Chogo v Republic (Criminal Miscellaneous Application E093 of 2024)
[2025] KEHC 15537 (KLR) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15537 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E093 OF 2024

JN KAMAU, J

OCTOBER 30, 2025

BETWEEN

ABISAI ABWONZA CHOGO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Introduction

1. In his Notice of Motion application dated and filed on 6th October 202, the Applicant herein sought a review of sentence. He was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). He was convicted and sentenced to death.

2. Being aggrieved by the said decision, he lodged first appeal at the High Court in Kakamega HCCRA No 116 of 2016 whereby the same was dismissed and his conviction and sentence upheld.

3. Being aggrieved by the said decision, he filed a second appeal at the Court of Appeal in Kisumu, Criminal Appeal No 185 of 2017 where the court also upheld his sentence.

4. He pointed out that the death sentence was commuted to life imprisonment by His Excellency the President in the year 2022.

5. His Written Submissions were dated and filed on 7th February 2025 while those of the Respondent were dated and filed on 17th March 2025. This Ruling is therefore based on the said parties' Written submissions on mitigation.

Legal Analysis

6. The Applicant was remorseful of his actions that led to the commission of the offence. He asserted that he was reformed and rehabilitated through the prison integrated correctional and rehabilitation

programmes. He added that he was also spiritually upgraded through the department of spiritual reformation and an ambassador of Christ.

7. He pleaded with court to consider the ten (10) years he had already served as sufficient rehabilitation including the provision of Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) that factored in the eleven (11) months he spent in prison.

8. He further submitted that he was ready to mentor and help the youth when released. He pointed out that life sentence was constitutionally untenable and was under review in parliament in the Penal Code Amendment Bill 2023. He added that he was a young adult at the commission of the offence and was ignorant of the law and blinded by the vagaries of youth.

9. He placed reliance on the case of Michael Kalewa vs Republic [2018]eKLR where it was held that the court had to take into account the aggravating and mitigating circumstances. He added that that was also held in the case of Muruatetu I where the court considered mitigating factors to be age of the offender, being first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence against gender-based violence, remorsefulness of the offender, the possibility of reform and any other the court may consider relevant.

10. He also cited the case of Julius Kitsao Manyeso vs Republic Criminal Appeal No 12 of 2021(eKLR citation not given) where the court held that life imprisonment was unconstitutional.

11. He argued that an offence could define someone at the time of committing it but with time the circumstances and people change. He added that he became a true Christian while in prison and that the religious teachings had changed him as he learned that once one accepts Christ, he became a new being.

12. He asserted that he was twenty-nine (29) years old having left behind a family that depended on him. He sought for a second chance in life. He pointed out that he was a first-offender and relied on the case of R vs Otieno (1983) where it was held that a maximum sentence should not be imposed on a first offender and it would be wrong to depart from that principle.

13. He invoked Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya and placed reliance on the case of Ahamad Abolfathi Mohamed Criminal Appeal No 135 of 2016(eKLR citation not given) where it was held that the sentence should commence from the date of arrest. He urged the court to take into account the time he spent in remand during trial.

14. He further relied on the cases of Aggrey Mbai Injaga Petition No E012 of 2024(eKLR citation not given) and Benjamin Kahindi Changawa & Another vs Republic[2020]eKLR where the common thread was that the appellate courts reduced the life sentence and death sentence to definite sentences. He urged the court to allow his application.

15. On its part, the Respondent submitted that the High Court derives 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 flow from Article 50(6) and Article 50(2)(q) of the *Constitution*. 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.

16. 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 not exhausted his right of appeal.

17. 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, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor that the court would consider relevant.

18. 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 added that however, Muruatetu decision did not outlaw the death penalty, thus the sentence meted out to the Applicant was lawful at the time it was passed and the Trial Court found it appropriate for this particular case.

19. It pointed out that the Trial Court considered the aggravating circumstances of the case. 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 does not mean the natural life of the convict but translated to thirty (30) years imprisonment.

20. 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 Applicant to inflict harm as the sentence imposed on a an offender must be commensurate to his blameworthiness.

21. It asserted that the Applicant had not demonstrated material evidence in proof of his application and that he invoked Section 333(2) of the Criminal Procedure Code and Section 4 and 6 of the Probation Offenders Act erroneously as they were not applicable to his case.

22. 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.

23. 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.

24. 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)."

25. 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

26. 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.
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> 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....
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> 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.
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> 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."

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. The Applicant herein filed his documents in support of his mitigation on 7th February 2025. In his mitigation in the lower court, he told the Trial Court that he was twenty- five (25) years of age and that he had a child who depended on him. The Prosecution indicated that it did not have any previous records and asked the Trial Court to treat him as a first offender. However, it was necessary that the court obtain a Pre-Sentence Report to enable it make an informed decision when considering his prayer for re-sentencing.

Disposition

34. 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 6th October 2024 was merited and the same be and is hereby allowed in the following terms:-

    a. That the Probation Office file a Pre-Sentence Report by 1st December 2025.

    b. That the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 15th January 2026.

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2025

J. KAMAU

JUDGE