



**Ndirangu v Republic (Criminal Petition E050 of 2022)  
[2024] KEHC 11072 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11072 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL PETITION E050 OF 2022  
RM MWONGO, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**LEWIS NJOGU NDIRANGU ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner was charged at the Principal Magistrates court at Gichugu in Criminal Case No.190 of 2013, with the offence of Robbery with Violence contrary to section 296 (2) of the *Penal Code*.
2. The particulars of the charge were that on 12<sup>th</sup> March, 2013 at Rwambiti Market in Kirinyaga County, jointly with others not before the court, and while armed with an AK-47 rifle, they robbed Jane Wambui Kariuko, complainant, of Kshs 18,000/- and a Nokia cellphone valued at kshs 2000/-; and immediately after the time of robbery, they threatened to use actual violence on the complainant.
3. He was tried upon the charge, convicted and sentenced to death on 12<sup>th</sup> June 2014. His appeals in the High Court and the Court of Appeal in Criminal Appeals Nos 27 of 2014 and 197 of 2017, respectively, were dismissed.
4. In the meantime, his death sentence was commuted to a life sentence by Presidential decree.
5. He now moves this Court for a review of the sentence through a petition filed on 6<sup>th</sup> November 2023. He has not challenged the conviction.
6. Parties were directed to file submissions which they did.
7. The petitioner invokes the provisions of Article 27(1) on equality before the law and non-discrimination and section 333(2) of the *Criminal Procedure Code* on the court's obligation to take into account the time served in custody when meting sentence. He has also cited the Court of Appeal



case of *Abmed Abolfathi Mohamed and Another v Republic* (2018) KLR in respect of time spent in custody.

8. The Petitioner has also relied on Articles 25(9), 27(1)(2), 50(2)(p) and 51(1) of the *Constitution* to buttress his argument that it is unfair to him that the life sentence imposed on him diminishes his rights under the *Constitution*.
9. In his mitigation, he stated that being a first offender with no previous criminal record and having served close to 9 years, he prays for leniency and promises to be a man of good conduct; and that he would keep peace. He is also remorseful and says he has been rehabilitated.
10. The Court received a report from the State Department for Correctional Services Kenya Prisons Service showing his recommendation. He has actively participated in RODI Kenya training in making home detergents and farming.
11. Further, the complainant in this case has been supporting him as shown in her sworn affidavit dated 13<sup>th</sup> April, 2023. She visits him frequently in prison and so she is aware of his remorsefulness. She has made peace with him and helps him a lot.
12. In conclusion the petitioner seeks to persuade the court to resentence him as submitted or even at set him at liberty considering that he is an orphan.
13. The respondent submitted on the court's Jurisdiction stating that by virtue of Articles 23 of the *Constitution* of Kenya 2010, this Court has jurisdiction to deal with the Petition before it pursuant to Article 165 of the *Constitution*.
14. As to the whether the applicant's character, conduct and industry should be considered, provided that the burden to prove and demonstrate remorsefulness, rehabilitation and reform rests with the Applicant/Petitioner.
15. As to whether the Petitioner should benefit from re-sentencing the respondent submits that the having been afforded a fair hearing during trial, the Court should consider the circumstance that the victim/complainant was subjected to at the time of the commission of the offence; including the weapon used at the time of the crime, injuries inflicted to the victim, and brutality employed by the Petitioner to the victim.
16. The respondent submits that the re-sentence should be commensurate to the underlying factors as to whether the Petitioner/Applicant was a first offender and if at all he has since gained any applicable knowledge, skills and/or acquaintance during his pendency in prison.
17. On the report of the Kenya Prisons Service dated 9<sup>th</sup> May, 2023, the respondent noted that indicates that the petitioner (inmate) is remorseful for the offence; that he has been in prison for 9 years; that he relates well with fellow inmates and staff; and that he has not been charged with any prison offence while in custody leading him to be appointed the prison volley ball referee. He has participated in rehabilitation programs and achieved grade III tailoring, bible study and also participated in RODI Kenya Training in making home detergents and farming. The DPP noted that the report recommends that the petitioner would be a good and productive citizen if returned to the society.

### **Issues for Determination**

18. The only issues for determination are:
  1. Whether this court has jurisdiction.
  2. Whether the applicant is entitled to resentencing.



## Analysis and Determination

### Whether this court has jurisdiction

19. The petitioner person was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code, in the lower court. He appealed to both the High Court and Court of Appeal. He now seeks resentencing of the life sentence to a definite sentence. Article 23(1) of the [Constitution](#) provide the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.

20. Further, Article 165(3)(b) of the [Constitution](#) of Kenya 2010 provides that:

“Subject to clause (5), the High Court shall have-

Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights had been denied, violated, infringed or threatened.”

21. Accordingly, there is no doubt that the Court has the requisite jurisdiction to determine this petition.

### Whether the applicant is entitled to resentencing

22. The petitioner seeks resentencing as the life sentence presently being served is harsh and excessive, humiliating punishment due to its indefinite nature. Further, the imposed sentence should accord the petitioner an opportunity to be rehabilitated.

23. The question of the diminished quality of life wrought by a life sentence was well described in the case of [Evans Nyamari Ayako v Republic](#) Criminal Appeal No. 22 of 2018 where the court went ahead to define life imprisonment to mean 30 years’ imprisonment. It was held thus:

“This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

24. In the Court of Appeal, case of [Julius Kitsao Manyeso v Republic](#) [2020] eKLR [2023] KECA 827 (KLR) (7 July 2023) (Judgment), a decision that was rendered on 7<sup>th</sup> July 2023, has held that imposition of a mandatory indeterminate life sentence, constitutes an unjustifiable discrimination, and is unfair and repugnant to the principle of equality before the law under article 27 of the [Constitution](#). The Court held:

“We are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence. We note in this respect that the appellant did raise the concern of his sentence of life imprisonment while he was 18 years of age in his first appeal... We, therefore in the circumstances, uphold



the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction”

25. Whilst I am aware that the state has filed an appeal against the decision of the Court of Appeal in Julius Kitsao Manyeso, the present law of the land is, as stated in Manyeso, that life imprisonment in Kenya is unconstitutional.
26. Accordingly, I will apply that authority and hereby find and hold that the petitioner's life sentence is unconstitutional.
27. As far as re-sentencing is concerned, this court will be guided by the sentencing policy to determine the appropriate sentence for the petitioner.
28. The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows: “Sentences are imposed to meet the following objectives:
  1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
  4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
  5. Community protection: To protect the community by incapacitating the offender.
  6. Denunciation: To communicate the community's condemnation of the criminal conduct.”
29. This Court has jurisdiction to render itself on the Petitioner's application on definite sentence while considering mitigating factors such as:
  - 1) The age of the offender;
  - 2) Whether the applicant was a first offender;
  - 3) Whether the applicant pleaded guilty;
  - 4) The character and record of the applicant and
  - 5) The possibility of reform and social re-adaption of the applicant and any other factor that this Court will deem fit.
30. In this case, the offence was committed under aggravating circumstances as the petitioner and his accomplice threatened the complainant with an AK- 47 rifle while robbing her. However, the violence did not result in any injury to the complainant.
31. Whilst the petitioner submits that he is remorseful for his irresponsible action., and that he has participated in some rehabilitative courses while in prison as offered by correctional service, and acquired skills and knowledge which he did not have before his arrest, these are hereby taken into consideration. They include: Grade III tailoring; Certificate in Bible Study and RODI Kenya training in making home detergents and farming.



32. There is also no doubt that in meting a definite sentence on the accused, the period he has spent in custody should be considered pursuant to Section 333(2) of the *Criminal Procedure Code*. The petitioner was arrested on 29<sup>th</sup> March, 2013. He was sentenced on 12<sup>th</sup> June, 2014. He has been in custody for 11 years.

33. In *Republic v Isaac Wanjala Murumba* [2021] eKLR Kemei J held:

“In accordance with section 333(2) of the *Criminal Procedure Code*, the court should deduct the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. It is noted that the accused has been in custody since 6<sup>th</sup> October, 2021. I hereby direct that the period spent in custody during the pendency of the trial be taken into account and be deducted from the term.”

34. In *James Kariuki Wagana v Republic* [2018] eKLR Ngugi J held on appeal:

“In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.”

35. In *Hassan Juma v Director of Public Prosecution* [2021] eKLR Ogola J held:

“I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robbery does not call for invocation of the death penalty. However, in this case there are aggravating circumstances involving the use of a knife, which eventually injured the victim’s hand when he tried to save himself from being murdered by the Petitioner and his accomplice. In my view, the mitigating circumstances of the Petitioner being a first offender and being misled do not outweigh the aggravating circumstances.”

36. In light of all the foregoing, I am satisfied that this is a proper case for re-sentencing, wherein the petitioner should get a definite sentence.

37. Accordingly, the petitioner’s life sentence herein is substituted with a sentence term of 30 years. Such period shall, subject to the provisions of section 333(2) of the *Criminal Procedure Code*, take into account the whole period that he has been held in custody or prison.

38. Orders accordingly.

**DATED AT KERUGOYA THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2024**

.....

**R. MWONGO**

**JUDGE**

**Delivered in the presence of:**

1. Mamba - for State

2. Applicant - Present in Person



3. Murage - Court Assistant

