

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION NO E001 OF 2024
WYCLIFFE LUDENYO AIKA.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death.
2. Being aggrieved by the said decision, he lodged first appeal at Kakamega **HCCRA No 79 of 2016**. The court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged a second appeal at Court of Appeal Kisumu **CRA No 12 of 2018**. The court dismissed his appeal and upheld his conviction and sentence.
4. On 4th November 2024, he filed a Notice of Motion dated 4th October 2024 seeking a review of his sentence. He relied on Article 165(3)(b) of the Constitution of Kenya, 2010 which he stated gave this court the jurisdiction to hear and determine such applications. He further invoked Article 50(2)(p)(q) of the Constitution of Kenya and asserted that he was entitled to the least severe sentence.
5. He contended that a life sentence contravened Section 216 and 389 of the Criminal Procedure Code on mitigation and the values of sentencing as in Paragraph 4:1 of the Sentencing Policy Guidelines,

2016. He added that under the provisions of the Constitution of Kenya and Practice and Procedure Rules 2010, this court had the power to hear and determine infringements of fundamental rights and award remedies.

6. His undated Written Submissions were filed on 24th February 2025 while those of the Respondent were dated and filed on 7th April 2025. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

7. The Petitioner submitted that the death sentence that was imposed on him was inconsistent with Article 50(2)(h) and (p) of the Constitution of Kenya and Section 329 of the Criminal Procedure Code. He urged the court to declare that Section 296(2) of the Penal Code was inconsistent with Articles 26(1), 27(1) and (2), 28, 48, 50(1)(2)(p) of the Constitution.
8. He further urged this court to find that his constitutional rights had been infringed upon and further order for re-opening of his case for re-sentencing as it allowed him to produce his mitigating factors for the court to impose a proportionate sentence in line with Article 50(2)(p) of the Constitution of Kenya.
9. He pleaded with the court to consider that he had been incarcerated since the year 2013. He placed reliance on several cases among them the case of **The Owners of Motor Vessel Lillian "S" vs Caltex Oil (Kenya) Ltd (1989) eKLR** where it was held that

jurisdiction was everything and without it, a court had no power to take one more step. He invoked Article 23 and 165 of the Constitution of Kenya and argued that this court had the jurisdiction to hear and determine the application herein.

10. He cited Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 2(1), (5) and (6), 10, 19(3)(a), 20(1),(2),(3) and (4), 25(c), 26, 28, 48, 50(2)(q) and 131 (1)(e) of the Constitution of Kenya and argued that the death sentence did not uphold the said constitutional provisions. He also referred to Section 216 and 329 of the Criminal Procedure Code and argued that he was not given a chance to mitigate. In this regard, he relied on the case of **Edwin Otieno Odhiambo vs Republic[2009]eKLR** where an appeal was allowed on the grounds that the appellant therein had not been given the right to mitigate at the Trial Court.

11. He further relied on the case of **Godfrey Ngotho Mutiso vs Republic Criminal Appeal No 17 of 2008** (eKLR citation not given) where it was held that a uniform sentence deprived the courts the opportunity of considering mitigating circumstances. It was further held that a uniform sentence also failed to appreciate that sometimes there could be unequal participation in a crime which would result to different charges and sentences on the accused persons.

12. He placed reliance on the case of **Mithu vs State of Punjab Criminal Appeal No 745 of 1980** where the Indian Supreme Court

held that a law that disallowed mitigation and denied judicial officers' discretion in sentencing was harsh, unfair and unjust.

13. He also referred to the case of **Francis Kafantayeni & 5 Others vs AG (2007) MWNCI 9** which he stated the court therein held that sentencing was a legal issue that formed the right to fair trial and required the determination during trial and was not a legislative fiat. He submitted that Sections 295, 296(1) and 296(2) of the Penal Code contravened the principles of fair trial as Article 50(1)(2)(p)(q) of the Constitution of Kenya entitled the accused person the least severe of the prescribed punishment of an offence.

14. He also referred this court to the case of **Francis Opondo vs Republic[2017]eKLR** where it was held that in determining the appropriate sentence to mete out, the court had to consider factors such as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed and the effect of the sentence on the accused person.

15. He further argued that the recent development of the law had shown that a death sentence was not mandatory. To buttress his point, he relied on several cases amongst them the case of **Paul Njoroge Ndungu vs Republic[2021]eKLR** where the court therein reduced the appellant's death sentence to thirty-five (35) years. He also relied on the case of **Roberts vs Louisiana , 431US MWNCI 9** wherein he averred that the Supreme Court declared the mandatory death sentence unconstitutional.

16. He also cited the case of **Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR** where it was held that courts were obliged to take into account the period that accused persons spent in custody during trial. He urged the court to consider Section 333(2) of the Criminal Procedure Code in the event it imposes a custodial sentence on him. He also sought for the benefit of remission.
17. He pleaded with court to consider that he had been rehabilitated and had undergone transformation while in custody. He pointed out that he was a first offender and had been reformed having been in custody for twelve (12) years. In this regard, he placed reliance on the case of **Douglas Muthaura Ntoribi vs Republic [2014] eKLR** where it was held that a good working prison could reform convicts and that there was no legal research that had shown that capital offenders could not be reformed.
18. On its part, the Respondent conceded that this court had the jurisdiction to entertain the present application. It submitted that the High Court derived its jurisdiction from various statutes and Article 165 of the Constitution of Kenya, 2010. It asserted that the power to hear and determine applications from persons convicted for criminal offences also flowed from Article 50(6) and Article 50(2) (q) of the Constitution of Kenya. It argued that since there was no existing express statutory provisions under which re-sentence hearing could be conducted, the High Court was resentencing eligible offenders by invoking their inherent jurisdiction to

implement the decision of the superior court in order to give effect to **Muruatetu** decision.

19. It placed reliance on the case **Petition No 15 & 16 (Consolidated) of 2015 Francis Karioko Muruatetu & Another vs Republic** (eKLR citation not given) where the court held that 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. It argued that in the present case, the Applicant had exhausted his right of appeal.

20. It further asserted that in the said **Muruatetu Case** (Supra), the court held that the guidelines with regard to mitigating factors applicable in a re-hearing of sentence for the conviction of a murder charge included age of the offender, whether the offender was a first offender, whether the offender pleaded guilty, the character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform, social re-adaptation of the offender and any other factor that the court would consider relevant.

21. It invoked Section 216 and 329 of the Criminal Procedure Code and noted that the Trial Court's record showed that the Applicant was not given an opportunity to mitigate before sentencing. It, however, added that the **Muruatetu** decision did not outlaw the death penalty and hence, the sentence that was meted out to the Applicant at the time it was passed was lawful. It pointed out that the Trial Court considered the aggravating circumstances of

the case and found the death sentence to have been appropriate in this particular case.

22. It further placed reliance on the case of **Evans Nyamari Ayako vs Republic Criminal Appeal No 22 of 2018** (eKLR citation not given) where it was held that life imprisonment in Kenya did not mean the natural life of the convict but translated to thirty (30) years imprisonment.

23. It urged the court to consider the circumstances of the case in order to determine the appropriate sentence and be guided by the Judiciary Sentencing Policy Guidelines especially on objectives of sentencing on page 15 paragraph 4.1 which included among others, the gravity of the offence, the threat of violence against the victim and the nature and type of weapon used by the offender to inflict harm as the sentence imposed on an offender had to be commensurate to his blameworthiness.

24. In the case of **Mbugua & 6 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment)**, this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right.

25. It recognised that under Article 27(1) of the Constitution of Kenya, persons who had been convicted for robbery with violence

and attempted robbery with violence were also equal before the law, they had a right to be protected before the law and had to derive equal benefit from the law as the non- capital offenders.

26. The court's decision was in line with the directions of the Supreme Court on 6th July 2021 in **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR** (commonly now known as **Muruatetu II**) that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the High Court and thereafter escalated to the Court of Appeal, if necessary. It rendered itself as follows:-

“46. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that 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 this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases (emphasis court).”

27. In the case of **Ramadhan & 8 others v General & another (Petition 5 of 2022 & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024)**

(Judgment), Sewe J looked at the mandatory nature of the death sentence under Section 296(2) and 296(2) of the Penal Code and declared it unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

28. In the case of **Mbugua & 6 Others vs The Hon Attorney General** (Supra) as consolidated with **Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others** (Supra), this court looked at the aspect of re-sentencing of persons who had been convicted under Section 296(2) and Section 297(2) of the Penal Code and rendered itself as follows:-

“67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.

68. The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of the Constitution of Kenya....

86. For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of the Constitution of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of the Constitution of Kenya.

87. Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction.”

29. In this regard, it found that applicants seeking re-sentencing ought to file documents to support their mitigating factors. These documents could include certificates of programmes they had

undergone in prison leading to their rehabilitation and recommendation letters from the In-charges of prisons.

30. While considering the present application for re-sentencing, this court was alive to the fact that the Court of Appeal upheld the death sentence that was meted out against the Applicant herein. It was the mandatory nature of the death sentence that this court found to have been unconstitutional and found that persons who had been convicted for the offence of robbery with violence and attempted robbery ought to be allowed to mitigate and be re-sentenced.

31. This court noted that appellants who included Francis Karioko Muruatetu in the Court of Appeal case of **Gachanja & 7 Others (Criminal Appeal 51 of 2004) [2011] KECA 402 (KLR) (20 May 2011) Judgment** were re-sentenced by the High Court on 16th December 2019 in **Misc Criminal No 394 of 2017 consolidated with Misc Criminal Applications Nos 614, 28, 560, 589, 590 and 586 of 2018.**

32. In the same vein, as the Court of Appeal had not yet dealt with the constitutionality of the mandatory nature of death sentence in respect of the Applicant herein, this court therefore found and held that it would not be violating the doctrine of *stare decisis* if it determined that it could allow applicants seeking re-sentence to mitigate and then re-sentence them in line with the case of **Mbugua & 6 Others vs The Hon Attorney General** (Supra) as consolidated with **Alfred Eyase Kinamundu & 2 Others vs the**

Hon Attorney General & Others (Supra) and **Ramadhan & 8 others v General & another** (Supra) despite the Court of Appeal having upheld their death sentence on appeal.

33. In this regard therefore, this court recognised that as it had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of the Constitution of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q) of the Constitution of Kenya, it did not have to send the lower court file back to the lower court for re-sentencing.

34. To avoid further delays in this matter, this court found it prudent to consider the mitigation and re-sentencing of the Applicant herein as it already had proceedings of the Trial Court. In reviewing the sentence herein, this court was interested to establish if the Applicant herein had been reformed with a view to being re-integrated in the society. It, therefore, determined that it was necessary to obtain documents to support the Applicant's mitigation as it noted that he only told the Trial Court that he was remorseful and was a first offender.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 4th October 2024 and filed on 14th November 2024 was merited and the same be and is hereby allowed in the following terms:-

- a. **THAT the Applicant do provide documents to support his mitigation by 20th November 2025.**
- b. **THAT the Probation Office file a Pre-Sentence Report by 1st December 2025.**
- c. **THAT the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 15th January 2026.**

36.It is so ordered.

DATED and DELIVERED at VIHIGA this 30th day of October 2025

J. KAMAU
JUDGE