Kanyonyo v Republic (Petition E002 of 2022) [2023] KEHC 20855 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

PETITION E002 OF 2022

HM NYAGA, J

JULY 20, 2023

BETWEEN

PETER MUNGAI KANYONYO ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant brought the instant petition dated June 29, 2022 wherein he seeks resentence hearing.
2. It is his case that he was charged and convicted of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* in Narok CM Criminal Case No 643 of 2012 and sentenced to death. That he appealed to this court vide Nakuru High Court Criminal Appeal No 150 of 2013 and which appeal was dismissed. He subsequently lodged several Applications in Misc. Application No3 of 2017,13 of 2018 and No16 of 2016 seeking for retrial but all were dismissed.
3. On September 17, 2020 the Applicant withdrew his Appeal before the Court of Appeal.
4. The Respondent did not file any response to the Applicant's petition.
5. The Petition was canvassed through written submissions. The Appellant filed his submissions on April 12, 2023 whereas the respondent filed its submissions on May 10, 2023.

Appellant's Submissions

6. The Appellant submitted that Pursuant to Section 364 (1)(b) of the *Criminal Procedure Code* and Article 50(2)(q) of *the Constitution* this court can review or revise his sentence.
7. The Applicant urged this court to consider an appropriate sentence devoid of the mandatory sentence imposed by the trial court in conformity with: -

1. *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR
2. *Jared Koita Injiri v R* (2019) eKLR
3. *Reuben Muange Ndambuki v Republic* [2020] eKLR
4. *William Okungu Kittiny v Republic* [2018] eKLR
5. *James Kariuki Wagana v Republic* [2018] eKLR
6. *Paul Ouma Otieno & another v Republic* [2018] Eklr
7. *Vura Mwachirumbi V Republic* [2021] eKLR

8. The Applicant urged this court in considering the appropriate sentence to take into account whether the offender used any dangerous and offensive weapons; whether the offender injured the victim and to what degree; whether the offender is remorseful; whether he is a first time offender; whether the period the offender has been in prison is in court considered opinion enough punishment; and whether the offender has reformed.

9. The Applicant also urged this court to consider the value of subject matter of the charge and whether there has been restitution of the property by the accused guided by the cases of *Mathai v R* [1983] KLR 442 & *Hezekiah Mwaura Kibe v R* [1976] KLR 118 respectively.

10. The Applicant submitted that he regrets the occurrence of the incident and has taken time to reflect on his past actions and the pain he caused to the victim and his young family. He urged this court to take into account the factors that led to the commission of the offence and relies on Criminal Appeal No 12 of 2013 where the Court held that;

> " From the said mitigation, the Appellant was a first offender, had a young family and said to have reformed and the items robbed were of modest value. The Appellant has already paid his debt to the society and learnt his lesson."

11. The Applicant contended that he is a reformed person and has undertaken rehabilitative programs while in prison.

12. He further urged the court to take into account the period of time spent in remand in accordance with Section 333(2) of the *Criminal Procedure Code*.

Respondent's Submissions

13. The Respondent submitted that this court although differently constituted had determined the Appellant's Appeal and upheld the conviction and sentence of the lower court and as such it is functus officio and bereft of jurisdiction to entertain this matter.

14. The Respondent contended that this court also lacks jurisdiction to determine this matter as it is Res Judicata in view of the fact that the Petitioner had already benefitted from the Presidential power of mercy that commuted his death penalty to life imprisonment.

15. The Respondent therefore asserted that the Applicant can seek resentencing before the Court of Appeal. To buttress this position, the Respondent relied on the case of *Joseph Waititu Kago v Republic* [2020] eKLR.

16. According to the Respondent, the Petitioner is not deserving of Leniency of this Court due to the following aggravating factors: -The Petitioner with others mercilessly attacked the complainant who was unarmed and alone in the house;He was armed with a pistol which shows he is a dangerous person;He was ready to shoot the Complainant if he could have resisted the robbery;He still assaulted the Complainant even after he had surrendered his wallet that contained Ksh 14,000/=;He denied the charges and took the court through rigorous trial process; &He is not remorseful

17. The Respondent prayed that this court considers the above factors in exercising its discretion.

Analysis & Determination

18. The issues that arise for determination are: -

    1. Whether this court has Jurisdiction to entertain this Application; and

    2. Whether the petitioner's plea for resentencing is merited.

Issue No1

19. Jurisdiction is the authority of the court to hear and determine cases. The same may be general or specific, limited or unlimited and it may be conferred by *the Constitution* or Statute. Without jurisdiction, a court cannot adjudicate the case before it Nyarangi, J.A. in the often-cited case of *The Owners of Motor Vessel Lilian "S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 at page 14 stated:

> "Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

20. The jurisdiction of this court is donated by *the Constitution 2010*. Article 165(3) provides as follows; -

> "... Subject to clause (5), the High Court shall have—
>
> (a) Unlimited original jurisdiction in criminal and civil matters;
>
> (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) The question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the

constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction, original or appellate, conferred on it by legislation...."

21. The Revisionary power of the High court is set out in Article 165 (6) & (7) of *the Constitution* which provides: -

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

22. The supervisory jurisdiction in criminal matters is expounded under Section 362 & 364 of the *Criminal Procedure Code*. Section 362 of the *Criminal Procedure Code* provides as follows: -

" The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

Section 364 of the *Criminal Procedure Code* which provides for the following;

"In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge the High Court may:

(a) In the case of a conviction exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence.

(b) In the case of any other order other than an order of acquittal alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence."

23. In the course of perusing the court record I did note that the applicant withdrew his Appeal in the Court of Appeal on September 17, 2020.

24. In Francis Muruatetu case(supra) the Supreme Court was categorical that any applicant who wished to have a resentence hearing and who had an appeal pending had to first withdraw the appeal.

25. In clarifying the import case of its earlier decision, in Muruatetu 2 the Supreme Court gave the following guidelines:

i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*;

ii. .....

iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.

iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.

v. .....

vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.

vii. .....

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

26. In view of the directions under paragraph (iv) I am of the opinion that this court can only proceed with the application once it is satisfied that the applicant has complied by the above directive.

27. As already stated the Applicant withdrew his Appeal before the Court of Appeal and therefore this Court has jurisdiction to hear and determine this Application.

Issue No2

28. The Applicant herein is basically asking this court to review its sentence by applying the principles set out in Francis Karioko Muruatetu.

29. The mandatory sentence is unconstitutional in accordance with the constitutional test in the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR where the said court declared the mandatory sentence for murder under Section 204 of the *Penal Code* to be unconstitutional on grounds that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case.

30. Subsequently, the Court of Appeal in *William Okungu Kittiny v Republic* (2018) eKLR applied the Muruatetu case mutandis mutatis to the mandatory sentence for robbery with violence under the provisions of section 296 (2) of the *Penal Code* and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the Muruatetu case. As follows:

> "...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ..."

31. In the premises, a court can in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence.

32. The Supreme Court in the *Francis Karioko Murwatetu case* (supra) set out the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

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-adaptation of the offender;

h. any other factor that the Court considers relevant.

> We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:
>
> Guideline Judgments
>
> Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

33. In *Nicholas Mukila Ndetei v Republic* (2019) eKLR, Odunga J. considered what the court has to consider in a re-sentencing hearing and held that: -

> " In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report."

34. Section 333 (2) of the *Criminal Procedure Code* requires a sentencing court to take into account the period spent in custody awaiting trial.

35. I have considered the above stated principles of sentencing and the seriousness of the offence. I do note that the Applicant in mitigation had nothing to say. I have also considered the circumstances prior to the offence, which showed that the Applicant on the material day was armed with a dangerous weapon i.e. a pistol. In the process of robbery, he injured the complainant. The clinical officer who examined the complainant assessed the degree of injury as harm. It is noteworthy that the Applicant did not plead guilty however he was a first time offender and in his submissions before this court he has stated that

he regrets committing the offence. I also do note that the Applicant has been in custody from the time he was first arranged in court on June 8, 2012. Therefore, he has spent almost 11 years in prison as at the date of this Ruling. I also note that the complainant was robbed Ksh 14,000/= and a Phone. The said Phone was recovered.

36. In *James Kariuki Wagana v Republic* [2018] eKLR, Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

37. In Nairobi Misc Cr Application No 430 of 2015; *Simon Kimani Maina v Republic* [2019] eKLR, the Applicant was convicted for the offence of attempted robbery with violence and sentenced to life imprisonment. The court considered that he was 18 years at the time of his arrest and the victims were not injured during the failed robbery attempt. It also considered the fact that he was a first offender, that he was not the one with the AK-47 rifle and that he appeared remorseful. He was resentenced to the time served of 14 years.

38. In Nairobi Misc Cr Application No 393 of 2018; *Joseph Kaberia Kainga v Republic* [2019] eKLR the Applicant was convicted for the offence of attempted robbery with violence and sentenced to death. He was 27 years old at the time of his arrest and had been in custody for 16 years. In resentencing him to the time served, the court noted that the victims were not injured during the failed robbery attempt, that the probation officer's report was positive, that the Appellant appeared to have been rehabilitated during his period of incarceration and that he was remorseful.

39. In Nrb Misc Criminal Appeal Nos 81 & 82 of 2009; *Martin Bahati Makoha &Another v Republic* [2018] eKLR, the Appellants were convicted for the offence of robbery with violence and sentenced to death. The victim sustained a cut wound on the left thumb and throat and his injuries were classified as harm. The court was of the view that the circumstances under which the offence was committed were not so grave to warrant a death penalty. The Appellants were resentenced to the time served of 10 years and 2 days

40. The Applicant herein stated that he has reformed and has undertaken rehabilitative programs while in prison. There is no pre-sentence report in this matter to ascertain this position. Be that as it may, I have taken into account his mitigation herein and the aggravating factors bearing in mind the aforesaid period he has been in custody, and guided by the above precedents, I am of the considered view that a sentence of 20 years' imprisonment will serve the justice of the case.

41. The upshot is that the sentence of life imprisonment imposed by the trial court is set aside and substituted with one of 20 years commencing from the date he was first arraigned in court. i.e. on June 8, 2012. Orders accordingly.

Dated, Signed and Delivered at NAKURU this 20th day of July, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Applicant present