samsung and cash Kshs. 510 all valued at Kshs. 3,000 and wounded the him.
5. Charles Githae the victim testified that the accused assaulted him with a panga as he demanded for his phone. PW6 the clinical officer examined the complainant and noted that he had cut wounds on the head, nose, mouth and had missing three upper incisors teeth. He had an open fracture on the right forearm. He assessed the injuries to amount to grievous harm.



6. The petitioner seeks court intervention only in sentencing since the death sentence was commuted to life sentence imprisonment, by presidential decree in the year 2016. He filed this application when he learned that the sentence is unconstitutional as well held by court of appeal in case of Julius Kitsao Manyeso vs Republic (2023) eKLR CR. Appeal No.12 of 2021 at Malindi Where the court of appeal declared life sentence being unconstitutional.
7. The Petitioner urges this honourable court to impose a sentence that is proportionate in terms of the above decision. He submits that the imposed sentence is harsh and excessive, humiliating punishment due to its indefinite nature. He asserts that being a first-time offender he is constitutionally guaranteed for the benefit of the law in sentencing as prescribed under provision of article 25, 27 and 50(2)(p)(q) of constitution, in order to grant him a chance in life through imposition of appropriate sentence.
8. The petitioner states that, being a first offender, the trial court ought to have granted him a soft sentence, since there was no evidence tabled before court indicating that he cannot reform or rehabilitate when given a lesser sentence.
9. He adds that since his imprisonment he has participated in some courses in while in prison rehabilitation facilities as are the ways of rehabilitation as offered by correctional service, and has acquired skills and knowledge which was not available to him, which affect his future.
 - i. Certificate of Carpentry and Joinery Grade Iii
 - ii. Certificate of Rodi Kenya
 - iii. Certificate in Theology
 - iv. Certificate of Prisoner Journey
10. The petitioner is remorseful and pleads for the court's leniency. He is 39 years old.
11. It is not disputed by the Respondent that the High Court has jurisdiction, in accordance with Article 165, to hear and determine an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Subject to clause (5), the High Court shall have-

“Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights had been denied, violated, infringed or threatened.”

The respondent submit that this Honourable Court has jurisdiction to redress a violation that arose from the operation of the law through the system of Courts.

12. The respondent concedes that upon the interpretation by the Courts under the Bill of Rights as envisaged in *the Constitution* of Kenya 2010, the mandatory sentence has since been declared unconstitutional although the death sentence itself is not a cruel, inhuman or degrading. Article 26(3) of *the Constitution* of Kenya 2010 provides that where the death sentence is provided under any law, it shall not amount to the deprivation of the right to serve a death sentence.
13. 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.
14. The respondent further submits that Courts having declared maximum and minimum sentences inconsistent with *the Constitution*, this Court has jurisdiction to render itself on the applicant's application on definite sentence while considering mitigating factors on:



- 1) The age of the offender;
 - 2) Whether the applicant was a first offender;
 - 3) Whether the applicant pleaded guilty;
 - 4) The character and record of the applicant
 - 5) The possibility of reform and social re-adaption of the applicant
15. The state urges that Court should evaluate the mitigation factors and evaluate the appropriate sentence befitting the circumstances of the case.
 16. In light of the Julius Kitsao Manyeso Case [2023] eKLR, the life sentence in Kenya has been found to be unconstitutional. The sentence being served by the Petitioner is therefore unconstitutional and this court and should interfered with it.
 17. The petitioner stated that, being a first offender, the trial court ought to grant him a soft sentence, since there was any evidence tabled before court indicating that he cannot reform or rehabilitate when given a lesser sentence. He also states that he has participated in some courses in while in prison rehabilitation facilities as the way of rehabilitation. They include: carpentry, theology classes and prisoner journey. The court has taken these into account.
 18. The prison report dated 16th January, 2013 indicates that the petitioner has maintained a clean record and has never been charged with any offence against Prison Discipline. This has also been taken into account.
 19. The court has also taken into account the period spent in custody which should be considered in sentencing the accused. The petitioner was arrested on 3rd May, 2013. He was sentenced on 30th May, 2015. He has been in custody for 11 years. The period spent in custody must be taken into account. Accordance with Section 333(2) of the Criminal Procedure Code.
 20. Accordingly, the Petitioner's life sentence is substituted with a sentence of twenty-six (26) years and such period shall take into account the period already spent by the Petitioner in Custody.
 21. Orders accordingly.

DATED AT KERUGOYA THIS 8TH DAY OF MAY 2024

R. MWONGO

JUDGE

Delivered in the presence of:

1. Isaiah Wangai Ngari - Applicant present at Nyeri Maximum
2. Mamba - for State
3. Murage - Court Assistant

