



**Koros v Republic (Miscellaneous Application E045 of 2020)  
[2023] KEHC 23436 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E045 OF 2020  
SM MOHOCHI, J  
OCTOBER 11, 2023**

**BETWEEN**

**GEOFFREY KIPKOSGEI KOROS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This Application by way of an un-dated Notice of Motion and an un-dated and an un-commissioned affidavit all filed on the 12<sup>th</sup> February 2020 seeks the following reliefs:
  - a. That application be certified urgent and be heard on a priority basis.
  - b. That the Court be pleased, to grant a re-hearing of the sentence in High Court Nakuru Criminal Case Number 42 of 2012
  - c. That the Court be pleased, to receive mitigation from the Applicant herein for consideration of an appropriate sentence devoid of the mandatory death sentence which has since been declared unconstitutional by Supreme Court of Kenya.
  - d. That, the Honorable Court be pleased to issue any other order it may deem fit for the interest of justice.
2. The Applicant concedes that he had filed an appeal before the Court of Appeal Criminal Appeal No. 38 of 2015 that he withdrew to give way to this Application as now been placed before me for revision in the exercise of powers conferred on this Court by section 362 of the *Criminal Procedure Code* which provides thus: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”

3. The Respondent is not opposed to the re-sentencing in this matter to a definitive sentence as envisioned in Article 50 (2) (p) of *the Constitution* which provides that "every accused person has a right to a fair trial, which includes the right 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).
4. Owing to the foregoing, it is important for this Court to consider its jurisdiction to review a sentence confirmed on appeal by a Court of equal jurisdiction.
5. Jurisdiction is everything as was held in the case of *Samuel Kamau Macharia Vs. KCB & 2 others*, Civil application No. 2 of 2011:

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
6. Article 50(2) of *the Constitution* provides: -

“Every accused person has the right to a fair trial, which includes the right- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”
7. Article 165(6) of *the Constitution* empowers the High Court to exercise supervisory jurisdiction over Subordinate Courts. The *Criminal Procedure Code* is the Statute that expounds on this jurisdiction. Section 362 of the *Criminal Procedure* provides: -

“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 subordinate court.”
8. Section 364 of the *Penal Code* empowers the High Court to exercise its revisionary powers ... conferred to it as a Court of Appeal by Sections 354, 357 and 358 and may enhance sentence.
9. In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to Section 362 of the *Criminal Procedure Code* as follows:
  - a. Where the decision is grossly erroneous;
  - b. Where there is no compliance with the provisions of the law;
  - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
  - d. Where the material evidence on the parties is not considered; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
10. The Applicant has filed an application for a re-sentence hearing in High Court Criminal Case No. 42 of 2012 where he was convicted together with his co-accused Benard Cheruiyot Kiplangat for the



offence of murder contrary to Section 203 of the Penal Code and subsequently sentenced to suffer death in accordance with Section 204 of The Penal Code.

11. The basis of the application is the finding in the Supreme Court Petition No. 15 and 16 of 2015, in Francis Kariuki Muruatetu & Another v Republic where it was held that Section 204 of the Penal Code was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing.
12. In this case, the Applicant herein was sentenced to suffer death and the same was passed prior to the decision in the Muruatetu case when the Courts would not exercise discretion while sentencing in murder cases.
13. Further, the Supreme Court did issue guidelines for its decision on the Constitutionality of the mandatory death sentence for the offence of murder in the Muruatetu case where all offenders who had been subject to the mandatory death penalty in murder cases are entitled to re-sentencing hearing before the High Court.
14. This Article is as read with Article 23 (1) of the Constitution allows this court to impose sentence that may be less severe than the mandatory sentence of death.
15. Being a resentence hearing, this Court is called upon to issue an appropriate and proportional sentence after considering the circumstances of the case in striving to achieve the objectives of punishment.
16. It is important to clarify that this court has considered the aggravating circumstances of the offence committed, the fact that the Appellant has so far served 10 years of incarceration, the commendations in support of his reformation and his current health status as a basis of this re-sentence.
17. Consequently, I find this application to be of merit and the same is allowed.
18. The Sentence of life imprisonment imposed on the Applicant is hereby set aside and varied.
19. The Applicant is hereby sentenced to 20 years' imprisonment which period shall run from 1<sup>st</sup> June 2012  
It is hereby so ordered.

**SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 11<sup>TH</sup> DAY OF OCTOBER 2023**

**MOHOCHI S.M**

**JUDGE**

