Githiari v Republic (Criminal Revision E165 of 2023)
[2024] KEHC 14646 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14646 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL REVISION E165 OF 2023

RM MWONGO, J

NOVEMBER 19, 2024

BETWEEN

SIMON GITHINJI GITHIARI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(A revision in respect of the judgment of J.N. Mwaniki, SRM dated 25th February, 2010 in Criminal Case Number 339/2009 at P M's Court - Baricho)

JUDGMENT

1. The applicant was convicted with the offence of robbery with violence on 25/02/2010. At the time of sentencing the trial court stated that there was only one sentence in law for the offence and imposed the death sentence.

2. The applicant appealed in the High Court and his appeal was dismissed by a two-judge bench on 4/1/2013. Due to lack of funds, he stated, he was unable to pursue a further appeal.

3. He has now filed a motion dated 4th April, 2023 seeking the following orders:

    1. This honorable court be pleased to grant an order rendering the review of the applicant's case in redress of unfair trial in sentencing conducted by the trial court due to the mandatory nature of sentencing under section 296 (2) of the *P.C*.

    2. This honorable court be pleased to hear and determine my sentence review application for the interests of justice.

    3. This honorable court be pleased to give an order that will render invocation of section 216 of the *C.P.C* in the redress of unfair trial in sentencing for interests of justice.

4. The applicant further points out that he is serving an imposed life sentence, which I presume means that the death sentence imposed was commuted to life imprisonment by the President, as is the usual case.

5. In his supporting affidavit he states, inter alia, that in regard to this application he is seeking court intervention in sentencing only, since, due to the mandatory nature of sentence imposed under section 296 (2) of the *Penal Code* his mitigating circumstances among other relevant factors of consideration before sentencing were not taken into account as part of the trial.

6. The parties submitted as follows.

7. Through counsel, the applicant submitted that he is not challenging his conviction but is seeking to have his death sentence reviewed; that he be resentenced; and that Section 333 (3) of the *Criminal Procedure Code* be invoked to take into account the time spent in custody prior to sentencing.

8. The applicant stated that the complainant testified in court on 6th August, 2009 that he was attacked at the gate of his house by 2 people armed with clubs. That he was hit on the head and fell down. The injuries were classified as harm by PW4, a clinical officer. He stated that the other attacker hit him with a stick. That he screamed and struggled with one of the attackers while the other ran away. He lost an ATM card and Kshs.3,000/= which were never recovered.

9. The applicant submits that the circumstances of the offence does not warrant a death sentence and as such he urges the court to review the same and sentence him to a definite prison sentence.

10. He relies on the persuasive authority of *Martin Bahati Makoha & another v Republic* [2018] eKLR where Ngenye, J (as she then was) considered the circumstances of the offence in reviewing a death sentence into a definitive sentence of time served. Reference was made to the Court of Appeal decision in *William Okungu Kittiny v R* [2018] eKLR where the court held that the findings and holding of the Supreme Court in Muruatetu applies mutatis mutandis to the offence of robbery with violence; and thus, that the sentence for robbery with violence is discretionary.

11. Further, he relies on the authority of *James Kariuki Wagana v Republic* [2018] eKLR, where Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the complainant during the robbery" and he was not armed during the robbery. The learned Judge therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

12. Further reliance was placed on *Martin Bahati Makokha & Another v R* [2018] eKLR where Ngenye J (as she then was) considered the circumstances of the offence in reviewing tha death sentence into a definitive sentence of time served.

13. The respondent submits that Article 165 vests the High Court with vast powers including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated or denied, infringed on or threatened and the jurisdiction to hear any question respecting

the interpretation of the *Constitution*. Further, that the High Court has revisionary jurisdiction, in accordance with Article 165(6) as follows:

> " The High Court has supervisory Jurisdiction over the subordinate Courts and over any person, body or authority excising a judicial or quasi-judicial function."

14. The respondent submits that the provisions of the law that impose the death sentence are still couched in mandatory terms. However, after the interpretation by the Courts under the Bill of Rights as envisaged in the *Constitution* of Kenya 2010, the mandatory sentence has since been declared unconstitutional although the death sentence itself is not a cruel, inhuman or degrading as Article 26(3) of the *Constitution* of Kenya 2010 provides that where the death sentence is provided under any law, it does not amount to the deprivation of the right to serve a death sentence.

15. The respondent argues that he Applicant was convicted of a capital offence without the trial Court having considered the mitigating factors as such, this Court has jurisdiction to consider the mitigating factors and render itself appropriately.

16. The applicant states that he takes full responsibility for the offence he committed and does not challenge his conviction but seeks definite sentence under Article 50 92) (p) of the *Constitution* of Kenya 2010.

17. Further the state submits that the applicant also seeks to benefit from Section 333(3) of the *Criminal Procedure Code* on the time spent in remand be regarded. The respondent submits that the Courts having declared maximum and minimum sentences inconsistent with the *Constitution*, this Court has jurisdiction to render itself on the applicants' application on definite sentence while considering mitigating factors such as:

    1)The age of the offender;

    2)Whether the applicant was a first offender;

    3)Whether the applicant pleaded guilty;

    4)The character and record of the applicant and

    5)The possibility of reform and social re-adaption of the applicant and any other factor that this Court will deem fit.

18. The state cited the case of *Godfrey Muchiri Njuguna v Republic* [2020] eKLR where the court took into account the time spent in prison and stated:

> " The applicant has been in custody for the las nineteen years. He has demonstrably reformed .....in the circumstances of this case, I am persuaded that no more sentencing objectives would be achieved by the continued incarceration of the applicant".

19. The state submits that the Court should evaluate the mitigation factors and the appropriate sentence befitting the circumstances of the case.

Analysis and Determination

20. The applicant was convicted and sentenced to death on 25/2/2010 for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code.* He appealed against both the conviction and sentence in the High Court in Criminal Appeal No. 58 of 2012 at Kerugoya, whereby the appeal was dismissed.

21. The question before me is whether the death sentence for robbery with violence can be reviewed.

22. In the case of *Francis Karioko Muruateu & Another v R* [2017] eKLR, the Supreme Court appeared to open a path for convicts serving death sentences to benefit from the principle in Muruatetu that the mandatory nature of the death sentence was unconstitutional, and asserted by the Court of Appeal in William Kittiny's case. However, on 06/07/2022, the Supreme Court clarified that Muruatetu was only applicable to sentences of murder under sections 203 and 204 of the Penal Code.

23. This meant that courts applying Muruatetu as a basis for re-sentencing applications by persons convicted with robbery with violence and other offences where the death sentence applied, could not benefit from Muruatetu.

24. It is clear that, at present, the courts in Kenya have not declared sections of the law providing for the death sentence to be inconsistent with the Constitution.

25. The applicant submits that the circumstances of the offence do not warrant a death sentence; and he has urged the court to review the same and sentence the applicant to a definite prison sentence.

26. There is also no uniformity on the question of the sentence for robbery with violence in the various High Court decisions. The respondent submitted that the provisions of the law that impose the death sentence are still couched in mandatory terms, citing section 296 (2) of the *Penal Code* which provides:

> "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."

27. In *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR the High Court re-emphasised the mandatory nature of the death sentence stating:

> "A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word 'shall'. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law."

28. However, in the following cases it appears clear that High Court judges are gravitating in the direction that the court has discretion to impose any other penalty that it deems fit, and in particular taking into consideration the aggravating and mitigating circumstances. The cases include:

29. *James Kariuki Wagana v Republic* [2018] eKLR where Ngugi J held on appeal:

> "In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon."

30. *Hassan Juma v Director of Public Prosecution* [2021] eKLR where Ogola J held:

> " I have now considered the mitigating and aggravating circumstances in the case. In my view, the nature of this robbery does not call for invocation of the death penalty. However, in this case there are aggravating circumstances involving the use of a knife, which eventually injured the victim's hand when he tried to save himself from being murdered by the Petitioner and his accomplice. In my view, the mitigating circumstances of the Petitioner being a first offender and being misled do not outweigh the aggravating circumstances."

31. In other instances, the High Court has formally recognized the Presidential commutation as a sentence that can be imposed even in cases where aggravating circumstances exist. For example, in *Maritim v Republic* (Criminal Appeal E024 of 2021) [2022] KEHC 10256 (KLR) (6 July 2022) (Judgment) Gikonyo J held:

> " 46. The level of violence unleashed on the complainants is sufficiently serious to warrant death sentence or long period of imprisonment. A person was shot dead by the gang of thugs who attached the complainant and his colleagues.
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> 47. The court is aware that death sentences were commuted by the president to life imprisonment. In the circumstances of this case, life sentence is an appropriate sentence. I formally set aside the death sentence and impose life sentence upon the appellant. It is so ordered."

32. In the present case, the applicant had appealed in the High Court in HCCRA No 58 of 2012, which appeal was dismissed. I have perused his petition of appeal and noted that he was appealing "against the sentence of death for robbery with violence". In the judgment on appeal, it is clear that focus was directed to whether the conviction was justified, that is to say, whether a case had been made out against him. The High Court then found that his conviction was proper and confirmed the sentence imposed upon him. However, there were no arguments presented concerning the sentence, and the High Court did not consider the appropriateness of the element of sentence in its own right.

33. In the case of *Gitahi v Republic* (Miscellaneous Criminal Application E028 of 2022) [2023] KEHC 26339 (KLR) (8 December 2023) the applicant was sentenced to death for robbery with violence. On appeal, his sentence was reduced to a life sentence. Dissatisfied he filed a petition, and later a notice of motion for review. As in the present case that applicant stated that the Muruatetu Principles were adopted by the Court of Appeal in *William Okungu Kittiny v Republic* and he relied on them.

34. Wakiaga J held:

> " 19. However, it is clear that the Applicant's mitigation was taken into account by this Court while reducing the mandatory death sentence to life imprisonment and would therefore agree with the State that the Court cannot now reopen the same unless under the window provided for in review. This perhaps explain why the petition was filed in Machakos and Nairobi.
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> .....
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> 21. The authorities submitted by the Applicant cannot come to his aid as the same are in respect of the Court either exercising its original jurisdiction or appellate jurisdiction and not where the Applicant, as in this case, is applying for resentencing under the Muruatetu principles. The Applicant had or still

has an opportunity to advance his claim to a lesser sentence on appeal to the Court of Appeal, this Court having exercised discretion and mated out a lesser sentence on appeal."

35. In this case, the applicant has not been to the Court of Appeal, and thus has not exhausted his appeal rights. That is an option that is still open to him.

Conclusion and Disposition

36. I have perused the lower court proceedings and noted the nature of violence that was used by the applicant. The evidence of the Clinical Officer PW4 was that:

> "..[the complainant] had blood stained clothes. He had multiple deep cut wounds on the head, multiple bruises on the back, bruises and tender right elbow and bruises on both lower arms. The bruises were a few hours old occasioned by a blunt object"

37. Despite this record, the applicant has made light of the injuries sustained by the complainant because the amount alleged to have been stolen was only 3,000/= and an ATM card. I do not think the injuries are so light

38. In any event, the Court of Appeal in *Julius Kitsao Manyeso v Republic* [2020] eKLR, a decision that was decided on 7th July 2023, has held that imposition of a mandatory indeterminate life sentence, constitutes an unjustifiable discrimination, and is unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*.

39. Whilst I am aware that the state has filed an appeal against the decision of the Court of Appeal in *Julius Kitsao Manyeso,* the present law of the land is as, stated in Manyeso, that life imprisonment in Kenya is unconstitutional.

40. Accordingly, taking into account all matters the offender's life sentence herein is substituted with a sentence term of 24 years imprisonment and shall, subject to the provisions of section 333(2) of the *Criminal Procedure Code*, commence from the date the offender was arrested.

41. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF NOVEMBER, 2024

R MWONGO

JUDGE

Delivered in the presence of:

Applicant - Present at Shimo La Tewa Prison

Kiragu - for Applicant

Mamba for the State

Murage, Court Assistant