



REPUBLIC OF KENYA



**Mutai v Republic (Criminal Appeal 19 of 2023)
[2024] KEHC 7272 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 19 OF 2023**

**RB NGETICH, J
JUNE 14, 2024**

BETWEEN

PHILIP KIPNGENO MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the decision of the Honourable M. Kasera in Eldama Ravine
Magistrate's courts Criminal case No. 608 of 2011 delivered on the 13th December, 2012)*

JUDGMENT

1. The Appellant and 2 others were charged with three counts of Robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars were that on the 2nd day of July, 2011 at about 2230 hours at Equator Trading Centre in Koibatek District of Baringo County, the accused persons robbed John Wafula cash Kshs.2100/= and at or immediately before the time of robbery used actual violence to the said John Wafula and caused the death of the said John Wafula.
2. The particulars to count 2 are that on the 2nd day of July, 2011 at about 2230hours at Equator Trading Centre in Koibatek District of Baringo County, the accused persons robbed Alex Wafula cash Kshs.800/= and at or immediately before the time of robbery used actual violence to the said Alex Wafula.
3. Particulars to count 3 are that on the 2nd day of July, 2011 at about 2230 hours at Equator Trading Centre in Koibatek District of Baringo County, accused persons robbed Antony Ngori cash Kshs.200/= and at or immediately before the time of robbery used actual violence to the said Antony Ngori.
4. The appellant denied all the 3 counts hence the matter was set down for full trial. Upon close of hearing, the trial court delivered judgement on the 13th December, 2012 where the court found the Appellant guilty as charged and convicted him of the offence in Count 1 and Count II. The appellant



- was acquitted of count III under Section 215 of the [Penal Code](#). The trial court subsequently sentenced the accused to suffer death sentence in respect to Count I and II.
5. Dissatisfied with the decision of the trial court, the Appellant has now appealed to this court against conviction on the following Principal grounds: -
 - i. The Learned trial Magistrate erred in both law and facts when she convicted the Appellant but failed to consider that the charge sheet was defective.
 - ii. The Learned Trial Magistrate erred in both law and fact by convicting the without observing that the case was not proved beyond reasonable doubt as the law provides.
 - iii. The trial Magistrate erred in both law and facts by convicting the Appellant hence failed to glimpse that the investigations was shoddy and inconsistent.
 6. The appellant prays that his appeal be allowed, conviction quashed and the sentence be set aside and the Appellant set at liberty.
 7. The Appellant filed amended grounds of Appeal together with the written Submissions. The Appellant sets down the following grounds of appeal :-
 - i. That the Honourable Magistrate failed to note that the elements of the offence charged were never proved against the Appellant to the required standards as the Appellant was not identified as the person who was armed neither was he identified as the person who attacked the complainant and lastly no dangerous weapon was recovered from him.
 - ii. That the Learned trial Magistrate erred in law by awarding a conviction and a mandatory death sentence but failed to appreciate recent law developments, the [Sentencing Policy Guidelines](#) and the Constitutional provisions Article 50(2) (q).
 - iii. That the Learned Trial Magistrate erred in law and fact when he failed to consider the defence evidence given by the Appellant alongside other prosecution evidence.
 8. When the matter came up for hearing on the 16th April, 2024, the Appellant informed the court that he had filed written submissions. He stated that he was charged with the offence of robbery with violence and that he is not challenging conviction. He stated that he was condemned to death on the 23rd December, 2012 but it was commuted to life sentence and he is now serving life sentence.
 9. The Appellant submitted that he is praying for a determinate sentence stating that he has been in prison for 13 years now and while in prison, he joined school from class 4 and proceeded up to class 7 when he started carpentry training after his sentence being commuted to life imprisonment but has not done the examination. He prayed for leniency and that the period he has served be sufficient. He said he was 27 years old when he was arrested and he is now 40 years old.
 10. The prosecution counsel Ms. Ratemo submitted that they are not opposed to the setting aside of life sentence owing to the recent jurisprudence but urged the court to call for social inquiry before determining this appeal. The court directed that a social inquiry report to be availed and set the matter for mention on the 22nd May, 2024.

Social Inquiry Report

11. The social inquiry report was filed on the 21st May, 2024. From the report, the applicant was born in 1984 at Longisa Location in Bomet County. He attended Mataima Primary school up to standard seven where he dropped out due to socio-economic challenges. He engaged in farming at home for



- almost eight years and later moved to Equator Trading Centre- Timboroa in search of farm related casual jobs for another two years before he was arrested.
12. He was sentenced to death on 13th December 2012 by Eldama-Ravine Law Court. He stayed at Eldoret prison for one year and Naivasha for ten years. At the time of interviewing him, he was at Naivasha Maximum Security Prison. At the prison, he has acquired a diploma in theology and is currently training in carpentry skills and is waiting to sit for grade three examination in December 2024.
 13. The Appellant pleaded for leniency from the court. He prays for a definite sentence; a sentence that will give him hope. Two of the victims are deceased. one Alex still lives at Equator Trading Centre with his uncle Cleophas. The surviving victim said that the inmate is not a stranger to him as they lived in the same trading Centre. He later come to learn that he was not from that area of Baringo County but from Bomet County.
 14. The victims' family members are not opposed to the applicant being granted his request of a definite sentence. The family of the applicant and families of the victims have not met for reconciliatory talks. They are however willing and available for the meeting that would bring forth psychological and social healing as the members are still traumatized.
 15. The applicant's family said they learnt of applicant's criminality after he was convicted and sentenced. They were shocked about it as the applicant previously led a lawful life. They indicated that they would wish to meet the family members of the deceased victims for purposes of reconciliation, compensation and healing but who they are and where they are is their challenge. They pleaded that his request for a definite sentence is granted.
 16. The administrator of the area where the applicant was born revealed that he was shocked to learn about the applicant committing offences of great magnitude as he was a good person. He is not opposed to him being granted a definite sentence.
 17. Both families are willing to have a meeting that will enhance harmonious co-existence. The probation office is willing to help the two families by connecting them to each other for the sake of fostering peace and healing among their members.

Analysis And Determination

18. The issue for determination in this matter is whether this court has discretion to grant the orders sought herein.
19. The petitioner was sentenced to death by the trial court in 13th December, 2012. Which was commuted to life imprisonment through a Presidential directive. The petitioner is now serving the sentence of life imprisonment and is now seeking determinate sentence.
20. In Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso Versus Republic*, the court of appeal declared life imprisonment unconstitutional. In view of the above, the appellant deserves to benefit from change of jurisprudence by having his life sentence reviewed to comply with the law as amended by case law.
21. I have considered sentiments given by the victim's families and the victim who is still alive and from the local administrator and applicant's family. I have also considered that the applicant has been in prison for 13 years and that he has taken imprisonment positively by taking advantage of opportunities available and learnt a skill of carpentry which will be beneficial to him, his family and community at large. I also take note of the fact that the appellant was convicted for 3 counts of robbery with violence. In view of the above, I find that imprisonment for a period of 20 years for each count will be appropriate



for the accused. The sentences to run concurrently and period served in remand and prison form the date of arrest to be computed in the sentences above. The sentences to run concurrently.

22. Final Orders: -

1. Sentence of life imprisonment in respect to count 1 & 2 are hereby set aside.
2. Appellant sentence to 20 years imprisonment each for count 1 and 2.
3. Sentence in respect to count1 & 2 to run concurrently.
4. Period served in remand from the date of arrest and the period he has served in prison to be computed in sentence above.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 14TH DAY OF JUNE 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Court Assistant: Elvis.

Ms. Omari for state

Appellant present

