



REPUBLIC OF KENYA



**Sewedy v Republic (Criminal Petition 26 of 2023)
[2024] KEHC 5011 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL PETITION 26 OF 2023
DO OGEMBO, J
MAY 16, 2024**

BETWEEN

ISSA JOMO SEWEDY APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an Application for review of sentence and Conviction of Bondo PM's
Court vide Criminal Case No. 481 of 2015 delivered by Hon. M. Obiero – PM)*

RULING

1. The Applicant herein, Issa Jomo Sewedy has applied to this court for revision of his sentence based on the mitigation that he has raised. He has filed a document headed “application” which is undated, and undated Chamber Summons application and a Supporting Affidavit. The gist of his application is that he was charged and tried for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code in Bondo Criminal Case No. 481 of 2015 and sentenced to life imprisonment. He filed appeal No. HCCR Appeal 40 of 2016 at Siaya High Court. His appeal on both conviction and sentence was wholly dismissed on 10/11/2016.
2. He has now deponed that he was sentenced to a mandatory sentence without consideration of his mitigation and the circumstances of his case. He relies on the case of *Muruatetu & Anothr – v- R* Pet. 15/16 OF 2015,) that mandatory sentences are unconstitutional and discriminatory. He has also claimed that the period he spent in custody be computed in his sentence pursuant to Section 333 (2) of the *Criminal Procedure Code*.
3. In the submissions that the Applicant has filed, he has stressed on the above overment he has made in his Affidavit in support of application. He has gone ahead to raise mitigating factors showing the various courses he has undertaken and the relevant certificates earned for consideration. He relies on *Sango Mohamed Sango & Ano. – v- R*, Criminal Appeal No. 1 Of 2023 (2015) Eklr, *Henry Katap*



Kipkeu – v- R, Criminal Appeal No. 295/2008, And Dorcas Jebet Keter & Ano. – v- R, Cr. Appeal No. 10/2012.

4. Finally, he has submitted that the life sentence imposed on him is unconstitutional and contravenes Article 27, 28, 36, 38, 40, 33 and 31 of the Constitution. He prays for revision of his sentence to one that will give him the opportunity to reform and rejoin society.
5. The prosecution opposes the application of the Applicant, basically on grounds that the Applicant ought to explore his right of appeal. The prosecution urges that this application be dismissed.
6. I have considered this application of the Applicant, the Affidavit filed in support of the same, the submissions filed and the authorities relied on. I have also considered the response of the prosecution.
7. The Applicant seeks revision of his sentence, first, on the ground that life sentence meted out against him was a mandatory sentence. He relies on the case of Muruatetu & Ano. – v- R, a decision of the Supreme Court. It is therefore, important to consider the ration in that decision. In the said decision, it is important to understand that he court declared the mandatory nature of the sentence for the offence of murder (death) unconstitutional. It did not declare death sentence per se unconstitutional. To that extent, death sentence and indeed any other minimum or maximum sentences prescribed in law remains legal and the courts may mete out the same based on the facts, law and circumstances of each case.
8. In the same case, the court noted that the said mandatory sentence was unconstitutional to the extent that it took away the discretionary powers of the court on sentencing. And this formed the opinion of the Supreme Court in directing that the applicants be referred back to the trial courts which would take their mitigation and re-sentence the Applicants.
9. So the issue is not whether the applicants were given maximum sentences. It was that they had been accorded the opportunity to make their mitigation before their sentences were passed.
10. I have perused the record of proceedings of the trial of the Applicant. It is clear that the Applicant was accorded the opportunity to mitigate on 13/4/2016. He stated;

“I do pray for leniency. I have children who depend on me.”

“I have considered the mitigation by the accused person and the circumstances of this case.
11. The court proceeded to note as follows in the sentencing the Applicant;

I have noted that the accused is a first offender. However, from the circumstances of this case, the accused person planned and attacked the helpless lady that is the deceased and cut her all over the body and left her for death. In fact, in the mind of the accused, he had killed the deceased by the time he went and covered her on bed. The accused does not deserve any leniency from this court. The accused must serve the maximum sentence which is life imprisonment. I do sentence the accused to life imprisonment. Right of appeal explained.”
12. The trial court therefore apart from according the Applicant the opportunity to mitigate, also considered such mitigation and the circumstances of the case before meting out the maximum sentence. It is therefore not quite right to submit and claim that the trial court passed the sentence as a mandatory minimum or maximum sentence.



13. And in dismissing the appeal of the Applicant, the Hon. Justice Makau J. A, noted;
- “The upshot is that the appeal is dismissed. I uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate.”
14. And the Honourable Judge made this finding after a comprehensive evaluation of the evidence and the circumstances of the case. The High Court having determined the appeal of the Applicant, the only recourse open for the Applicant was to appeal to a higher court. This court does not have or possess any jurisdiction to revise any orders or findings of a judge of concurrent jurisdiction. And I decline the invitation of the Applicant.
15. From the submissions of the Applicant, he has raised the issue of determinate sentences. This court is aware of the trends in our jurisprudence on the need to mete out determinate sentences. Whereas life imprisonment remains a legal sentence in our statutes, courts have recently adopted the practice of imposing determinate sentences seemed to be equivalent to life sentences where it is suitable. I have considered the circumstances of this case and I am convinced that it is proper that this court, without altering the sentence of the court passed by the trial court and confirmed on appeal, to mete out a determinate sentence on the Applicant.
16. I accordingly therefore substitute the sentence of life imprisonment meted out against the Applicant. I order that the Applicant shall serve 40 years imprisonment. This sentence shall run from 11/6/2015, the date when the Applicant was first arraigned before court. Pursuant to Section 333 (2) of the [Criminal Procedure Code](#). It is so ordered.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY, 2024.

D. O. OGEMBO

JUDGE

Court

Read out in Court in presence of Applicant (Manyani) and Ms. Kerubo for State.

D. O. OGEMBO

JUDGE

