



REPUBLIC OF KENYA



**Kaningi v Republic (Petition 5 of 2023)
[2024] KEHC 12758 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION 5 OF 2023
A MSHILA, J
OCTOBER 18, 2024**

BETWEEN

SIMON NJOROGE KANINGI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an application for sentence review in which the Petitioner prays that the Court be pleased to grant him a lenient definite sentence informed by his mitigation and the unique circumstances of his case pursuant to Article 50 (2)(p)(q) of *the Constitution*; he prays that the period spent in custody be computed into the eventual sentence to be awarded pursuant to Section 333(2) of the Criminal Procedure Code and that he be granted probation orders if circumstances fit.
2. The Petitioner was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code in Criminal Case No.1679 of 2013 at Kiambu Law Court. The particulars of the offence were that on 1st July 2013 at Banana Shopping Centre, Karuri within Kiambu County, the Petitioner jointly with others not before the court, while armed with crude weapons namely iron bars, robbed Peter Kimani Kabaru of his mobile phone Nokia C1 valued at Kshs.5,000 and immediately before the time of such robbery used actual violence on the said Peter Kimani Kabaru.
3. The Petitioner was convicted and sentenced to death which sentence was later commuted to life imprisonment by the President. He has exhausted all avenues of appeal. He appealed to the High Court in H.C.CR.A No.127 of 2014 and the appeal was dismissed. He further appealed to the Court and Appeal in Nairobi C.O.A No. 20 of 2020 and the same was still dismissed. He has now approached this court through a constitutional petition to review his sentence and to substitute the life sentence with an appropriate lenient definite sentence.



The Petitioner's Submission

4. The Petitioner filed written submission in which he averred that this court has jurisdiction to entertain the matter under Article 165 (3)(d) of *the Constitution*. The death sentence imposed on him is cruel, inhuman and a degrading punishment that violates his human rights. Section 296 (2) of the Penal Code contravenes the principles of fair trial because of inherent ambiguity as to what constitutes robbery with violence. The Petitioner's fundamental rights and freedoms were breached because he was sentenced to serve an inhuman sentence and that his mitigation was not considered.
5. The Petitioner stated that the death sentence is unconstitutional and that a court can impose a sentence other than death in a case of robbery with violence. He relied on the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic (2017)eKLR* where it was held that the mandatory death sentence for the offence of murder was unconstitutional because such a sentence fetters the court's discretion in imposing an appropriate sentence based on mitigation and the unique facts and circumstances of the offence. He stated that this reasoning applies to the offence of robbery with violence. He cited the Court of Appeal decision in *Omukanga v Republic (Criminal Appeal 260 of 2019)[2013] KECA 430 (KLR)(14 April 2013) (Judgment)*.
6. The Petitioner submitted that Section 296 (2) of the Penal Code is inconsistent with Article 27 of *the Constitution* which guarantees every person equality before the law. Convicts sentenced under Section 296 (2) of the Penal Code are not accorded equal treatment as convicts who are sentenced under other sections of the Penal Code that do not mandate a death sentence. A convict of robbery with violence, unlike convicts of other offences under the Penal Code, are denied the right to be heard in mitigation. This is discrimination contrary to Article 27 of *the Constitution*.
7. He averred that although his death sentence was commuted to life imprisonment by the President, such an indeterminate sentence is unconstitutional and the court should fix a determinate number of years of imprisonment. An indeterminate life sentence is contrary to Article 28 and Article 29(d) and (f) of *the Constitution* and denies the prisoner any avenue for review. He relied on *Manyeso v Republic (Criminal Appeal 12 of 2021)[2023] KECA 827(KLR)(7 July 2023)(Judgement)* and *Boniface Keya v Republic Misc. Criminal Application No. E007 of 2023*.

Issue for Determination

8. The only issue framed for determination is whether the court should review the sentence meted out to the Petitioner.

Analysis

9. The applicable law that grants this Court jurisdiction is premised under Article 165(3) of *the Constitution* and this Court is mandated to determine cases where the rights and fundamental freedoms of citizens under the Bill of Rights have been violated. The Petition seeks for review of sentence on the basis that the mandatory death sentence imposed on him was unconstitutional because by statute it is the only sentence that must be imposed. This takes away the discretion of the court in sentencing. The court's discretion in sentencing pertains to fair trial and any law which precludes exercise of discretion by a court in sentencing in particular offences sets apart those affected is outright discrimination contrary to Article 27 of *the Constitution*. Such discrimination justifies a cause of action under Articles 23 and 165(3) of *the Constitution* for redress for violation or threatened violation of a right and or fundamental freedom enshrined in the Bill of Rights. Reference is made to the case of *Tanui v Republic (Miscellaneous Criminal Application E028 of 2022) [2023] KEHC 22623 (KLR) (26 September 2023) (Judgment)*.



10. In *Omukanga v Republic* (Supra) the Court of Appeal held that the rationale on unconstitutionality of mandatory death sentence in murder cases espoused in *Francis Karioko Muruatetu & Another v Republic* (Supra) applies to cases of robbery with violence. The court stated;-
- “ Even though in its 2021 directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court limited the applicability of its decision in *Francis Karioko Muruatetu & another* (supra) to the death sentence under section 204 of the Penal Code; we have no doubt that the deficits identified by the Court in the above excerpt applies to all mandatory death sentences. For instance, the rights to fair trial and dignity as discussed by the Supreme Court above are inherent and applicable to all accused persons.”
11. The Petitioner’s death sentence has been commuted to life imprisonment by the President. The Court Of Appeal in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) held that although the Supreme Court clarified that the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR is to mandatory death sentences imposed on murder convicts pursuant to Section 204 of the Penal Code, the reasoning in that decision applies to the imposition of a mandatory indeterminate life sentence. Such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. An indeterminate life sentence is also an inhumane treatment and violates the right to dignity under Article 28.
12. The Court of Appeal was persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.
13. This court is of the view that an indeterminate sentence limits sentencing to the purpose of retribution. Sentencing should not be restricted to the sole objective of retribution. According to paragraph 4.1 of the 2016 Judiciary of Kenya Sentencing Policy Guidelines, other objectives of sentencing include deterrence, rehabilitation, restorative justice, community protection and denunciation. When carrying out sentencing all these objectives should be considered in totality. A life sentence should not necessarily mean the natural life of the prisoner; that would be an indeterminate sentence that limits sentencing to retribution. Properly construed, a life sentence could mean a set period of time depending on criminal responsibility, retribution, rehabilitation, community protection and recidivism.
14. The appropriate sentence in this matter depends on the facts and the circumstances of the case. The Supreme Court set out guidelines and mitigating factors in resentencing in *Francis Karioko Muruatetu & Another –vs- Republic*. Further the Judiciary Sentencing Policy Guidelines lists the relevant factors in sentencing at page 15 paragraph 4.1 including the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Petitioner to inflict harm.
15. In this case the Petitioner and his accomplices waylaid one Stephen Ng’ang’a on his way back home from a nearby local bar. The victim surrendered and they took everything from his pockets. When the bar owners, the complainant and his wife, tried to assist the victim, the Petitioner hit the bar owner’s wife with a stone on her mouth. The Petitioner and his accomplices also hit the complainant with iron



bars on his legs resulting in injuries. In mitigation the Petitioner submitted that he was a first offender at the time of the commission of the offence. Life was not lost during the commission of the offence and that having been in prison for 10 years, he has been sufficiently rehabilitated.

Findings and Determination

16. In light of the above reasoning this court makes the following findings and determinations
- i. This court finds the Petition has merit and it is hereby allowed.
 - ii. The death sentence, as currently commuted to life imprisonment, is hereby set aside and substituted with a sentence of 30 years imprisonment, to run from the date of conviction.

Orders Accordingly

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 18TH DAY OF OCTOBER, 2024.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Gacharia - for the State

Petitioner – Present in person at Manyani Maximum Prison

Language - Kiswahili

