



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gathuri v Republic (Criminal Revision E196 of 2022)  
[2023] KEHC 22308 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E196 OF 2022  
PM MULWA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**KELVIN NJOROGE GATHURI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a revision from Kiambu CM's Criminal Case No.1418 of 2010)*

**RULING**

1. By a Notice of Motion application dated June 14, 2022, the applicant seeks a review of the sentence imposed. The application is supported by the annexed affidavit of the applicant sworn on event date, where he depones that he was charged and convicted of the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code* and sentenced to death and that he has exhausted all appeals. According to the applicant, during the trial he was not accorded a fair sentence as the mandatory death sentence is unconstitutional as held by the Supreme Court in the case of *Francis Karioko Muruatete & another v Republic*.
2. In opposing the motion, the learned state counsel, Mr. Muriuki filed a replying affidavit sworn on June 23, 2022, and he states that the offence of robbery with violence attracts a mandatory death sentence. That the decision of the trial court considered the aggravating circumstances and that the applicant failed to mitigate for a lenient sentence during sentencing. According to counsel the Muruatetu case cited by the applicant only applies to murder cases. The sentence meted out to the applicant is legal and lawful and not excessive. That the applicant has failed to demonstrate that the trial court acted on wrong principles. Counsel urged the court not to interfere with the sentence but to proceed and affirm the same, and this will ensure that the applicant is fully reformed.
3. I have considered the application, and the response opposing the application. From the trial court record, the applicant was charged with the offence of Robbery with Violence contrary to section 296(2)



of the Penal Code. The particulars were that on the 27<sup>th</sup> day of August 2010, at Kiduata village he robbed George Nderitu Ciuri of a Motorcycle Registration Number KMCE 986E, a helmet and a pair of protective gloves all valued at Kshs. 275,000/= . The applicant also faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code in that he retained a helmet worth kshs. 3,500 knowing very well to be stolen property. On the second count, he was charged with the offence of conveying suspected stolen property contrary to section 323 of the Penal Code.

4. After a full trial the learned magistrate found the prosecution had proved the case in count one beyond reasonable doubt. The applicant was acquitted in the second count under section 215 of the Criminal Procedure Code.
5. In mitigation the applicant pleaded for leniency as he would suffer in jail. Considering his mitigation, the court proceeded to sentence the applicant to suffer death as provided by the law.
6. Under sections 362 and 364 of the Criminal Procedure Code, this court has powers to call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.
7. Further, article 165(6) of the Constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts.
8. The applicant invites this court to review his sentence imposed in Kiambu Chief Magistrate's Criminal Case No. 1418 of 2010. The applicant was first arraigned in court on September 3, 2010. He was convicted and sentenced on May 31, 2011. He appealed unsuccessfully against the conviction and sentence.
9. I have considered the circumstances under which the offence was committed and the value of the goods stolen. The complainant was attacked at night he could not properly see his assailants as it was dark and he was hit with a metal rod and stone on the head.
10. From the trial court record the trial magistrate imposed the mandatory death sentence on the applicant. Sentencing is a discretionary remedy for the judicial officers, but should be exercised judiciously and in accordance with the law.
11. The Judiciary Sentencing Policy Guidelines list the objectives of sentencing in page 15 as retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. I am not persuaded that the above objectives of sentencing are achieved when the court imposes mandatory sentences. This court is guided by the court of appeal decision in *Julius Kitsao Manyeso v Republic - Mombasa Criminal Appeal No 12 of 2021* where the Court of Appeal set aside the sentence of life imprisonment imposed on the appellant and substituted it with a sentence of 40 years in prison to run from the date of his conviction.  
  
The court went on to state: - "mandatory sentence of the law deprives the courts from exercising their sentencing discretion based on the facts and circumstances of the case".
12. I find the trial court did not exercise its discretion in sentencing as it applied the mandatory nature of the sentence as provided by law.
13. In the circumstances, I hereby set aside the (commuted) mandatory sentence of life imprisonment imposed and affirmed by the courts on appeal and substitute the same with a prison term of 25 years. Taking into consideration the provisions of section 333 (2) of the Criminal Procedure Code which require a sentencing court to consider the period already spent in custody during trial, the sentence will run from the date of the applicant's arrest which according to the charge sheet is August 28, 2010.



It is so ordered

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2023.**

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**P.M. MULWA**

**JUDGE**

**In the presence of:**

Kinyua & Duale – Court assistants

Applicant– present (virtually from Manyani prison)

Mr. Muriuki - for the State/Respondent

