



REPUBLIC OF KENYA



**Shah v Republic (Criminal Revision E058 of 2023)
[2023] KEHC 21567 (KLR) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E058 OF 2023
PM MULWA, J
AUGUST 3, 2023**

BETWEEN

MEHTAB AHMEDALI HUSSEIN SHAH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant Mehtab Ahmedali Hussein Shah was charged with the offence of robbery with violence contrary to section 295 as read with Section 297(2) of the *Penal Code*. The particulars of the offence were that on the October 4, 2015 at around 9.30 am along Ruaka- Gachie road within Kiambu County with others not before the court while armed with a pistol, robbed George Mwanga Onguso his Motor vehicle Registration No KCD 728A Toyota Probox valued at Kshs Seven Hundred and Fifty Thousand Shillings (Kshs 750,000/=) and at the time of such robbery used actual violence on George.
2. He was also charged with an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*, in that on October 4, 2015 at around Mathara Trading Centre along Timboroa-Nakuru County, in the course of robbing, dishonestly retained one motor vehicle Reg No KCD 728A Toyota Probox, knowing or having reason to believe it to be stolen goods.
3. After the hearing, the trial magistrate convicted the applicant and sentenced him to death. The applicant was dissatisfied by both the sentence and conviction and on December 14, 2016, lodged an appeal to the High Court which upheld both the sentence and conviction of death. Kamau, J further ordered the file be remitted back to the trial court for resentencing.
4. Aggrieved by the decision of the High Court, the applicant lodged an appeal in the Court of Appeal. He faulted the High Court for dismissing his appeal without subjecting the entire evidence to a fresh and exhaustive examination. In its judgment, the Court of Appeal dismissed the appeal on both conviction and sentence. It relied on the Supreme Court decision in *Francis Muruatetu & Anor vs*



Republic, SC Pet No 15 of 2015, where the court held as unconstitutional the mandatory sentence in murder by section 204 of the Penal Code.

5. The Court of Appeal also ordered the file to be remitted back to the trial court for resentencing in terms of the High Court order.
6. The matter was remitted back to the trial court for resentencing. The learned trial magistrate Hon M Opondo in her ruling of April 13, 2023, stated that she lacked the jurisdiction to resentence in view of the Supreme Court directions of July 6, 2021 which stipulated the decision in the Muruatetu Case applied only to sentences of murder under Section 203 and 204 of the Penal Code.
7. Dissatisfied by the decision of the trial magistrate on resentencing, the applicant has filed an application for revision before this court seeking to revise the learned magistrate's decision declining to comply with the orders of the court of appeal to resentence him.
8. Prof. Nandwa, counsel for the applicant submitted that the trial magistrate misdirected herself in declining to follow the orders of the Court of Appeal, and urged this court to rectify the misdirection.
9. The High Court under Article 23 (1) of the Constitution is vested with the jurisdiction to determine issues of infringement of human rights -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.
10. Sentencing is a discretionary remedy of the judicial officers, it should however be exercised judiciously and in accordance with the law. The trial court convicted the applicant of the offence of robbery with violence and sentenced him to death. The death sentence was commuted to life imprisonment. The sentence imposed was the only mandatory sentence prescribed by the law.
11. The courts have held that the mandatory nature of sentences deprive the courts of sentencing discretion on the basis of the facts and circumstances of the case. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing on page 15 paragraph 4.1 as follows:
 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender to reform from his criminal disposition and become a law-abiding person.
 4. Restorative Justice: To address the needs arising from criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct.
12. It is obvious that the deterrence or rehabilitative aspect of sentencing is not achieved by a life sentence. The Constitution of Kenya 2010 allows every accused person as of right to benefit from the least severe of the prescribed sentences as enshrined under Article 50(2)(p) of the Constitution: -

Article 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.

13. The evidence adduced demonstrates the applicant was charged with the offence of Robbery causing grievous body harm. He stole the motor vehicle KCD 728A belonging to George Mwanga valued at Kshs 750,000/=. At the time of the robbery, he was in the company of 5 others not before the court and was armed with a pistol.
14. The Muruatetu case changed the law which imposed mandatory sentences on all convicts, the courts have the discretion to impose a less severe mandatory sentence. Being guided by the decision of the Supreme Court in Muruatetu (*supra*) that held the death sentence as unconstitutional, this court has the discretion to interfere with the sentence imposed on the applicant.
15. I am guided by the decided Court of Appeal authorities in:
- Julius Kitsao Manyeso vs Republic* Mombasa Criminal Appeal No 12 Of 2021 – the court set aside the sentence of life imprisonment imposed on the appellant and substitute it with a sentence of 40 years in prison to run from the date of his conviction.
- Wycliffe Wangugi Mafura vs Republic* - Eldoret Criminal Appeal No 22 of 2016 (2018) the court imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an M-pesa shop agent while armed with a firearm.
16. I have also considered the provisions of Section 333 (2) of the *Criminal Procedure Code* which require a sentencing court to take into account the period already spent in custody. From the record the applicant was arrested on October 4, 2015, he was sentenced on November 21, 2016. He has been in prison for around 7 years and 9 months.
17. In the circumstances therefore, I hereby set aside the sentence imposed by the trial court and affirmed by the High Court and the Court of Appeal (commuted to life imprisonment) and substitute the same with a prison term of thirty (30) years. The period to run from the time of the applicant's conviction on October 18, 2016.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 3RD DAY OF AUGUST 2023.

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P.M. MULWA

JUDGE

In the presence of:

Duale – court assistant

Mr. Muriuki - for the Respondent

Prof. Hassan Nandwa - for the Applicant

