Maingi & 9 others v Director of Public Prosecution & another (Criminal Miscellaneous Application E052 of 2022) [2024] KEHC 15682 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL MISCELLANEOUS APPLICATION E052 OF 2022

FR OLEL, J

DECEMBER 9, 2024

BETWEEN

PHILIP MUEKE MAINGI .... 1ST APPLICANT

HESBORN ONYANGO NYAMWEYA .... 2ND APPLICANT

MWANZIA MULATYA .... 3RD APPLICANT

JOSEPHAT MACHIWA OKOKO .... 4TH APPLICANT

PETER MUSYOKA HARUN .... 5TH APPLICANT

JOHN BYENGOMA .... 6TH APPLICANT

JACKSON IRUNGU MWANGI .... 7TH APPLICANT

ZACHARIA OLEMESIEK .... 8TH APPLICANT

OPALA ALFRED OCHIENG .... 9TH APPLICANT

JOSEPH KAIRU KIGONDU .... 10TH APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION .... 1ST RESPONDENT

THE HON ATTORNEY GENERAL .... 2ND RESPONDENT

RULING

A. Introduction

1. The 1st and 2nd Applicants describe themselves as paralegal and law graduates held at Kamiti Maximum Prison, while the rest of the Applicants (3rd to 14th) are convicts of the offense of "Robbery with violence contrary to Section 296(2) of the *Penal Code*" and were convicted and sentenced to serve mandatory

death sentence by various courts across the country. The 1st and 2nd Applicant aver that they act on behalf of the other Applicants as allowed under provisions of Article 22 (1),(2)(a),(b), and (c) as read with 23 of the *constitution* of Kenya for the reason that this Application is one filed in public interest.

2. The applicants through the Notice of Motion filed seek for orders that;

    a. That the Honourable court be pleased to Adopt, Apply, Implement, and Enforce the decision of *Joseph Kaberia Kahinga & 11 others* in Petition No 618 of 2010, which declared mandatory death sentence on Capital offenders a violation of the Petitioner's rights.

    b. That the Honourable court be pleased to issue any such further orders or directions that this court may deem fit in the context of the resent Supreme Court directives on *Muruatetu case* and in light of those declarations in *Joseph Kaberia Kahinga* on matter sentencing.

3. The applicants averred that they were not challenging their conviction, but in light of the recent *Muruatetu (2)* directions issued by the supreme court, which confined resentencing to Murder cases only, and also because the High court in *Joseph Kaberia Kahinga case*, had declared the mandatory nature of their sentencing unconstitutional, they had approached this court to adopt, apply, implement and/or enforce the declarations made in the *Joseph Kaberia Kahinga case* (*supra*).

4. It was apparent that the Attorney General had failed to implement the directives issued in the *Joseph Kaberia Kahinga case*, to their detriment and it was therefore only just and fair to have their cases referred back to their respective trial court for purposes of resentencing.

5. The 1st respondent strenuously opposed this Application and filed grounds of opposition, where they stated that the said application was defective and was supported by affidavits which had no probative value, and thus could not be relied upon by the court. In the Joseph Kaberia Kahinga case, high court at prayer (6) had held *inter alia* that " the petitioner's prayer for a declaration (ii) to have their respective cases remitted to the trial courts for reception and consideration of their mitigating circumstances is hereby dismissed."

6. The applicants therefore could not through this application regurgitate on the same issue determined in the *Joseph Kaberia Kahinga case* and were trying through the back door to mislead the court and have a second bite at the cherry. There was also no material placed before this court to enable it to act or enforce the said decision. Finally, the said application had been presented in an omnibus manner based on misleading and sweeping statements and the court was thus urged to dismiss the same for being vexatious, misleading, and for being an abuse of the process of this court.

7. The 2nd Respondent, the Hon Attorney General did not participate in these proceedings.

B. Parties Submissions

Applicants Submissions

8. The applicants submitted that they had a right under Article 22(1),(2),(a),(b),(c) and Article 23 of *constitution* of Kenya 2010 to file this application/proceedings in public interest to protect their fundamental rights and also to challenge the strict adherence by various trial courts to the mandatory sentencing provisions envisaged under Section 296(2) and 297(2) of the *Penal Code*, Cap 63 laws of Kenya. This court also had inherent jurisdiction under Article 165(3), (b) of *constitution* of Kenya 2010 to determine any question as to whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened. Reliance was placed in *Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited* (1989) Klr, *Protus Buliba Shikuku v Attorney General* (2012) eklr, *A.O.O &*

6 Others v Attorney General & Another (2017) eKLR and *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* (2013) eKLR.

9. For avoidance of doubt and any misunderstanding, they submitted that the court had to first note that, they were not challenging the legality of the death sentence, their conviction and the manner in which the death sentence was to be executed, if at all. What they were challenging was the constitutionality of the mandatory nature of Sections 296(2) and 297(2) of the *Penal Code*, Cap 63 laws of Kenya, which made the death penalty arbitrary, cruel, inhuman and unfair. They were also challenging the notion that courts do not have sentencing discretion over capital offences and that upon conviction of any offence under Section 296(2) and 297(2) of the *Penal code*, death penalty was mandatorily prescribed.

10. Article 160(1) of *constitution* provided for the independence of the judiciary, which meant that the courts were not subject to control or direction by any person or authority in the exercise of judicial Authority. To this extent, the imposition of punishment in any criminal matter, Where the trial court had to assess the facts of the case and mitigating circumstances before arriving at an appropriate sentence was sacrosanct and had to be observed. The mandatory death sentence prescribed under provisions of Section 296(2) and 297 of the *Penal Code* derived its authority from parliament thus ran foul of the constitutional principle of separation of powers and was an encroachment by the legislature on judicial powers. The said provisions also ran afoul of the Kenya judiciary sentencing policy guidelines.

11. The applicants relied on *Bernard Kimani Gacheru v Republic* (2002) eklr, *Edwin Wachira & 9 others v Republic*, Petition No 97 of 2021, *Poonoo v Attorney General*, *Deaton v Attorney General & Revenue Commissioners*, *Mithu v State of Punjab* (1983) 2 SCR, 690, *S v Malgas* 2001 (2) SA 122, SCA, *S v Jansen* 1999 (2) SACR 368 (C) and *Geoffrey Ngotho Mutiso v Republic* (2013) eklr. Where it was emphasized that mandatory sentencing was undesirable and interfered with the sentencing function of the trial court.

12. The applicants did further submit that in the *Joseph Kaberia Kahinga* (Supra) case, the court dealt with the issue of mandatory death sentence in robbery with violence cases and held that a person convicted of a capital offence could not be sentenced to serve a death sentence as a matter of course without the court considering mitigating circumstances and other statutory pre–sentence requirements and this position had been affirmed by several cases both locally and internationally. See *Watson v The queen & A.G for Jamaica* (2004), *Kennedy v Louisiana* (2008), *S v Mchunu & Another* (AR24/11) {2012}, *Kafantayeni v Attorney General* (2007) MWHC, *Vinter and others v United Kingdom* and *Joseph Kaberia Kahinga & 11 others v Republic*.

13. It was therefore only fair and in line with Articles 27, 28 and 50(2) of *constitution* of Kenya as read with clause 7 of the Transitional and Consequential provisions that mandatory death penalty in Robbery with violence cases be construed with necessary adoptions, qualifications and exceptions, which then would allow the trial court to impose just and appropriate sentences for each offence. Reference was made to the *Judiciary sentencing polcy guideline*, *International Covenant on Civil and Political Rights* of 1966, *Republic v Philip Muthiani Kathiwa*, Machakos High Court Criminal Case No 14 of 2015 and *Geoffrey Ngotho Mutiso v Republic* (2010) eklr.

14. Further Order (4) in the Joseph Kaberia Kahinga case (Supra) had specifically tasked the Attorney General to formulate a task force in consultation with relevant stakeholders to identify the shortcomings of the impugned sections 295, 296(1),296(2), 297(1) and 297 (2) of the *Penal code* with a view of remedying the prejudices identified. The Hon Attorney General was given eighteen (18) months to give her report to the court but had failed to do so. Order (5) thereof kicked in, allowing

the petitioners in the *Joseph Kiberia Kahinga case* and other convicts in the same situation as them to apply/ move court as appropriate.

15. The majority of the Applicants herein had already spent considerable time in custody since their arrest and their continued stay in prison amounted to subjecting them to physical and psychological torture as they did not know for how long they would serve before they got a date with the hangman's noose.

16. The Applicants therefore urged this court to uphold and declare that the mandatory death sentence under sections 296(2) and 297(2) of the *Penal code* was unconstitutional insofar as the said provision of law infringed on the inherent rights of every accused person to fair trial as envisaged under Article 25(c) as read with Articles 27 (1), 28 and 50(2), (p) of *constitution* of Kenya. They further also urged the court to uphold and issue a declaration that all offenders who have been charged under the aforestated sections of the Penal code and had not been resentenced before the pronouncement of this judgment have a right to have their sentence reviewed.

Respondents Submissions

17. The 1st respondent submitted that the application as filed was misconceived and was intended to mislead the court as nowhere in the Joseph Kaberia Kahinga decision, did the constitutional bench hold and/or make a declaration that, "mandatory death sentence on capital offenders was a violation of the petitioners rights." The said application was also fatally defective for the reasons that, the Applicants had filed an omnibus Application, without clear averments made in the supporting affidavit, and this had the effect of denying the court a proper opportunity to examine each case on its merit.

18. The 1st respondent also pointed out that in the *Joseph Kaberia Kahinga case* (supra), the constitutional bench had at prayer (6) declined to have the petitioner's cases remitted to the trial courts to reconsider the mitigating circumstances and resentencing. The prayers sought herein were therefore re-judicata and could not be allowed.

19. The 1st respondent therefore urged this court to find that the Application as filed lacked merit and urged the court to dismiss the same.

C. Determination

20. The applicants herein have sought for an order that this court does Adopt, Apply, Implement, and Enforce the decision of *Joseph Kaberia Kahinga & 11 others* in Petition No 618 of 2010, which declared mandatory death sentence on capital offenders a violation of the petitioner's rights therein and be pleased to issue further directions that the court may deem fit in the context of the said court's directions and also taking into consideration the directives made by the supreme court in *Muruatetu case*, commonly referred to as *Muruatetu (2)* directives.

21. The Applicants, based on the reading and analysis of the lengthy submission presented, want this court to make a declaration that mandatory death sentences as prescribed under Section 296(2) and 297(2) of the *Penal code* are unconstitutional as they infringe on the inherent rights of every accused person to mitigate and the trial courts sentencing discretion as envisaged under various statutes and supported by provisions of Article 50(2),(p) of *constitution* of Kenya 2010.

22. Unfortunately, the Applicants did, filed an application without filing any petition to anchor the same. The application filed has no legal foundation and is filed contrary to the direct provisions of the "Rule 10(1) of *constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*." (Mutunga Rules) which provides that;

10

(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

a. the petitioner's name and address;

b. the facts relied upon;

c. the constitutional provision violated;

d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

f. the petition shall be signed by the petitioner or the advocate of the petitioner; and

g. the relief sought by the petitioner.

23. The applicants may argue that the court has inherent jurisdiction in dealing with matters touching on fundamental rights to proceed and determine issues raised and should be able to fall back on the non-technicality principle enshrined under Article 159(2)(d) of *constitution*, 2010, which provides that:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles –
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> (d) Justice shall be administered without undue regard to procedural technicalities

24. The principles that guide the court in the discharge of its mandate donated by the above provision have now been crystallized by case law. I take it from the cases of *Jaldesa Tuke Dabelo v. IEBC & Another* [2015] eKLR; *Raila Odinga and 5 Others v. IEBC & 3 Others* [2013] eKLR; *Lemanken Arata v. Harum Meita Mei Lempaka & 2 Others* [2014] eKLR; *Patricia Cherotich Sawe v. IEBC & 4 Others* [2015]eKLR for principles/propositions, *inter alia*, that: the exercise of the jurisdiction under Article 159 of *constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that Article 159(2)(d) of *constitution* is not a panacea for all procedural ills.

25. In *Raila Odinga v. I.E.B.C & others* (2013) eKLR, the Supreme Court observed further:

> "Article 159(2) (d) of *constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

26. Also, in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR, Kiage, JA, on the same issue stated that:

> " ... I am not in the least persuaded that Article 159 of *constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

27. The applicant's application as filed breaches clear and succinct provisions of the "Mutunga Rules". The said application is not a petition and seeks for the court to award vague and generalized declarations, the basis of which are not fleshed out therein. The applicants also failed to specify/detail the various case Numbers/ files where they were convicted and if they appealed, the constitutional provisions violated, and remedies sought. Some of these issues were brought out in the submissions filed, but it is common ground that submissions are not pleadings.

28. The 1st respondent also correctly noted that the constitutional bench in the Joseph Kaberia Kahinga case did not declare that the "mandatory death sentence on capital offenders was a violation of the petitioners' rights". To quote verbatim the declarations made and/or directives given by Hon Justice Lesiit, Kimaru and Mutuku JJ, were that;

    a. The We hereby declare that Sections 295, 296 (1), 296(2), 297(1) and 297(2) of the *Penal Code* do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defence.

    b. In light of (1) above, we recommend that the Attorney General, the Kenya Law Reform and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to enabling parliament to appropriately amend, Sections 295,296(1), 296(2), 297(1) and 297(2) of the *penal code* with a view to removing the ambiguity and inconsistency inherent in the said sections as regards the definition of the offence of robbery and differentiate and graduate the degrees of aggravation and the attendant penalties. In considering the amendments, it should be recommended to parliament to take into consideration international good practices on sentencing, so as to accord similar facts to similar charges of equal gravity.

    c. In view of the fact that there are pending trials before the courts at various stages of the hearing process where accused persons have been charged under the impugned sections of the penal code and in order not to prejudice those trials, the effected of the declaration in (1) above is suspended for eighteen (18) months from the date of the delivery of this judgment to enable the Attorney General, the Kenya Law Reform and Parliament to act and appropriately amend

the impugned sections of the *Penal Code* with a view to removing the identified ambiguities and inconsistencies and setting out the degrees of aggravation and differentiate and graduate the various aspects of the offence of robbery.

d. As regards the petitioners, and those other convicts in the same situation as them, we direct the Attorney General in consultation with other relevant authorities, to consider the shortcomings identified in this judgment in relation to those charged and convicted under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the *Penal code*, with a view to remedying and prejudice that may have suffered and prescribe appropriate solution. The Attorney General is granted eighteen (18) months to give a report to this court.

e. If the above orders are not complied with within the stipulated period, the Petitioners shall be at liberty to apply.

f. The Petitioner's prayer for declaration (ii) in their Petition to have their respective cases remitted to the trial courts for the reception and consideration of their mitigating circumstances is hereby dismissed.

g. Since this is a constitutional matter, and due to the public interest involved, we are of the view that the appropriate order to make in regard to cots is that there shall be no orders as to costs.

29. That being the position, there is nothing for this court to Adopt, Apply, Implement, and Enforce in the said decision of *Joseph Kaberia Kahinga & 11 others* in Petition No 618 of 2010. This also applies to their prayer for resentencing as the holding number (6) of the said *Joseph Kaberia case* (Supra) expressly dismissed the plea for respective cases to be remitted back to the trial court for resentencing.

30. The omnibus Application as filed herein, cannot pass for a petition and cannot be made a basis, where parties seek declaratory constitutional orders not clearly pleaded. The Applicants must go back to the drawing board, while also critically considering that issues to be raised must not have been determined in the *Joseph Kaberia case* (Supra).

D. Disposition

31. Having considered the merits of the Notice of Motion (undated), filed herein, I do find that the same does not have merit and proceed to dismiss it with no orders as to costs.

32. Right of Appeal 14 days.

33. It is so ordered.

RULING WRITTEN, DATED, AND SIGNED AT MACHAKOS THIS 9TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 9TH DAY OF DECEMBER, 2024.

In the presence of;

2nd to 10th present from Kamiti maximum prison - Applicants

Ms. Mang'are/Ms. Otulo for 1st Respondent

Susan/Sam - Court Assistants