



**Agwata v Republic (Miscellaneous Criminal Application E030 of 2023)
[2024] KEHC 10964 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CRIMINAL APPLICATION E030 OF 2023
WM MUSYOKA, J
SEPTEMBER 20, 2024**

BETWEEN

NORMAN OWINO AGWATA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application, dated 30th November 2023, principally seeks re-sentencing. The applicant had been convicted, in Busia CMCCRC No. 1028 of 2010, of robbery with violence, contrary to section 295, as read with section 296(2), of the *Penal Code*, Cap 63, Laws of Kenya, which attracts, upon conviction, the death penalty, and the trial court had imposed that sentence.. He filed an appeal, in Busia HCCRA No. 2 of 2012, which was dismissed. He avers that his sentence was later commuted to life imprisonment.
2. The application, no doubt, rides on the decision in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle, that all mandatory sentences were unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been imposed, with a view to revising or reviewing them. The Supreme Court re-visited the issue, in *Francis Karioko Muruatetu & another v. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision, in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was of application only in murder cases.
3. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of *Constitution* of Kenya of 2010. The offence, that the applicant was convicted in respect of, attracts



a mandatory sentence. The principle laid out in Francis Karioko Muruatetu & another v. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), declaring mandatory sentences unconstitutional, was boosted by that of the Court of Appeal, in Julius Kitsao *Manyeso v. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), with respect to the unconstitutionality of the life sentence. Recently it was held, in *Evans Nyamari Ayako v. Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), that life imprisonment translated to 30 years.

4. The application appears to be informed by Julius Kitsao *Manyeso v. Republic Malindi* CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), now that his death sentence was commuted to life imprisonment. As sentences of life imprisonment have been pronounced unjust and unconstitutional, then it stands that the sentence imposed on the applicant herein is no longer tenable. I hereby set it aside. I shall proceed to consider the appropriate substitute sentence, guided by *Evans Nyamari Ayako v. Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported).
5. The applicant was convicted of robbery with violence, which is a heinous crime. He was armed with a pistol and knives, and personal violence was actually used on some of his victims. The fact of being armed with a firearm aggravated that offence, for, in the event of a mishap, a life could easily have been lost.
6. Upon review of everything, I am not persuaded that the applicant is deserving of a non-custodial measure. However, he is entitled to benefit from *Evans Nyamari Ayako v. Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported). I shall, hereby, impose upon him an imprisonment sentence of 30 years, to be calculated from the date of his arrest. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 20TH DAY OF SEPTEMBER 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Norman Owino Agwata, the applicant in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

