Warui v Republic (Criminal Revision E172 of 2024)
[2024] KEHC 12385 (KLR) (14 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E172 OF 2024

DKN MAGARE, J

OCTOBER 14, 2024

BETWEEN

PETER MURIITHI WARUI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Arising from the original case being Karatina CMCR Case No. 343 of 2007)

RULING

1. This is a ruling on an application filed on 21/5/2024 for resentencing.
2. The application is premised on the grounds in the application and supported by the affidavit of the Applicant principally as follows:
    a. The Applicant was convicted on the charge of robbery with violence and sentenced to death.
    b. The Applicant's appeals to the high court and court of appeal were dismissed and conviction and sentence upheld.
    c. The sentence of death was subsequently commuted to life imprisonment pursuant to the Presidential Decree in 2016.
    d. The Applicant is a first offender, remorseful and has been rehabilitated.
    e. The court to consider time served as sufficient punishment if circumstances demand.
3. I have not had sight of any response or submissions by the Respondent. The Applicant also did not file submissions.

Analysis

4. The issue is whether the Applicant's life sentence should be reduced. I note that the Applicant was just one of the 2 accused persons jointly charged with the offence of robbery with violence in the trial court. The co-accused, one Duncan Mwangi Ngatia was also convicted and has since been commuted to serve 25 years taking into account the time spent in custody. The Respondents conceded to the said period and are of the position that this application presents similar circumstances.

5. The Supreme Court opined in Francis Karioko Muruatetu & Another v Republic (2017) eKLR (Muruatetu I) that the mitigation factors that may reduce a sentence imposed by the law by no way replace judicial discretion.

6. It is a settled principle that mandatory sentences deprive courts of discretion to impose appropriate sentences and are thus arbitrary and unconstitutional.

7. The instant application is premised among others on Article 50(2)(q) of *the Constitution*. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right to appropriate or less severe sentence – a principle embodied in *the Constitution* including Article 50(2)(p) of *the Constitution* as follows:

   Every accused person has the 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.

8. I understand that under Section 296(2) of the Penal Code, it is provided as doth:

   If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

9. However, in my view, re-sentencing merely provides an effective remedy to an injustice that may arise from a violation of a right or fundamental freedom. This was equally the view of this Court in Michael Kathewa Laichena & Another -v- Republic (2018) eKLR thus:

   > "...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence."

10. As was held by the Court of Appeal in Thomas Mwambu Wenyi Vs Republic (2017) eKLR citing the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71:

    > "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of

> proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

11. In this case, I note that the death sentence was imposed since it was the mandatory sentence provided under the law. Under Section 296(2) of the Penal Code, the sentence for robbery with violence is death. In Kenya, death sentences are usually commutated to life imprisonment by administrative fiat. However, the sentence under Sentence 296(2) was a minimum mandatory sentence which deprived the court of the powers to exercise discretion to mete out appropriate sentences.

12. Therefore, I find and hold that this court has jurisdiction to reconsider the sentence meted upon the Applicant for the purposes of substitution. As was held in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu II):

> In respect of other capital offences such as treason under Section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under Section 297(2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached.
>
> ... All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.
>
> Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.

13. In a subsequent advisory after Muruatetu & another v Republic; Katiba Institute & 5 others (Supra) the supreme court, differently constituted in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Direction) stated that the foregoing decision only applied only with respect to sentences of murder under Sections 203 and 204 of the Penal Code. However, they left open for this court to pronounce itself, a constitutionally mandated court to do so. They stated as follows in the post Judgment advisory: -

> 9. To obviate further delay and to avoid confusion, the court issued the following guidelines: -
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> 1. The decision of Muruatetu and the guidelines herein were applicable to sentences of murder under sections 203 and 204 of the Penal Code only.
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> 2. The Judiciary Sentencing Policy Guidelines were to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
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> 3. All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.
>
> 4. Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
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> 5. In the re-sentencing hearing, the court had to record the prosecution's and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on a suitable sentence.

6. An application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which had jurisdiction to do so and not the subordinate court.

7. In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court: -

   i. Age of the offender;

   ii. Being a first offender;

   iii. Whether the offender pleaded guilty;

   iv. Character and record of the offender;

   v. Commission of the offence in response to gender-based violence;

   vi. The manner in which the offence was committed on the victim;

   vii. The physical and psychological effect of the offence on the victim's family;

   viii. Remorsefulness of the offender;

   ix. The possibility of reform and social re-adaptation of the offender; and,

   x. Any other factor that the court considered relevant.

8. Where the appellant had lodged an appeal against the sentence alone, the appellate court would proceed to receive submissions on re-sentencing.

14. The court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015)* [2021] [Supra] proceeded as thus; -

> In respect of other capital offences such as treason under section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under section 297(2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached.

15. The day referred has now come. The prisoners are entitled. Death by hanging is the same for murder, treason and robbery with violence. There is no reason why any sentence can be treated differently. The accused as capital offenders are entitled to equal treatment under the law. A person hanged for robbery with violence cannot be less dead than a murder suspect, even a treason suspect. They are all entitled to mitigation and equal treatment. Article 27 of *the constitution* provides as follows: -

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

16. Criminality is not listed. However, rights are unlimited and inherent. The fact that 10 people are facing a death penalty, means that those people are facing the same situation and cannot be discriminated without any justification in a free and democratic society. They are entitled to equal treatment. It does not mean that the death penalty is unconstitutional. The Supreme Court has found that it is the mandatory nature in murder cases that is unconstitutional.

17. This court notes that there can be no discrimination in sentencing. Regard must however be had to differentiation. The Court of Appeal in Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR posited as follows: -

With the above in mind, we turn to consider whether the guidelines discriminated against Dida.

Black's Law Dictionary, Ninth Edition defines "discrimination" as,

> "Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured."
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> And direct and indirect discrimination was distinguished in the case of Nyarangi & Others vs Attorney General [2008] KLR 688 when it was stated that;
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> "Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".
>
> With regard to differential or unequal treatment it was observed in the case of Kedar Nath vs State of W.B. (1953) SCR 835 (843) that;
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> "Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that

it does not rest on any rational basis having regard to the object which the legislation has in view."

Similarly, in the case of Federation of Women Lawyers Fida Kenya & 5 Others vs Attorney General & another 2011 eKLR it was stated thus;

"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which *the Constitution* had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of *the Constitution*. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

So as to ascertain whether discrimination or unfair discrimination was founded, it is instructive that in disparate jurisdictions varying stages of enquiry have been adopted. For instance, in the Canadian Supreme Court case of Andrews vs Law Society of British Columbia, [1989] 1 S C R 143 McIntyre J. based his analysis of whether discrimination under section 15 of the Canadian Charter of Rights and Freedom, Part 1 of *the Constitution* Act, on infringement of equal rights, was made out by seeking to answer three questions. Firstly, whether there had been denial of one of the four basic equality rights; secondly whether there was discrimination; and thirdly whether the discrimination was based on enumerated or analogous grounds. The case of Law vs A.G Canada [1999] 1 S C R 452 which followed Andrews (supra) also adopted a three step enquiry to determine whether a violation of rights was established, as follows;

(a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?

(b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

(c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?

18. The question then is whether, the capital offenders in murder and those in robbery with violence and other criminal cases are children of a lesser god. Whereas the Supreme Court was dealing with murder and no other offence, and it was bound to do as it did, we are left with two decisions of two benches of the apex court that are to guide but one expressly seeks not to give guidance. In short, the high court is free to consider the case on its own as may even reach the same conclusions. In the words of the Supreme Court, the matters should be fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached."

19. I have thus reached a similar conclusion that a mandatory death sentence is unconstitutional. This is independent from the decision in Muruatetu advisory. In this matter, the prosecution counsel concedes that this court can give 25 years.

20. The death sentence was subsequently reduced to life imprisonment through a gazette notice under the hand of the President of Kenya. However, it should be noted that the judicial entice is a death sentence for which I must consider in this application.

21. The court of appeal jurisprudence has also determined that life imprisonment is unconstitutional and courts have remitted life sentences to a determinate period of time. This emerging jurisprudence is a product of a purposive reading of Articles 27 and 28 of *the Constitution* as applied to sentencing. In interpreting these provisions, the Court of Appeal, in the Malindi Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso v Republic (Judgement 7/7/2023) (unreported) stated as follows:

...mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter & Others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) 120161 Ill ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

22. In the case of Vinter and others v. the United Kingdom (Applications Nos. 66069/09, 130/10 and 3896/10) the Court held that:

> It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognized by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
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> Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.

23. In State vs. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA, writing for the majority of Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts."

24. The Court also cited Mithu Singh vs. State of Punjab, 1983 AIR 473, in which the Supreme Court of India considered the constitutionality of a provision of law prescribing a mandatory sentence of death that was challenged. In holding that the provision was unconstitutional, the Court stated as follows:

> "...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

25. In arriving at its decision this Court is similarly guided by the decision of the Constitutional Court of Uganda in Susan Kigula & 417 Others vs. Attorney General, Const. App. No. 3 of 2006 that:

> " The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with *the Constitution*."

26. I therefore have no doubt that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.

27. The Supreme Court of Appeal of South Africa in S v Nkosi & others 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. The Court stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s. 12(1)(e) of *the Constitution* of the Republic of South Africa *Act 108 of 1996*.The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

28. The Court of Appeal in *Ayako v Republic (Criminal Appeal 22 of 2018*) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) stated as follows:

> 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.

12. Based on the above discourse, I am persuaded that this is a proper case for me to exercise my discretion to review the sentence of death as imposed by the trial court and upheld on appeal. I find legal basis on which to exercise my discretion in favour of the Applicant. The Applicant was not unduly violence and respected the right to life. They took 500/- and threatened to use violence. The mitigating factors and the long period in custody is noted. There is no useful purpose to be served for holding the Appellant more than the period he has been in custody. I have already set free the co-accused who was in similar circumstances.

12. The application thus present forth particulars based on which the court is persuaded to exercise discretion in favour of the Applicant. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> "Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

29. I allow the prayer for re-sentencing. The sentence of life imprisonment/death penalty is set aside and substituted with the period spent in prison since the date of arrest on 8/4/2007. The period spent in custody is thus sufficient given the miniscule nature of damages caused, the age of the Applicant, who was in his late 20s and now old after 17 years in custody. This is informed by the nature of the offence, the same was not heinous and a property valued Kshs. 500/- was lost. It is important to note that no life was lost or grievous harm sustained.

Determination

30. I therefore make the following orders: -

    a. Death sentence is hereby set aside and in lieu thereof replaced with the period served.

    b. The application for review is merited and is allowed. The sentence is reduced to the period served. The Applicant is therefore set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF OCTOBER, 2024.

KIZITO MAGARE

JUDGE

Ruling delivered through Microsoft Teams Online Platform.

In the presence of:-

Mr. Mwakio for the State

Applicant in person – present

Court Assistant – Jedidah