



**Karethi & 2 others v Republic (Miscellaneous Criminal Application E024, E026 & E027 of 2021 (Consolidated)) [2023] KEHC 669 (KLR) (14 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION  
E024, E026 & E027 OF 2021 (CONSOLIDATED)**

**F GIKONYO, J**

**FEBRUARY 14, 2023**

**BETWEEN**

**DENNIS MUREITHI KARETHI ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA KOBIA MWITI ..... 2<sup>ND</sup> APPLICANT**

**THOMAS IRUNGU KAMAU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision from Original Conviction and Sentence in Narok CMCR  
No. 786 of 2002 and Nakuru HCCRA498, 499, 500 & 501 of 2002)*

**JUDGMENT**

**Sentence re-hearing**

1. Before me are three applications. Two are miscellaneous applications dated 17/9/2021, and July 19, 2021. The other is an undated application received in court on July 30, 2021.
2. The applications are seeking sentence rehearing pursuant to Articles 2,3(a), 19(2), 20(1), 22(1), 23(1), 25(c), 26(1), 27(1) (4), 28, 50(2)(q)(q), 159(2), 160(1), 165(3) of the [Constitution](#) of Kenya (protection of rights and fundamental freedoms) practice and procedure rules 2010, section 216, 329 and 333(2) of the [Criminal Procedure Code](#), and Section 295 and 296(2) of the [Penal Code](#).
3. The applicants pray for a lenient definite sentence in count I and II and for the sentences to run concurrently from the date of arrest since the offences emanated from the same transaction. Further, they seek for the time spent in remand to be factored in the sentences to be awarded.



## Brief background

4. The applicants herein were charged with two counts of robbery with violence contrary to section 296(2) of the *Penal Code* in Narok CMCR No. 786 of 2002. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> applicants were all convicted of the offence and sentenced to death in count I and II. However, the sentence in the second count was held in abeyance.
5. The 3<sup>rd</sup> applicant was charged with two other counts. In Count III, he was charged with the offence of being in possession of a firearm contrary to section 4(1) of the Firearm Act and was sentenced to serve 5 years' imprisonment. In count IV, he was charged with the offence of being in possession of ammunition and sentenced to serve two years' imprisonment.
6. The applicants dissatisfied with the decision of the trial court filed an appeal in Nakuru HCCRA 498, 499, 500 & 501 of 2002 (*Joshua Kobia Mwiti & 3 Others v Republic* [200] eKLR). The appeals were dismissed.
7. The applicants did not appeal to the Court of Appeal.
8. The three applicants then separately filed miscellaneous applications. The 1<sup>st</sup> applicant filed Narok Misc. Appl. No. 67 of 2018. The 2<sup>nd</sup> applicant filed Narok Misc. App. 100 of 2018, the 3<sup>rd</sup> applicant filed Narok Misc. App. No. 27 of 2021 and 96 of 2018.
9. The applicants averred that as per directions by the Supreme Court issued on 6/7/2021 limiting application of Muruatetu Decisional law to sentence in murder cases only, their miscellaneous applications stated above were overtaken by events in so far as they were premised upon the Muruatetu decisional law.
10. The applicants withdrew those applications but, again subsequently, separately filed miscellaneous application no. E024, E026, and E027 are all of 2021.

## Directions of the court.

11. On 7/12/2021, this court directed that the record of the trial court as well as the appellate court be submitted to this court. For purposes of writing a single judgment E026 of 2021 and E027 OF 2021 were consolidated with this file- E024 of 2021- which is the lead file.
12. The applications were canvassed by way of written submissions.

## Applicants Submission

13. The applicants' submissions were similar in form and substance except that they were filed separately.
14. The applicants submitted that the death sentence is cruel, inhuman, and degrading punishment. They urged this court to declare that the death sentence imposed on them by Narok chief magistrate's court on October 28, 2003 and confirmed by the High Court at Nakuru on November 14, 2006 and later commuted to life imprisonment by the president is inconsistent with Article 50(2) (h) (p) of the *constitution* and section 329 of the *CPC*. They further urged this court to declare section 296(2) of the *Penal Code* is inconsistent with articles 26(1), 27(1) (2, 28, 48, 50(1) (2) (p) of the *constitution*. They urged the court to find that their constitutional rights were gravely violated and order that their case be reopened for a resentencing process to allow them to offer their mitigation.
15. The applicants submitted that the trial magistrate's hands were tied and did not exercise discretion.



16. The applicants submitted that section 296(1 falls under section 295 of the Penal Code and has prescribed sentence of 14 years as the least severe of the prescribed punishment for an offence of robbery.
17. The applicants submitted that the court has jurisdiction to hear this matter.
18. The applicants submitted that they have been in custody for 19 years and have undergone rehabilitation programs that have transformed their life in all dimensions. Thus the applicants are ripe and ready to be re-interrogated back to society and utilize the skills learned while in safe custody.
19. The applicants have relied on the following authorities;
  - i. Petition no. 15 of 2015 as consolidated with petition no. 16 of 2015 (Francis Karioko Muruatetu) in the supreme court of Kenya.
  - ii. Article 19(3)(a),20(1 (2(4)(3), 22(1 (2 (b),23(1 , 26(1 27(1 (2, 50(2 (q), 28, and 131(1 (e)of the Constitution.
  - iii. Article 10 of the universal declaration of human rights
  - iv. International covenant on civil and political rights (ICCPR).
  - v. Section 216 and 329 of the C.P.C.
  - vi. Edwin Otieno Odhiambo v Republic [2009] eKLR.
  - vii. Godfrey Ngutho Mutiso v Republic Criminal Appeal No. 17 of 2008.
  - viii. The supreme court of Uganda Susan Kigial And 416 Others v AG [2005] Constitutional Petition No. 6 Of 2003.
  - ix. Malawi in Francis Kafantayeni and 5 Others v AG [2007] MWNCI9.
  - x. Roberts v Louisiana, 431 US 633 [1977] A Louisiana.
  - xi. Indian supreme court in Mithu v State of Punjab Criminal Appeal No. 745 of 1980.
  - xii. Exersley Thomas v St Vincent Communication Number 806/ 1998 UN DOC CCPR/70/806/1998[2000].
  - xiii. Section 295, 296(1 (2 of the Penal Code.
  - xiv. The court of appeal in Joseph Mwaura Njuguna & 2 Others v Republic [2013] eKLR.
  - xv. The Owners of Motor Vessel Lilian 's' v Caltex Oil (Kenya) Ltd [1989] KLR at page 14.
  - xvi. The supreme court of Kenya in the case of Samuel Macharia & Another v Kenya Commercial Bank Ltd & 32 Others, Application No. 2 of 2011.
  - xvii. Francis Opondo v Republic [2017] eKLR.
  - xviii. Article 10 (3) of the ICCPR.
  - xix. Daniel Gichimu & Another v Rep [2018] eKLR.
  - xx. Martin Babati & Another v Rep [2018] eKLR at page 115 para 2
  - xxi. George Munyinyi Kihuyo v Republic [2018] eKLR at page 98



- xxii. *Michael Kathewalaichena & Ano v AG* [2018] eKLR page 119.
- xxiii. *John Kathia M'itobi v Rep* [2018] eKLR at page 101
- xxiv. *Joseph Mwanginge & Another v Rep* [2018] eKLR 106.
- xxv. *Lawrence Nkonge Mwiadi* Misc. Cr. App. No. 72 Of 2018 Nakuru (UR) page 113
- xxvi. *Samson Njuguna Njoroge v Republic* H.C. Cr. App. No. 150 of 2016(UR) delivered on 15th Feb 2018 at page 130
- xxvii. *John Kiema Kaibi v Republic* [2018] eKLR
- xxviii. *Ahamad Abolfathi & Another v Republic* [2018] eKLR page 63
- xxix. *Robert Mutashiauda v Rep* [2018] eKLR page 123 para

### **Prosecution's Submission**

- 20. The prosecution opposed the applications.
- 21. The prosecution submitted that this court does not have jurisdiction to determine these applications and ought to down its tools. The applicants filed their appeal to the High court at Nakuru and the matter was determined by a two-judge bench. The applicants failed to move to the Court of Appeal as per section 361 of the *CPC*. According to the DPP, the applications are couched as resentence hearings but the prayers sought ought to be raised in the Court of Appeal. Therefore, this court should disregard the current application as it offends Article 165(6. of the *constitution*.
- 22. The prosecution submitted that the applicants have raised constitutional challenges on the mandatory nature of the death penalty in their submissions. However, they have not raised it as one of the prayers in the application. They have also not placed before this court a constitutional petition raising those grounds or seeking a constitutional determination.
- 23. The prosecution submitted that the section of the law that the applicants were charged (Section 296(2 of the *penal code*) has not been amended to increase a stiffer penalty than what is already prescribed. They argued that the applicants misinterpreted article 50(2 (p) of the *Constitution*.
- 24. The prosecution submitted that the applicants have misinterpreted Article 50(2 (q) of the *constitution* and sought a resentencing hearing on its strength.
- 25. The prosecution submitted that section 333(2 of the *CPC* can only be invoked where the sentence is determinate.
- 26. In the end, the prosecution urged this court to dismiss the misc. applications in total and advise the applicants to exhaust the appeal process or present a proper constitutional petition as provided for in law.
- 27. The prosecution has relied on the case of *Peter Nganga Muiruri v Credit Bank Limited & 2 Others* [2008] eKLR.

### **Analysis And Determination**

- 28. I have considered the applications herein and the rival parties' written submissions. It appears the issues for determination are: -
  - i. Whether this court has jurisdiction to adjudicate upon these applications; and



- ii. Whether the trial court imposed arbitrary mandatory death sentence without exercising any discretion thereto.

### **Nature and scope of Re-sentencing**

28. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not consider conviction. In re-sentencing, the court will ordinarily check the legality or propriety or appropriateness of the sentence. Thus, it will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
29. The challenge on the jurisdiction of this court to conduct a re-sentencing will, therefore, be treated within the scope curved above.

### **Of Jurisdiction**

30. Jurisdiction is the judicial power given by the Constitution or legislation or both, to the court to adjudicate upon a dispute (The Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others*, Application No. 2 of 2011,) Without jurisdiction, a court cannot adjudicate the case before it. Jurisdiction is therefore everything and is of such preliminary importance (Nyarangi, J.A. in The *Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page 14)
31. In this case, the Applicants filed appeal number HCCRA NO. 498, 499, 500 & 501 of 2002 which were heard and dismissed. The Applicants has filed the applications herein before me for resentencing. The prosecution counsel argued that this court pronounced itself on the sentence and so it is *functus officio*.
32. Does this court have jurisdiction to hear the applications?
33. Given the nature of the relief sought in the applications, the observation of the Court of Appeal in the case of *William Okungu Kittiny -v- R* (2018. eKLR is to the point, that:  

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7. of the *Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.
34. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made on the basis of unconstitutionality of mandatory sentence.

### **Alleged violation**

35. At first, the applicants submitted that the death sentence is cruel, inhuman, and degrading punishment. One got a feeling that they are questioning the constitutionality of death as a sentence in Kenya. But, further reading of the submissions, reveals an incoherent and abrupt turn; they immediately, without making any arguments in support of their first allegation, moved into challenging the mandatory nature of death sentence in section 296(2 of the *Penal Code* for denying the court discretion to impose appropriate sentence. I should consider this kind of pleading to be careless or one which results from failure to understand the purport of applying for remedy. As they did not make any arguments to support the allegations that death sentence is cruel, inhuman and degrading



punishment, I will leave that aspect to lie. But, nonetheless, consider their contention on mandatory nature of the death sentence.

36. The applicants urged this court to declare that the death sentence imposed on them by Narok chief magistrate's court on October 28, 2003 and confirmed by the High Court at Nakuru on November 14, 2006 and later commuted to life imprisonment by the president is inconsistent with Article 50(2)(h)(p) of the constitution and section 329 of the CPC. They further urged this court to declare section 296(2) of the Penal Code is inconsistent with articles 26(1), 27(1)(2, 28, 48), 50(1)(2)(p) of the constitution. They urged the court to find that their constitutional rights were gravely violated and order that their case be reopened for a resentencing process to allow them to offer their mitigation.
38. In reacting to these submissions, the prosecution counsel has submitted that there is no constitutional petition before court to house a constitutional relief.
39. It is worth of mention that, although the applications before me have been commenced as miscellaneous criminal applications, their core purport and substance is of an application for redress of violation of rights or fundamental freedoms enshrined in the Constitution. There are the procedure-conformists who will see little value in substantive justice. There are also those whose orientation answer to a higher command of the Constitution; do not sacrifice substantive justice at the altar of technicalities.
40. These applications have invoked the jurisdiction of the High Court in Article 165(3) and 23 of the Constitution to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. And, I will deal with them as such.
29. They claimed violation of article 50(2)(p) of the Constitution which provides: -
- 50(2) Every accused person has the right to a fair trial, which includes the right—
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
41. The most potent argument is that mandatory sentences deprived courts of discretion to impose appropriate sentence. As discretion in sentencing pertains to fair trial, persons who suffer this deprivation may claim violation of right to appropriate or less severe sentence- a principle embodied in the Constitution including article 50(2)(p) of the Constitution. Therefore, Section 296(2) of the Penal Code to the extent that it provides for only a single and mandatory sentence of death, thereby, taking away the discretion of the court in sentencing, is inconsistent with the Constitution. The section provides: -
- 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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
42. However, the Constitution provided the courts with new tools- read-in and red-out techniques- in construing existing law with such modifications, exceptions, adaptations and alterations in order to bring it in conformity with the Constitution. There is therefore, no necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the Penal Code for being inconsistent with the Constitution. You simply read in or read out or alter or modify or adapt it to conform with the Constitution; in this case, I interpret the section to prescribe death as the maximum sentence. These techniques were specially designed to avoid paralysis and confusion in application of law which may



ensue upon down-right striking out of provisions of law, but also giving the legislature time to remove the offending elements aligning the it to the Constitution.

43. Having stated that, the purport of re-sentencing is to provide effective remedy to such injustice arising from a violation of a right or fundamental freedom as was aptly explained by Majanja J in Michael Kathewa Laichena & Another v Republic (2018. eKLR that:

“...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

44. I should however, add that the authority of the court in article 165(3) and 23 of the Constitution is inter alia, to uphold and enforce the Bill of rights. The authority also formally and actually gives the court power of consistently structuring, developing and deploying progressive jurisprudence on rights and fundamental freedoms across time and space in accordance with the command in article 20(3) of the Constitution, that: -

In applying a provision of the Bill of Rights, a court shall—

- a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

### **Sentence**

45. Applying the test, does the sentence herein violate the rights of the applicant?
46. I have perused the decision by this court (M. Koome, & L. Kimaru JJ. as they then were), and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time. I should think that every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. I am aware that the President commuted their death sentence to life imprisonment. But, I will consider the circumstances of the case and impose appropriate sentence.
47. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?
48. In the case before me, the evidence shows that the applicants were armed with a dangerous weapon, namely a gun, they robbed Caddy Njongi Munyaka and Bernard Kamau Kimani of cash Kshs. 23,400/=, one mobile phone make Siemens M30, four jackets, seven caps, and eight dresses, and at or immediately before or immediately after the time of such robbery used actual violence to the said Caddy Njongi Munyaka and Bernard Kamau Kimani. The applicants were found in possession of items which were robbed from the complainant and which items the applicants could not explain satisfactorily how they came into possession of them.
49. The manner the offence is committed is a relevant consideration. In this case, it was cruel. Security of the society from criminals is also quite relevant consideration in this case.
50. The offence is also serious; robbery with violence. And, the weapons used were also dangerous weapons; rifles.



51. In the circumstances of this case, deterrent sentence is most appropriate. I therefore set aside the death sentence and sentence the applicants to life imprisonment.

52. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE  
APPLICATION THIS 14<sup>TH</sup> DAY OF FEBRUARY 2023**

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**F. GIKONYO M.**

**JUDGE**

In the Presence of:

1. CA - Mr. Kasaso
2. 1<sup>st</sup> applicant
3. 2<sup>nd</sup> applicant
4. 3<sup>rd</sup> Applicant

