



**Korir v Republic (Miscellaneous Criminal Application E036 of 2021)
[2023] KEHC 18275 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2021**

**F GIKONYO, J
APRIL 24, 2023**

BETWEEN

ROBERT KIPROTICH KORIR APPLICANT

AND

REPUBLIC RESPONDENT

(From the sentence in Narok CMCR No.1372 OF 2017 and HCCRA NO. 28A of 2017)

JUDGMENT

Sentence re-hearig

1. The application dated December 8, 2021 is seeking sentence rehearing.
2. The application is expressed to be brought pursuant to Articles 2,3(a),19(2),20(1), 22(1) (3), 23(1), 25(c),27(1) (4), 28, 50 (2(p)(q), and 165 of *the Constitution, the Constitution* of Kenya (protection of rights and fundamental freedoms), practice and procedure rules 2010, sections 216 and 329 of the *CPC*, sections 295 and 296(2) of the *penal code* and section 333(2) of the CPC.
3. The applicant prays for a lenient definite sentence in count I, II, III, and IV and for the sentences to run concurrently from the date of arrest since the offences emanated from the same transaction.
4. Further, he seeks for the time spent in remand to be factored in the sentences to be awarded.

Brief background

5. The applicant was charged and convicted of an offence of robbery with violence contrary to section 296(2) penal code. In Narok CMCR No. 1372 of 2014, he was sentenced to suffer death.
6. The applicant's first appeal in HCCRA. 28A of 2007 was dismissed. According to him, he did not appeal to the Court of Appeal.



7. The applicant has now filed the current application.

Directions of the court.

8. This matter was canvassed by way of written submissions.

Applicant's submission

9. The applicant submitted that the death sentence is cruel, inhuman and degrading punishment which has violated his rights. That the death sentence should be abolished and declared unconstitutional.
10. The applicant submitted that an accused person is entitled to the benefit of the least severe of the prescribed punishments for an offence. That section 296(1) falls under section 295 of the penal code and has a prescribed sentence of 14 years which is the least severe of the prescribed punishment for an offence of robbery.
11. The applicant submitted that he was a young man and was influenced by his peers into the commission of the offence. Being a driver, he was tricked that they were going to collect a certain vehicle which later turned to be a stolen property. He regrets his participation in the commission of the offence.
12. The applicant submitted that he has undergone rehabilitation programs which have transformed his life in all dimensions. That he is ripe and ready to be re-integrated back to the society and utilize the skills learned while in safe custody.
13. The applicant prayed that the sentence of time already served in custody from the date of arrest.
14. He stated that he exhausted all his appeal remedies and is seeking this court to exercise leniency and review the present sentence because it has unlimited jurisdiction to hear and determine any matter before it.
15. The applicant submitted that he has reformed and has been well-trained in various courses. He urged this court to impose a definite sentence.
16. He relied on
 - i. Articles 2(5) (6) 19(3) (a) ,20 (1) (2) (3)(4)(a), 22(1) 92) (b) , 23(1), 50(2) (h) (p) , 26(1), 27(1) (2), 28, 48, 50(1)(2) (p) 131(1) € of the Constitution.
 - ii. Section 216, 333(2) and 329 of the criminal procedure code.
 - iii. Article 10 of the universal declaration of human rights.
 - iv. 3 of the European Convention on human rights.
 - v. Section 296(2) of the Penal Code.
 - vi. *Edwin Otieno Odhiambo Vs Republic (2009) eKLR*
 - vii. Section 27(1) of the Terrorism Act
 - viii. Section 202 and 205 of the penal code.
 - ix. *Godfrey Ngotho Mutiso vs republic criminal appeal no. 17 of 2008*
 - x. *Susan Kigula and 416 others vs AG92005) Constitutional Number 6 Of 2003. Francis Kafantayeni And 5 Others Vs Ag (2007) MWNCI 9*



- xi. *Roberts vs Louisiana, 431US 633(1977) Louisiana*
- xii. *Mithu vs state of Punjab criminal appeal no. 745 of 1980*
- xiii. [*Exersley Thomas vs St. Vincent communication number 806/1998 UN DOC CCPR /70/806 \(2000\)*](#)
- xiv. *Joseph Mwaura Njugun & 2 Others Vs Republic (2013) ECLR*
- xv. *The owner of motor vessel Lilian 's' vs Caltex oil (Kenya) ltd*
- xvi. *Samuel Macharia & another vs Kenya commercial bank ltd & 32 others application no. 2 of 2011.*
- xvii. [*Francis Opondo v Republic \[2017\] eCLR*](#)
- xviii. Article 10(3) of the [*I.C.C.P.R.*](#)
- xix. [*Thomas Mwambu Wenyi vs Republic \[2017\] eCLR*](#) cited in Anthony Pereira vs state of Maharashtra at paragraphs 70-71.
- xx. Francis Opondo v rep.[2017] eCLR
- xxi. [*Daniel Gichimu & another v rep\[2018\] eCLR*](#)
- xxii. [*Paul Njoroge Ndungu v republic \[2021\] eCLR*](#)
- xxiii. [*Abamad Abolfathi Mohammed & another v Republic*](#)
- xxiv. [*Robert Mutashi Auda v rep\[2018\] eCLR*](#)
- xxv. Martin Bahati 7 another v rep. [2018] eCLR page 115 para 2.
- xxvi. George Munyinyi Kihuyu v republic [2018] eCLR page 98.
- xxvii. Michael Kathewa Laichena & another v A.G. [2018] eCLR page 119.
- xxviii. John Kathia M'itobi vs rep [2018] eCLR page 101
- xxix. *Joseph Mwangi Ngige & another v rep [2018] eCLR page 106.*
- xxx. [*Lawrence Nkonge Mwiandi misc. Cr. App. No. 72 of 2018 Nakuru \(UR\) page 113*](#)
- xxxi. [*Samson Njuguna Njoroge v republic H.C.C.R. App. No. 150 Of 2016 \(Ur\) Delievered On 15th February 2018 At Page 130*](#)
- xxxii. *John Kirema Kaibi V Republic [2018] KLR Page 133-134.*

Respondent's submissions.

- 17. The respondent submitted that they are opposed to the application. Ms Torosi argued that this court had already pronounced itself on the issue of sentence. The applicant cannot therefore come again to the same court presided over by a different judicial official to seek for resentencing, a matter which had already been dealt with.
- 18. The respondent submitted that this court has no jurisdiction to entertain this application as it would sit on an appeal of a matter that was dealt with by a judge of similar jurisdiction. If the applicant is dissatisfied with the sentence passed by the high court he can move to the court of appeal. The respondent urged this court to dismiss this application as it lacks merit



Analysis And Determination

19. 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 this application; and
 - ii. Whether the applicant should be granted a definite sentence.

Nature and scope of Re-sentencing

20. 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. Thus, it will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
21. The above provides the scope of court's power in re-sentencing? Does the court have jurisdiction herein?

Of Jurisdiction

22. 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 sine qua non adjudication of a dispute by a court of law. Thus, a matter of profound preliminary importance (Nyarangi, J.A. in The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1 at page 14)
23. In this case, the Applicant filed appeal number HCCRA NO. 28A of 2017 which was heard and dismissed. The applicant has indicated that he never filed a second appeal. The Applicant has filed the application herein before me for resentencing. The prosecution counsel argued that this court pronounced itself on the sentence and so it is functus officio.
24. What does the law say on this court's jurisdiction to hear the applications?
25. 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”.
26. The application is for re-sentencing and is founded on alleged violation of *the Constitution*, and more specifically violation of rights and fundamental freedom in the Bill of Rights. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made on the basis of the unconstitutionality of mandatory sentence.



Alleged violation

27. The applicant submitted that the death sentence is cruel, inhuman and degrading punishment which has violated his rights. That the death sentence should be abolished and declared unconstitutional.
28. However, he did not elaborate on these submissions to enable the court determine the question of whether the death sentence is cruel, inhuman and degrading punishment, and should be abolished and declared unconstitutional. The debate on these matters is still raging out there as well as within judicial fraternity. I do not find it appropriate to attempt to resolve such humongous matter in a matter that has not been properly argued before me.
29. Nevertheless, the application has invoked the jurisdiction of the High Court in Article 165 (3) and 23 of *the Constitution* 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. And, I will deal with them as such.
30. The applicant 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
31. The most potent argument is that, the mandatory sentence provided in section 296(2) of the Penal Code, deprived courts of the discretion to impose an appropriate sentence. And as discretion in sentencing pertains to a fair trial, persons who suffer this kind of deprivation are entitled to claim violation of the right to appropriate or less severe sentence- a principle embodied in *the Constitution* including article 50(2)(p) of *the Constitution*.
32. Therefore, to the extent that Section 296(2) of the Penal Code provides for a mandatory sentence of death, thereby, taking away the discretion of the court in sentencing, it 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.
33. However, there are new techniques in construction of exiting law provided in *the Constitution* provided the courts with new tools- read-in, read-out or read-down techniques- in construing existing law with such modifications, exceptions, adaptations and alterations in order to bring it in conformity with *the Constitution*. Accordingly, unless it is totally irreconcilable, there is 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 construe such existing law with such modifications, exceptions, adaptations and alterations necessary to bring it in conformity with *the Constitution*; in this case, I interpret the section to prescribe death as the maximum sentence.
34. These techniques were specially designed to avoid paralysis and confusion in the application of law which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning them to *the Constitution*.



35. Having stated that, the purport of re-sentencing is to provide an effective remedy to such injustice arising from a violation of 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”.

36. 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—

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

Sentence

37. Applying the test, does the sentence herein violate the rights of the applicant?

38. The court is aware that the sentence was commuted by the president into life imprisonment.

39. Needless to say that life sentence is, of itself, a lawful sentence; and although it may appear harsh due to its indeterminate nature, it is now settled that it is not immutable or irreducible. Any formal determinacy of the spun of life sentence, should be furnished through legislative intervention. See the *Muruatetu Case*, the Supreme Court when it made this clear thus:

(87) In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole life sentence and it is only handed down to those who have committed heinous crimes.

(88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

(89) In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of *the Constitution*, which reads:.

“51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and



(b) takes into account the relevant international human rights instruments.”

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui), where the Court held at paragraph 72 and 76 that—

“As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one’s natural life or a term of years. In our view, that is also the province of the legislature.

76. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve.”

40. I should also state that death sentence has not been abolished in Kenya. And imposition of death sentence per se is not a violation of the applicant’s constitutional rights.
41. In this case, there appears to be no reference, by the learned magistrate or judge(s), to the mandatory nature of the sentence as a constraint to exercise of discretion.
42. Similarly, the applicant has not shown how life sentence has violated his right to a lesser sentence prescribed although he argued that section 295 provides for 14 years.
43. I find no reason to interfere with the life sentence commuted by the president. I however, for purposes of judicial record quash the sentence of death and in lieu thereof sentence him to life imprisonment.
44. In the upshot, I find his application for re-sentencing to be completely devoid of merit and is hereby dismissed.
45. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 24TH DAY OF APRIL, 2023.

F. GIKONYO M

JUDGE

In the presence of:

1. The Appellant
2. Ms. Mwaniki for Respondent
3. Court Assistant – Mr. Kasaso

