



**Makanga v Republic (Petition E046 of 2019)
[2024] KEHC 11104 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E046 OF 2019
RN NYAKUNDI, J
SEPTEMBER 20, 2024**

BETWEEN

IBRAHIM OKWARO MAKANGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. On 18th December, 2001, this court rendered a decision on appeal No. E129 of 1999 by upholding a conviction and a death sentence was passed. The applicant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and since conviction, he has been in custody for 22 years.
2. The applicant has approached this court for re-sentencing. He cited the decision “Muruatetu case” and prayed for a favorable sentence. That he is only interested in sentencing and not the conviction.

Analysis and determination

3. At the time of the applicant’s conviction, mandatory sentences had not been declared unconstitutional. With the advent of the Supreme Court’s decision in Francis Kariuki Muruatetu & Another v Republic & 5 others [2016] eKLR mandatory death sentences have been declared unconstitutional which has necessitated resentencing of all persons previously sentenced to the mandatory sentences.
4. I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.



5. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

6. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. The offence of robbery with violence is contained in Sections 295 and 296(2) of the *Penal Code* as follows:

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

7. I do also note the mitigation by the applicant to wit; that he is of old age and remorseful.
8. In the case of *Francis Karioko Muruatetu & another vs Republic*, criminal petition no. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict’s mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”

9. In the said decision, the following guidelines were recommended as applicable when the Court considers re-sentencing;

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;



- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaption of the offender;
- (h) any other factor that the Court considers relevant.”

10. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the ‘standard’ by taking into account a non-exhaustive “check list of aggravating and mitigating factors” which are already largely taken into account by sentencing courts.
11. There is a clear analogy between the present situation and that of successive petitioners who seek credit for time served on the original conviction before trial and determination of their respective cases on the basis that they were incarcerated for long periods of time either the capital offence like robbery with violence was not bailable as of right. This was the case for all those suspects arraigned in the magistrates’ court charged with the offence of Robbery with violence contrary with Section 296(2) of the *Penal Code*. The legislature in its wisdom provided for a mandatory death penalty for any suspect prosecuted and eventually found guilty and on conviction, there was no any other alternative sentence. the present situation and the facts involve equally the same circumstances in which the Petitioner was charged with various counts of having committed robberies which fall within the category of Section 296(2) of the Penal Code. This offence was not bailable and the accused persons endured long periods of incarceration in pre-trial detention pending determination of their case. it did not matter how long fragrantly or dramatically the period spent in pre-trial detention for it never counted in the imposition of the mandatory sentence of death. However, at the dawn of the new constitutional dispensation 2010, robust jurisprudence *has developed by the superior courts which culminated in the land mark decision of Francis Muruatetu* though speaking to matters arising under Section 204 of the *Penal Code* it became to be the precursor for the transformative jurisprudence on sentencing in Kenya.
12. It is important however to highlight the gaps which existed prior to the 2010 Constitution on protection of the Bill of Rights was breached by the promulgation of the new charter and incorporating Art. 2(5) & (6) for the international law to be part of the sources of Kenyan law. According to the *Universal Declaration of Human Rights*, everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he had all the guarantees necessary to conduct his defence. In the realm of our constitutional imperative, Art. 25 deals with the right against torture and degrading treatment and punishment. Whereas in Art. 26 the right to life in all facets is protected and guaranteed. In the case of Art. 27, every person has a right to equality before the law and freedom from discrimination on any of the grounds. The characters of Art. 28 deals with human dignity and Art. 30 is on rights to liberty which should not be taken away by the state arbitrarily. What then the court is to make of these Bill of Rights. In the recent times there has been progress in both the trial and superior courts in taking cognizance in pursuit of justice for the offenders to have Section 333(2) of the *Criminal Procedure Code* to scale up giving credit for the period spent in custody. The message out there from the decisions of the various may it be at the trial or conviction or appeals or re-sentencing of offenders’ pre-trial detention should be a measure of last resort.
13. This Petition would be incomplete without understanding the key purposive objectives and principles of sentencing. In Kenya a proper sentence is reached when the following objectives have been achieved:
- a. Retribution: - to punish the offender for their criminal conduct in a just manner.



- b. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
 - c. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages sustained by the victim for the community and to promote a sense of responsibility through offender's contribution towards meeting those standards.
 - e. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal act.
 - f. Denunciation: To early communicate the community's condemnation of the criminal conduct.
 - g. Reconciliation: to mend the relationship between the offender, the victim and the community.
 - h. Reintegration: To facilitate the re-entry of the offender into the society.
14. When I take all these factors in consideration, it is my considered view that the death penalty should be interfered with and substituted with a custodial sentence of 25-year imprisonment taking into account the provisions of Section 333(2) of the *Criminal Procedure Code*. That provides the petitioner with the commencement period of his sentence to be 8th September, 1997. In the event this sentence on computation grants the Petitioner leave to be considered to have served the appropriate period, he shall be set free unless otherwise lawfully held.
15. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 20TH DAY OF SEPTEMBER, 2024

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R. NYAKUNDI
JUDGE

