



**Makau v Republic (Criminal Revision E003 of 2024)
[2024] KEHC 6978 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION E003 OF 2024**

**DR KAVEDZA, J
JUNE 10, 2024**

BETWEEN

DAVID NDIKO MAKAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). He was sentenced to death which was later commuted to life imprisonment. His appeal before this Court vide Criminal Appeal No. 88 of 2011 was dismissed by Hon. Kimaru J January 31, 2017.
2. He has now filed the present application seeking resentencing. The grounds raised are that the death sentence was in contravention of his constitutional rights. He has been in custody for 15 years which is sufficient time for rehabilitation. He is remorseful and undertakes to become a law-abiding citizen if released.
3. The [Judiciary Sentencing Policy Guidelines, 2023](#) provides as follows on who can apply for re-sentencing.
4. 8.16 A resentencing application can be made:
 - i. After the completion of the trial process and where a sentence has been issued.
 - ii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for resentencing upon being satisfied that the appeal has been withdrawn.



- iii. Alternatively, a resentencing application can be made once an applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating and circumstances of the case.
- iv. In regard to the development of the law, it is expected that trial courts shall have considered the current jurisprudence arising from the superior courts under the principle of *stare decisis*.
 1. Accordingly, this court has jurisdiction to entertain the present application, recognising that both the subordinate court and this court failed to consider the applicant's mitigation. The question for determination therefore, is whether, the applicant should be resentenced as prayed.
 2. It is notable that the question of whether indeterminate life sentence is unconstitutional was raised in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR, and the Supreme Court of Kenya found that not having been canvassed before the two courts below, it was not available for the court's determination. The Supreme Court however noted that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons.
 3. Subsequently, the issue of mandatory sentences in defilement cases was argued before the Court of Appeal in [Dismas Wafula Kilwake v Republic](#) [2019] eKLR Criminal Appeal No. 129 of 2014. Parties urged the Court to interpret the legal framework on sentencing in a manner that aligns with the purpose, spirit, and letter of the 2010 [Constitution](#), specifically Article 50(2)(q), by permitting the review of sentences. The Court was emphatic that minimum mandatory sentences violate the right of an accused to a fair trial in so far as such sentences take away the discretion of the court in considering the mitigation of the accused. The Court set aside the minimum mandatory sentence of 20 years imposed and substituted thereof with a sentence of 15 years.
 4. In 2016, the judiciary developed the [Sentencing Guidelines](#) as a response to the challenges experienced by judges and judicial officers. The Guidelines were developed pursuant to section 35(2) of the [Judicial Service Act](#) 2011. These guidelines recognised that sentencing is perhaps one of the most intricate aspects of the administration of trial justice. The guidelines collated the principles of law that should guide courts in the exercise of their discretion, so that sentences for analogous circumstances are delivered as transparently and consistently.
 5. Since the formulation of the [SPGs of 2016](#), the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review ([The Sentencing Policy Guidelines 2023](#)) the Guidelines to align with the emerging jurisprudence, and make them more responsive to the justice needs of Kenyans. The revised [SPGs](#) provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned, as well re sentencing hearings.
 6. Consequently, the evolution of law and jurisprudence should grow in tandem with the [Constitution](#) while acknowledging the [judiciary guidelines on sentencing](#).
 7. The current jurisprudence emerging from the Court of Appeal ([Manyeso v Republic Criminal Appeal 12 of 2021](#)) [2023] KECA 827 (KLR) (7 July 2023) and ([Evans Nyamari Ayako v](#)



Republic Criminal Appeal No.22 of 2022 Kisumu Court of Appeal) is that life sentences are unconstitutional due to their indeterminate nature.

8. Flowing from above, it is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the sentencing policy guidelines.
9. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the Constitution of Kenya, 2010.
10. Furthermore, it is significant to emphasize that the decisions in the Supreme Court and Court of Appeal cases Muruatetu, Manyeso and Nyamari (*supra*), recognize that indeterminate sentences deprive a convict of the opportunity to be heard in mitigation, while convicts facing lesser sentences are granted such an opportunity. The deprivation constitutes unjustifiable discrimination, is unfair, and contravenes the principle of equality before the law as enshrined in Article 27 of the Constitution. Additionally, an indeterminate life sentence, amounts to inhumane treatment and violates the right to dignity under Article 28 of the Constitution. It is also a principle of international law that all prisoners serving life sentences should be afforded the possibility of rehabilitation and the prospect of release if such rehabilitation is achieved. (See the decisions of the European Court of Human Rights: Vinter and others v. United Kingdom (Application Nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) and Murray v. the Netherlands [GC], No. 10511/10, (26 April 2016)
11. In the instant case, the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and was sentenced to death as per the law, which sentence was commuted to life imprisonment. However, I am guided by the recent court of appeal decision in the case of Nyamari (*supra*) where life imprisonment was construed to mean a maximum of 30 years imprisonment, I hereby set aside the life sentence and substitute it with a sentence of thirty (30) years' imprisonment from the date of the applicant's arrest, September 1, 2009 pursuant to section 333(2) of the Criminal Procedure Code.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JUNE 2024

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D. KAVEDZA

JUDGE

