



**Mukira v Republic (Criminal Revision E006 of 2024)  
[2024] KEHC 9449 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9449 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL REVISION E006 OF 2024**

**LM NJUGUNA, J**

**JULY 24, 2024**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE  
22(1), 25(D), 50(1 & 2), 51(2) AND 165(3)(A) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 20(1),(2) &(4), 21(1), 48, 50(2)(P), 51(1),  
159(2)(A) AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE REDRESS OF CONSTITUTIONAL RIGHTS  
UNDER ARTICLE 25(B), 27(1&2), 28, 29(F), 47(1&2), 50(2)(P&Q),  
51(1) AND 259(1)(A&B) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SENTENCE REVIEW ARISING FROM  
CRIMINAL CASE NO. 23 OF 2003 AT EMBU HIGH COURT AND  
CRIMINAL APPEAL NO. 139 OF 2010 AT NYERI COURT OF APPEAL**

**BETWEEN**

**FABIANO UTUKU MUKIRA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The applicant has filed an undated notice of motion seeking the following orders:

a. Spent;



- b. That this honourable court be pleased to hear and determine this application under the stated provisions of the law as it may deem fit;
  - c. That this honourable court be pleased to review its decision pursuant to the Court of Appeal decision in *Julius Kitsao Manyeso v Republic*, Malindi Court of Appeal Criminal Appeal No. 12 of 2021; and
  - d. That this honourable court be pleased to grant any other orders it deems fit in the circumstances of this application.
2. The applicant stated that he was sentenced to death after he was convicted of 4 counts of murder in Embu High Court Criminal Case no. 23 of 2003. Following the appellant's conviction and sentencing, he appealed to the Court of Appeal sitting in Nyeri in Criminal Appeal no. 139 of 2010 challenging both conviction and sentence but the appeal was dismissed. To date, he has been incarcerated for 20 years and he seeks that the court reduces his sentence to time served, since his sentence was commuted to life imprisonment through a presidential directive.
  3. That owing to the nature of the offence and the mandatory nature of the sentence prescribed, his mitigation was not considered during sentencing. That the indeterminate nature of the life imprisonment sentence was rendered unconstitutional and he urged the court to review it in his case. He also urged the court to consider the time spent in custody as part of his sentence as provided for under section 333(2) of the *Criminal Procedure Code*. He assured the court that he has reformed through various courses he has undertaken while in prison and that he acquired skills to help him to be a productive citizen once he is released from prison.
  4. The applicant further sought the following reliefs from the court:
    - a. A declaration that the indeterminate nature of life sentence is unconstitutional and inconsistent and should be substituted with a lesser sentence;
    - b. A declaration that the indeterminate life sentence is inconsistent with Article 2 of *the Constitution* as it limits the applicant's prospects of being released and should therefore be reviewed to an appropriate sentence; and
    - c. Any other order as the honourable court may deem just in the circumstances of this application.
  5. The respondent did not file any response to the application but it filed submissions.
  6. The revision herein was canvassed by way of written submissions.
  7. The applicant submitted that the court has jurisdiction to review the sentence which was passed without considering mitigation. He placed reliance on the case of *Julius Kitsao Manyeso v Republic*, Malindi Court of Appeal Criminal Appeal No. 12 of 2021 and stated that in as much as the death sentence was commuted to life imprisonment, the same was held as unconstitutional by the Court of Appeal. He urged the court to exercise leniency and reduce the sentence.
  8. The respondent relied on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR where it was held that the trial courts may hear the applicant on resentence hearing, hence the application is properly before the court. It, however, urged that the sentence imposed need not be disturbed, given the circumstances of the case. That there were 4 victims whose deaths were brutally caused by the applicant without mercy. It cited the Judiciary Sentencing Guidelines 2023 and urged that the purpose of sentencing is to attain retribution and deterrence and in this case, the sentence



imposed and upheld by the appellate court serves this purpose. It submitted that if the court decides to review the sentence on the first count, the court should pronounce sentences on the other 3 counts which were held in abeyance by the trial court and the Court of Appeal.

9. From the foregoing, the issue for determination is whether this court has the jurisdiction to review the sentence meted out to the appellant.
10. The High Court's supervisory jurisdiction in criminal cases is established under Section 362 of the [Criminal Procedure Code](#) as follows:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

11. In the Malaysian case of *Public Prosecutor v Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was held:

“The powers of the High Court in revision are amply provided under section 325 of the [Criminal Procedure Code](#) subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

12. The kind of supervisory jurisdiction to be applied under section 362 of the [Criminal Procedure Code](#) is limited to the sub-ordinate court's findings, sentences, orders and regularity of any proceedings and can only be exercised by the High Court. However, this revision arises from a murder trial conducted at the High Court, which has original jurisdiction in that regard. There is no provision allowing or prohibiting the High Court from revising its own findings. Moreover, the Supreme Court in the case of [Muruatetu & another v Republic; Katiba Institute & 4 others](#) (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) donated further revisionary powers to the High Court where it sat as a court of original jurisdiction.
13. The Court of Appeal decision in the case of [Julius Kitsao Manyeso v Republic](#) (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) was delivered on 07<sup>th</sup> July 2023 and the court held that the indeterminate nature of life imprisonment sentences is unconstitutional. However, this must be done in line with the circumstances of the case. The applicant was charged with 4 counts of murder which were conducted in a gruesome manner. He was sentenced to death on each of the counts but the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> sentences were held in abeyance. The applicant is currently serving a life imprisonment sentence since his original death sentence was commuted to life imprisonment. The respondent urged the court to sentence the applicant for all the counts held in abeyance if it should consider reducing the life sentence.



14. I note the sentiments of the respondent in its submissions and, in my view, the sentence being served by the applicant is no longer in the category of sentences that may be held in abeyance on subsequent counts. Clause 2.2.9 of the Judiciary Sentencing Guidelines 2023 provides that:

“Where an accused person is convicted of several counts of capital offences each attracting the death sentence, the court shall pass the death sentence on each count but direct that the second or subsequent sentences be held in abeyance.”

15. In the Court of Appeal decisions in the cases of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (supra) and *Evans Nyamari Ayako v. Republic* Criminal Appeal No. 22 of 2018, the court held that the life imprisonment sentence is discriminatory and should be held as unconditional given its indeterminate nature. In these cases, the superior court reduced the said sentence to a defined number of years.

16. From a perusal of the trial record, the circumstances of the cases against the applicant were aggravating enough for the court to impose the death penalty. The findings of the trial court were upheld on appeal on both conviction and sentence. Judiciary Sentencing Guidelines 2023 recognizes the death penalty as a legally applicable sentence in Kenya. The Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR did not outlaw the death penalty which may be imposed where the circumstances of the case suit its application.

17. Consequently, in as much as this court bears the jurisdiction to review the sentence imposed, it is my view that the circumstances of the case demand that the sentence remain undisturbed. This court finds that the application lacks merit and it is hereby dismissed.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

