



**Nkayata v Republic (Miscellaneous Criminal Application  
E006 of 2022) [2023] KEHC 19990 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2022**

**F GIKONYO, J  
JULY 12, 2023**

**BETWEEN**

**NKAYATA OLE NKAYATA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision from Original Conviction/Sentence) in Narok  
CMCR No. 889 of 2014 and Narok HCCRA No. 15 of 2016)*

**JUDGMENT**

**Sentence review**

- [1] The applicant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) *Penal Code*. He was convicted and sentenced to death. He appealed to the High court vide Narok HCCRA No 15 of 2016. His appeal was dismissed in its entirety.
- [2] The applicant filed a document entitled 'Brief facts' on January 28, 2022 which contains an application for re-sentencing and submissions in support thereof. He has stated in the said document that he is seeking review of sentence of death imposed on him for the offence of robbery with violence under Article 50(2) (9)(p) and the sixth schedule rule 7 of the *Constitution*.

**Applicant's Submission**

- [3] The applicant orally submitted that he was seeking re sentencing. That he has not sought re-sentencing before. That he only filed an appeal in High court at Narok.
- [4] In his written submission, the applicant urged that this court has jurisdiction under article 165(3) to hear his application for re-sentencing- a relief to redress an injustice caused by imposition of mandatory sentence.



- [5] He also stated that he has reformed and is ready to be reintegrated back to the society.
- [6] The applicant submitted further that time spent in custody was not taken into account in sentencing. He now applies it be taken into account.
- [7] The applicant relied on the following authorities;
- i. The supreme court in *Samwel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others Application No 2 of 2011*.
  - ii. Article 23, 165(3) of the *Constitution*.
  - iii. *Stephen Kimathi Mutungu Vs Republic [2019] eKLR*.
  - iv. *Jasbir Singh Rai & 3 Others Vs Tarsloschan Sinc Rai Estate & Others [2013] eKLR*.
  - v. *Michael Kathewa Laichena & Another Vs Republic [2018] eKLR*.
  - vi. *Wilson Kipchirchir Koskei Vs Republic [2019] eKLR*.
  - vii. *Thomas Mwambu Wenyi Vs Republic [2017] eKLR*.
  - viii. *Ismael Hamisi Ndiragu & Another Vs Republic [2021] eKLR*.
  - ix. *Frankline Kiprotich Rono Vs Republic [2021] eKLR*.

### **Prosecution's Submission**

- [8] The respondents have not filed their written submissions.

### **Analysis and Determination**

#### **Of jurisdiction**

- [9] The rule of the thumb is that; a court of law should always satisfy itself of jurisdiction to adjudicate upon the dispute before it.
- [10] This is brought as an application for redress of a violation of right to less severe sentence under article 50(2)(p) of the *Constitution*.
- [11] Under article 23(1) of the *Constitution*; 'The High Court has jurisdiction, in accordance with Article 165, 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.'
- [12] This court, therefore, has jurisdiction to adjudicate upon this application.

#### **Merit of the application**

- [13] The court has perused the appeal file Narok High Court Criminal Appeal No 15 of 2016. It is apparent that the unconstitutionality of death sentence in section 296(2) of the Penal Code and alleged denial of fair trial thereof were canvassed and determined in the appeal. Therefore, this application is a veiled appeal against the decision of this court (Bwonwong'a J). Thus, an abuse of the court process. Consequently, the application is dismissed.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 12<sup>TH</sup> DAY OF JULY, 2023**



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**F. Gikonyo M.**

**Judge**

**In the presence of:**

1. Petitioner
2. Mr. Kasaso CA
3. Ms. Mwaniki for DPP

