



**Nyakundi v Director of Public Prosecutions (Criminal Miscellaneous Application E066 of 2024) [2024] KEHC 15563 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL MISCELLANEOUS APPLICATION E066 OF 2024**

**SM MOHOCHI, J  
DECEMBER 9, 2024**

**BETWEEN**

**SAMUEL ISINYA NYAKUNDI ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

**Background**

1. The brief background of this case is that the Applicant Samuel Isinya Nyakundi was charged before the Homa Bay Chief Magistrates' Court in Criminal Case No. 1004 of 2012 alongside 5 others with four counts of robbery with violence contrary to Section 296 of the *Penal Code*. That at the time of such robbery unlawfully caused the brutal death of four security guards three who were manning the supermarket where the robbery took place.
2. The Applicant and his co accused persons each also faced an alternative charge of handling stolen goods contrary to Section 322(1) and (2) of the *Penal Code*. They pleaded not guilty to all the charges. The Court called 20 witnesses. The Applicant together with the 1<sup>st</sup> accused were found guilty of the first three counts of robbery with violence and acquitted on the fourth one. They were convicted of the 1<sup>st</sup> Count and sentence to death with the other two counts being held in abeyance.
3. He preferred an Appeal preferred an appeal against the sentence and conviction in High Court Criminal Appeal 10 of 2014 which was consolidated with High Court Criminal Appeal 9 of 2014 filed by his co accused and Court comprising of a bench of Majanja J. and Mwita J. vide judgement dated 27<sup>th</sup> July, 2014 dismissed the appeal affirmed the Trial Court sentence and conviction on the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Counts of Robbery with violence.



4. The Applicant and his co-accused logged a second appeal at the Court of Appeal in Criminal Appeal No. 146 of 2016 and 31<sup>st</sup> March, 2023 a three-judge bench comprising Kiage JA, Kantai JA, and Tuiyot JA dismissed the appeal on both conviction and sentence.

### **Application**

5. By way of Notice of Motion application dated 16<sup>th</sup> October, 2024, the Applicant herein now seeks: -
  - a. That the Honourable Court be please to review the death sentence imposed against the Applicant herein and compute it into specific and fixed jail term.
  - b. That the Honourable Court be pleased to review and fix the sentence to not more that 30 years' jail term.
  - c. That the Honourable Court be pleased to orders that the jail term be computed to run from the time the Applicant was arrested on the 21<sup>st</sup> August, 2012 and has remained in custody during the entire trial proceedings; and
  - d. That the Honourable Court be pleased to grant such and further orders it deems fit and just to grant in the interests of justice.

### **Applicant's Case**

6. The Application was supported by the grounds on its face and the supporting affidavit of the Applicant sworn on the same day wherein he deposed that he is seeking a review of the death sentence imposed to one not exceeding 30 years having been pretested when he was only 22 years old on 21<sup>st</sup> August, 2012 and has spent 12 years in custody.
7. He averred that in the time he spent in custody, he had learned his lesson and reformed having good behaviour and conduct acceptable in the society as affirmed by Manyani prisons' recommendation. That he has studied various courses and well prepared to gainfully engage himself in when set free from jail and help in development and building of our county.
8. It was his case that he is a first offender having spent his youthful life away from his people and society, would refrain from engaging in all criminal activities, has matured into a person that can be trusted able to marry and maintain a family. That the criminal system is known to be restorative.
9. It was his case further that his remorse ran deeper than the Nile and his act of redemption may be construed as a sign of remorse the uncertainty of time has prompted him to move the Court through this application.

### **Applicant's Submissions**

10. The Applicant submitted that the Court should consider the evolution of sentencing principle following the of *Francis Kioko Muruatetu & Another v Republic* [2017] eKLR. He also relied on the case of *William Okungu Kittiny v Republic* [2018] eKLR where the Court affirmed the Muruatetu principles to the offence of robbery with violence that the death penalty was unconstitutional as it violated the right to fair trial. It was also submitted that Courts must exercise discretion in determining the appropriate sentences taking into account both mitigating factors and aggravating factors.
11. It was further submitted that there are compelling mitigation factors meriting a reduced sentence to wit the age of the Applicant, the time spent in custody, rehabilitation and reformation and the Applicant being a first-time offender.



12. The Applicant argued that the continued imposition of the death sentence would violate Articles 25(a), 28, 50 (2) (p) of the Constitution. He argued the Court to be guided by national values and the principles of governance as provided for under Article 10(2)(b) of the Constitution in considering his sentence.
13. It was his argument that the purpose of criminal justice is not to punish but to also rehabilitate and reconcile offenders with the society focusing on healing and rehabilitation rather than retribution as was acknowledged in the case of Rep v Thomas Patrick Gilbert Cholmondeley [2008] eKLR.
14. It was his argument further that the Kenya is signatory of international treaties the International Convention on Civil and Political Rights (ICCPR) and the United Nations Standard Minimum Rules for the treatments of Prisoners (the Nelson Mandela Rules) that prohibit the cruel, inhuman and degrading punishment and further promote rehabilitation and humane treatment to prisoners respectively. He contended that those international obligations together with the Kenyan Constitution confer a duty to the Court to ensure that his sentence is not disproportionate to the circumstances of his offence.
15. The Applicant relied on the case of Republic vs Simon Kimani Kairu [2020] eKLR to submit on the importance of Courts giving reformed offenders a second chance in life.
16. The Applicant also urged the Court to be guided by the Report on the question of the death penalty, pursuant to its decision 18/117 and Resolution 22/11 of the Human Rights Council.
17. The Application is unopposed. The Respondent was served with the application and the Submissions on 6<sup>th</sup> November, 2024 and acknowledged receipt as evidenced by the Return of service filed on 20<sup>th</sup> November, 2024.

### **Analysis and Determination**

18. I have considered the application herein and the written submissions and the Record before Court. It is my considered view the only issue is whether the same is merited.
19. The applicant has come to this Honourable Court by way of review provided for under Sections 333(2), 362 and 367 of the Criminal Procedure Code.
20. The Applicant has sought review of the death sentence imposed by the Trial Court and upheld two Appellate Courts. Having exhausted his appeal options, the Applicant now calls upon the Court to review of his sentence to a fixed jail term not exceeding 30 years while factoring the time he spent in custody during the trial proceedings. He also calls upon to consider the evolution of sentencing principles following the principles under the famous Muruatetu case.
21. For the avoidance of doubt, on 6<sup>th</sup> July 2021 the Supreme Court in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (Practice Directions) the Supreme Court set out guidelines on resentencing. It stated that: -

- “18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below as follows: -
  - i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the Penal Code.”



22. From the above, the Supreme Court clarified that their decision only related to the mandatory death sentence for murder cases under Sections 203 and 204 of the Penal Code, and not robbery with violence which attracts a mandatory sentence. The Supreme Court made a similar pronouncement in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR).
23. Similarly, the Court in Were v Republic [2024] KEHC 15110 (KLR)

“Again, the convict is here applying for resentencing. For avoidance of doubt, the Supreme Court has since declared that the minimum sentences under the *Sexual Offences Act* are lawful and constitutional and it has also clarified that the *Francis Muruatetu & Another V Republic* (2017) eKLR decision only applied to murder cases and not Sexual Offences or robbery with violence which have mandatory sentences. In other words, the Supreme Court has clarified in no uncertain terms that its decision in the Muruatetu Case I does not invalidate the mandatory or minimum sentences in the Penal Code or the *Sexual Offences Act* or any other statute. This pronouncement was made in the recent Supreme Court of Kenya Petition No. E018/2023 *Republic versus Joshua Gichuki Mwangi* [2014] eKLR.”
24. The fact that the Applicant was remorseful and had undergone several rehabilitation programs while in prison is immaterial. The Muruatetu case is inapplicable and cannot suffice in the circumstances.
25. Nonetheless, jurisprudence overtime has argued that mandatory sentences limit the Court’s discretion to impose appropriate sentences.
26. Be that as it may, the Applicant was charged with the offence of robbery with violence and was sentenced to death as per the law which is still a lawful sentence and has not been commuted. There are instances where the crime is so heinous that only a death sentence is appropriate. The Applicant in his wake of crime robbed a supermarket and left behind at least 3 watchmen dead. This is not a case where the Court applies its discretion and reduces the sentence the aggravating circumstances are palpable; the families of the victims are suffering the loss off their loved ones.
27. The Applicant remains with the petition to the Power of Mercy Committee and no criminal review shall overturn a valid and lawful sentence in this instance the death penalty.
28. The Applicant’s application for review of his sentence is not merited and the same is hereby dismissed.

It is so ordered.

**DATED SIGNED AND DELIVERED ON THIS 9<sup>TH</sup> DAY OF DECEMBER, 2024**

**MOHOCHI. S. M.**

**JUDGE**

