



REPUBLIC OF KENYA



KENYA LAW
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**Tum v Republic (Criminal Petition E054 of 2021)
[2024] KEHC 14269 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E054 OF 2021
RN NYAKUNDI, J
NOVEMBER 15, 2024**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURES RULES 2013**

AND

IN THE MATTER OF PRISONS ACT, CAP 90 LAWS OF KENYA

BETWEEN

DANIEL KIPROTICH TUM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged, convicted and sentenced to serve 20 years' imprisonment for the offence of Manslaughter contrary to section 202 as read together with section 205 of the *Penal Code*.
2. What is pending before me for determination is an undated Notice of Motion of Application where the Applicant is seeking the following orders:
 - a. That the service of this application should be dispensed with the first instance for resentencing hearing only.
 - b. That the cost of this application should not be provided for since the Petitioner/Applicant is serving sentence in jail.
3. The Application is based on the grounds on the face of it among others:
 - a. That this Honourable Court be pleased to hear and determine this application pursuant to the Supreme Court orders on sentencing vide Petition No 15 of 2015.



- b. That the Applicant was charged, tried and convicted for the offence of manslaughter contrary to section 202 as read with section 205 of the [Penal Code](#).
 - c. That after trial the Applicant was sentenced to 20 years' imprisonment for manslaughter.
 - d. That the applicant was treated as a first offender hence the same ought to have had a probative value during sentencing as per the judiciary policy sentencing guidelines as there were no existing mitigation aggravating circumstances.
 - e. That the applicant has served the 20 years sentence since then with a minimal balance of 4 years.
 - f. That while at Ngeria Farm Prison, the Commissioner General of Prisons promoted the applicant to special stage called 'Trustee' which is only given to inmates who have fully shown total reformation. The Commissioner General was satisfied about the applicant's character and the theological well-being which are vital in re integration back to the society upon discharge from prison.
 - g. That annexed here with is a photo showing the special stage category (trustee) as awarded by the Commissioner General of Prisons.
 - h. That equally the Applicant has served a third of his sentence being remorseful to the victim and the offence committed and wish to be discharged home to start a new life.
4. The Application is supported by the undated annexed affidavit sworn by Daniel Kiprotich Tum the Applicant herein where he avers as follows:
- a. That I am the accused person in criminal case No 08 of 2011 Republic v Daniel Kiprotich Tum.
 - b. That I am remorseful trained in vocational technical aspect tailoring holding grade II, III.
 - c. That I have been promoted to the stage of (trustee) hence this is a compliment to show my reform agenda is true.
 - d. That I seek resentencing hearing only having served a third of my sentence pursuant to the Supreme Court directives on Petition No 15 of 2015 [Francis Muruatetu v Republic](#) on mitigation only.
 - e. That I am a first offender and a born again Christian and having repented all my earthly sins in prison.
 - f. That this petition is made on good faith.

Analysis and Determination

5. I have considered the application and the mitigation by the applicant. The issue manifest for determination is:

Whether the sentence review is merited

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.



7. It bears repeating that, the High Court has the mandate under Article 165 (3) of the [Constitution](#) to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the [Constitution](#) ,A further leapfrog development; under article 50(2)(p) of the [Constitution](#):

50(2) Every accused person has the right to a fair trial, which includes the right—(p)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. In [Philip Mueke Maingi & others v Rep](#), Petition No E17 of 2021 specifically outlawed mandatory minimum sentence. It stated;

There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court’s discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine and/or review sentence’s where appropriate.

9. A similar position was taken by the High Court, in [Stephene Kimathi Mutunga v Republic](#) [2019] eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the [Constitution](#). The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.
10. In [Michael Kathewa Laichena & another v Republic](#) [2018] eKLR Majanja J. stated: “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”.
11. Further, the Court of Appeal sitting in Malindi in [Manyeso v Republic](#) Criminal Appeal No 12 of 2021 [2023] KECA 827 (KLR) held that mandatory life sentences are unconstitutional and are “an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the [Constitution](#). The said decision is supported by the case of [Vinter and others v UK](#), in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.
12. Article 50(6) of the [Constitution](#) of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.
13. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it’s entirely so as to arrive at appropriate sentence. The Court of Appeal in [Thomas Mwambu Wenyi v Republic](#) [2017] eKLR cited the decision of the Supreme Court of India in [Alister Anthony Pereira v State of Maharesbtra](#) at paragraph 70-71 where the court held the following on sentencing:

“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.”

14. Also in the case of *Francis Karioko Muruatetu & another v Republic* (*supra*) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed *Judiciary Sentencing Policy Guidelines* lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.
15. A glimpse of the Applicant’s application clearly calls for a re-hearing of the sentence imposed. Article 50(2)(p) of the *Constitution* provides as follows: Every accused person has the right to a fair trial, which includes the right—
 - p. 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; and
16. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.
 - (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
 - a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
 - b. New and compelling evidence has become available.
17. The foregoing provisions are instructive in matters brought before the high court for a new trial. The application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50(2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.
18. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the Muruatetu case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).
19. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court’s decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner’s offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.



20. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

“The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”

21. From the foregoing authorities, it is evident that mandatory sentences are unlawful. Having said so, I have considered The *Sentencing Policy Guidelines*, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

22. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.

23. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

24. In applying the statutory provisions, the sentencing principles in the policy guidelines of 2023, the mitigation and aggravating factors must be measured against the composite yardstick of substantial and compelling reasons which must be cumulatively weighed to justify a resentencing court to depart from the ordained sentence either at the trial or on appeal. In doing so, account must be taken of the fact that crime of that particular kind like in this case manslaughter under Section 202 as read with Section 205 is singled out for a severe punishment of life and that the sentence so imposed by the trial court in lieu of the subscribed sentence was 20 years’ custodial sentence. In reviewing this sentence as I am asked to do by the applicant, due regard must be accorded to the benchmark of life imprisonment which the legislature has provided for the offence of manslaughter. I am not persuaded that the applicant has satisfied that criteria for a downward review of his custodial sentence. As I see from the record, the only remedy available for the applicant is to be given the credit period served in pre-trial detention under Section 333(2) of the *Criminal Procedure Code*. The committal warrants shall be so amended to reflect the time spent in remand custody before conclusion of his trial.

DATED AND SIGNED AT ELDORET THIS 15TH NOVEMBER, 2024

R. NYAKUNDI

JUDGE

