



**Pakwaniki v Republic (Criminal Petition E015 of 2021)
[2024] KEHC 12021 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E015 OF 2021
F GIKONYO, J
OCTOBER 1, 2024**

BETWEEN

PARMALAI OLE PAKWANIKI PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction and Sentence in Narok
CMCR No. 456 OF 2011, and Narok HCCRA NO. 31 of 2017)*

JUDGMENT

Sentence Re-hearing

1. Before the court is an undated application filed on September 6, 2021. The petitioner is seeking a lenient definite sentence, a declaration that the death sentence is unconstitutional and consideration of time spent in custody in the sentence to be awarded.
2. The application is expressed to be brought under articles 22(1), 23(1), 2(5)(6), 19(2), 20(1), 22(1), 23(1), 25(c), 26(1), 27(1)(4), 28, 50(2)(p)(q), 159(2) 165, 258, and 259 of *the Constitution*, section 216, 329 and 333(2) of the Criminal Procedure Code, section 295 and 296(2) of the penal code and article 3 and 10 of the international covenant on civil and political rights.

Brief background of this case

3. The petitioner was charged, convicted, and sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the Penal Code in Narok CMCR No. 456 of 2011. He filed an appeal Narok HCCRA No. 31 of 2017 which was dismissed in its entirety.
4. He is now serving a life sentence following commuting of sentence by the President.



Directions of the court.

5. The application was canvassed by way of written submissions. Both parties have filed.

Petitioner's Submission

6. The petitioner submitted that this application is competent and properly before this court which is seized with the jurisdiction to hear and determine the matters herein. The petitioner relied on the cases of owners of Motor Vessel Lilian's' Vs Caltex Oil (Kenya) Ltd [1989] KLR1 at page 14, Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, article 23(1) and 165(3) of *the Constitution*, Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai Estate & 4 Others [2013] eKLR, Protus Buliba Shikuku Vs Attorney General [2012] eKLR.
7. The petitioner submitted that sentences are defined by law but the measure of what is appropriate sentence is left to the discretion of the judges and magistrate however section 296(2) of the penal code takes away the decisional independence of the court. The petitioner relied on Articles 27 and 25, 50(2) (k) and (p) of *the Constitution*, Article 3 of the African Charter on human and people's rights, Dakar declaration, and recommendations on the right to a fair trial in Africa, the supreme court of India in the cases of Natasha Singh Vs CBI {2013} 5 SCC 741, Zahira Habibullah Sheikh & Another Vs State Of Gujarat & Others AIR 2006 SC 1367, state of M.P. V Bablu Natt {2009} 2S CC 272, Alisters Anthony Pereira V State Of Maharastra {2012} 2SCC 648 PARA 69, SV Jansen 1999(2) SACR 368 AT 373 (G) –(H), SV TOMS 1990 (2) SA 802 (A) AT 806(L) -807(B), S V MOFOKENG 199 (1) SACR 502 (W) AT 506 (D), Joseph Kaberia Kahinga & 11 Others V Attorney General [2016] eKLR, and Ismael Ndirangu & Another V Republic [2021] eKLR.
8. The petitioner in his mitigation submitted that he is reformed and ready to reintegrate into the society. he has met Jesus and is now a friend of the good book. His co-accused was released in high court criminal application No. 20 of 2017 and he has been tortured during his stay in prison. He prays that this court finds that the petitioner needs uniformity in sentencing between him and his co-accused who was released in the same file.

Respondent's submission.

9. The respondent submitted that there is no rational reason why the reasoning of the Supreme Court in the Muruatetu case, which holds that the mandatory death sentence is unconstitutional for depriving the courts of discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply the provisions of robbery with violence which do exactly same thing. The respondent relied on section 296(2), 204 of the Penal Code, Francis Kariko Muruatetu & Another Vs Republic, James Kariuki Wagana Vs Republic [2018] eKLR, S Vs Mchuru & Another (AR 24/11) (2012) ZAKZPHC 6, S Vs Scott Crossely 2008 (1) SACR 223(SCA), Mithu Singh Vs State of Punjab 1983 AIR 473, Kisumu Court of Appeal Criminal Case No. 166 Of 2016 Cyrus Kawai Vs Republic.
10. The respondent submitted that the trial magistrate without any mitigating factors and without putting into consideration that the petitioner did not use excessive force nor did they unnecessarily injure the complainant during the robbery went ahead to pass a death sentence as was prescribed by the law. The violence unleashed on the victim was not sufficiently serious. The mitigating and aggravating factors were not put into consideration and the trial magistrate was tied to the prescribed law that imposed a mandatory death sentence upon the petitioner. The applicant has shown through the filed court documents that he has undergone rehabilitation, has reformed, and if given a second chance could be a productive member of society. The respondent relied on the case of James Kariuki Wagana Vs Republic [2018] eKLR.



11. The respondent submitted that life sentence commuted is inappropriate sentence thus conceded to the petition on review of both the death sentence and life sentence. The respondent relied on the case of Julius Kitsao Manyeso Vs Republic [2023] eKLR.

Analysis And Determination

12. The application herein and the rival parties' written submissions concentrated on imposition of death sentence without exercise of discretion. However, the sentence was commuted by the President to life imprisonment. The petitioner and the respondent did not discuss the life sentence except stating of the need for definite sentence. The issue should be what is the appropriate sentence.

Nature and scope of Re-sentencing

13. Re-sentence is neither a hearing de novo nor an appeal. But, the Kenya jurisprudence on re-sentencing is murky. The concept has mutated into other forms, including, becoming a kind of post-sentence parole scheme or an appeal against a decision made under article 133 of *the Constitution*, ushering total confusion in the practice of re-sentencing.
14. Apt jurisprudence is required on, exercise of power of mercy under article 133 of *the Constitution*, the place and the relevance of this jurisdiction in our legal framework for sentencing. The article provides that: -
 133. (1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by—
 - (a) granting a free or conditional pardon to a person convicted of an offence;
 - (b) postponing the carrying out of a punishment, either for a specified or indefinite period;
 - (c) substituting a less severe form of punishment; or
 - (d) remitting all or part of a punishment.
15. And under sub article (4) thereof: -
 - (4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.
16. *The Constitution* did not leave the jurisdiction to arbitrary practice; it mandated Parliament to enact legislation to provide, among other things, for: -
 - (3) criteria that shall be applied by the Advisory Committee in formulating its advice decisions
17. Therefore, this is one of the constitutional designs aimed at achieving the noble objectives of restorative justice in society. It also provides an anchor for a comprehensive parole system which will encompass correctional service providers and other service providers of services relevant to or necessary in the rehabilitation and re-integration of offenders back to society. A robust parole system under article 133 of *the Constitution*, or the correctional services law, may address most of the issues being raised in court as re-sentencing. These are relevant considerations and form a functional foundation for making or formulating judicial or policy decisions of general character or application towards building a healthy re-sentencing practice in Kenya.



was commuted to life imprisonment

18. The death sentence imposed by the court was commuted into life sentence by the President in exercise of the power of mercy under article 133 of *the Constitution*. In the circumstances, the question of mandatory sentence of death may not arise. Except, however, for purposes of the court record, the court endorses that, following the exercise of power of mercy by the President, the death sentence imposed on the applicant is set aside. He is now serving life imprisonment.

Alleged violation

19. The applicant prays for the life sentence to be set aside and for him to be given a definite lenient sentence. He says that he is rehabilitated and has learned new skills which makes him fit for re-integration in society. In addition, he submitted that he is advanced in age and hopes to get a sentence that will allow him to support his family.
20. The prosecution counsel has conceded to the application.

Sentence

21. The Judiciary Sentencing Policy Guidelines list the objectives of sentencing on page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the Applicant to inflict harm. What are the relevant circumstances of this case?
22. In the case of *Evans Nyamari Ayako Vs Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, Okwengu, Omondi & Joel Ngugi, JJ. A* held that;
- ‘On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.’
23. The court has considered the mitigating factors; his age, rehabilitation as well as family needs. Nevertheless, in the circumstances of this case, a deterrent sentence is most appropriate. As life sentence does not mean the natural life of the applicant, in lieu thereof, the petitioner is sentenced to 30 years imprisonment. The sentence is lenient; it will commence from the date he was first sentenced.
24. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 1ST DAY OF OCTOBER, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

Applicant

Ms. Rakama for DPP

Otolo C/A

