



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Tesha v Republic (Miscellaneous Application 041 of 2023)
[2024] KEHC 16661 (KLR) (22 July 2024) (Resentence)**

Neutral citation: [2024] KEHC 16661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION 041 OF 2023**

**JL TAMAR, J
JULY 22, 2024**

BETWEEN

WILBERT PHILIP TESHA APPLICANT

AND

REPUBLIC RESPONDENT

(Arising from court of appeal no 9 of 2018 Nairobi High Court criminal Appeal no 7 of 2015 at Kajiado and Criminal Case no 990 of 2012 at Kajiado Magistrate Court)

RESENTENCE

Brief background of the case.

1. The applicant Wilbert Philip Tesha was charged with the offence of Robbery with violence contrary to section 296 (2) of the [Penal Code](#) in criminal case no 990 of 2012 at Kajiado Law court, convicted and sentenced to a mandatory death sentence as provided for by the Law.
2. The particulars of the charge were that on 3rd of October 2012 at Emaui Village in Namnaga, kajiado central sub-county of Kajiado County jointly while armed with a knife he robbed Saitoti Murumbe Kishinda a motor cycle registration No KMCW xxxV valued at ksh. 75,000 and that immediately before the time of such robbery used actual violence to the said Saitoti Murumbe Kishinda
3. Dissatisfied with that decision, the applicant appealed to the High Court at Kajiado in HCCRA No 7 of 2015 where the appeal was heard and dismissed. The High Court in the concluding paragraphs of the judgement stated as follows;

“I am satisfied that the appellants conviction for the offence of robbery with violence under section 296 (2) was proper and in accordance with the law. I affirm the conviction of the lower court as the sentence imposed is lawful.”



4. The appellant not one to give up easily without a fight appealed to the court appeal against conviction and sentence. However, in the course of the plenary hearing the appellant through his counsel, abandoned the grounds of appeal against conviction and mounted challenge against sentence only.
5. The court of appeal in dealing with the appellant challenge against sentence, stated as follows;

“This court has previously applied the findings and holding of the supreme court in *Muruatetu*, particularly regarding the unconstitutionality of the mandatory nature of the death sentence and considering whether or not a death sentence ought to be substituted with a lesser sentence. It has found that the findings and holding apply mutatis mutandis to section 296 (2) and 297 (2) of the *Penal Code*”.

(see *Rajab Iddi Mubarak vs Republic*, Eldoret criminal appeal no 105 of 2015 and *William Okungu Kittiny vs Republic* Kisumu criminal Appeal no 56 of 2013.
6. The court then allowed the appellant prayer for review of sentence as the same was not opposed by the prosecution and further that both the trial court and the first appellate court did not consider the appellants mitigation. In allowing the appeal the court stated as follows;

“We have considered the fact that though armed with a knife, the appellants did not harm the complainant and the motor cycle was also recovered, we allow the appeal against the sentence and set aside the death sentence and direct that the matter be and is hereby remitted to the High Court sitting in Kajiado for mitigation and sentence”
7. It is on the basis of the court of appeal direction herein that the appellant by the Notice of Motion application filed on 19th July 2023 and his supporting affidavit of the same date that the appellant seeks review of the death sentence imposed by the trial court.

The application:

8. The application is expressed to be brought under Article 50 (2) (p) (q), Article 159 (2) 160 (1) and 165 of the *Constitution* and Section 333 (2) of the *Criminal Procedure Code*. The applicant in the main asked the court to review the death sentence imposed by the trial court and confirmed by the 1st appellate court and thereafter the period spent in remand custody be considered when computing an appropriate sentence. Lastly that should the computation result in a period less than three years, the applicant be placed on probation.
9. The applicant in his submission reiterates the content of his affidavit and the grounds upon which the application is based. He stated that he had been in custody for a period of 12 years during which he has tremendously reformed and benefited from the trainings offered at the prison facility which included;
 - a. Certificate of recognition for outstanding discipline and show of rehabilitation
 - b. Trade test grade 3 certificate in metal works from National Industrial Training Institute
 - c. Diploma certificate in Biblical Studies
 - d. Certificate of completion of focus on the family lessons
 - e. Certificate of completion of discipleship training on growing and maturing in Christ.
10. The appellant in addition to the achievement listed above, and although the copies of the certificates were not attached, told the court that he is very remorseful and has demonstrated capacity to reform



and rehabilitate through the above trainings. He prays that the court finds that he has atoned for his sins and detaining him further is not appropriate.

11. The state through the public prosecution submitted that this court has jurisdiction to entertain the applicant's application since the applicant was sentenced to death before the supreme court declared the mandatory nature of death sentence unconstitutional. Further that the Supreme court guidelines issued on 6th July 2021 also entitle the applicant to a re-sentencing hearing. However, the state urged the court to consider both aggravating and mitigating factors as well as the seriousness of the offence and met out a deterrent sentence.
12. The death sentence meted out on the applicant by the magistrate court, and affirmed by the High Court, was on appeal to the court of appeal set aside and the same remitted to this court for mitigation and sentence. The supreme court in *Francis Muruatetu & another vs Republic* (2017) eKLR did not outlaw death sentence in appropriate cases. The same however is no longer mandatory. The court stated;

“The mandatory nature of death sentence as provided for under section 204 of the penal code is hereby declared unconstitutional. for avoidance of doubt, this order does not disturb the validity of death sentence as contemplated under Article 26 (3) of the *Constitution*”
13. The court further stated that it was important for the court heard the matter to consider and evaluate mitigating submissions and evaluate appropriate sentence befitting the offence committed. The court further directed the relevant agencies of government to come up with a framework that would guide in re-sentencing hearing. This is important to ensure that there is a structured way of sentencing that promotes consistency and predictability in criminal justice. As we wait for the framework to be developed by the government agencies, and that notwithstanding, this court has jurisdiction to re-sentence the applicant herein considering the mitigating circumstances.
14. The applicant told the court in his submissions that he was truly remorseful and regrets his actions and that he has demonstrated capacity to reform and rehabilitate through trainings mentioned earlier. These in my view are positive acts that might put the applicant in a more sympathetic light and decrease the negative aspects of his (mis) conduct. This court exercising its re-sentencing jurisdiction, is required to consider both aggravating and mitigating factors related to the circumstances of the offence.
15. The court of appeal in remitting the matter to this court for re-sentencing observed that;

“Though armed with a knife, the appellants did not harm the complainant and the motorcycle was also recovered”
16. These in my view are such mitigating factors that the court should consider in either reduction of the severity of the sentence in terms of its length or type of sentence to be imposed.
17. On his part the prosecution urged the court to give a deterrent sentence considering the seriousness of the offence and the age of the applicant at the time of the offence. Beyond the nature of the offence, being robbery with violence, the prosecution has not placed before the court any material of aggravating circumstances nor challenged the applicant's assertion observed by the Court of Appeal that the complainant was not harmed and the motorcycle was recovered.
18. I have considered the applicants mitigations and the fact that he had had time to reflect during his 12 years in prison and in addition that he had undergone certain trainings and obtained certificates including one relating to discipline.



19. Consequently, therefore and taking into considerations the mitigating factors, the period spent in pre-trial, in accordance with the provisions of section 333 (2) of the *Criminal Procedure Code*, I re-sentence the applicant to 18 years imprisonment. For the avoidance of doubt, the sentence shall run from 4th of October 2012.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 22ND DAY OF JULY 2024

JOHN.T. LOLWATAN

JUDGE

