



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION- MILIMANI COURT
CRIMINAL MISC APPLICATION NO. E138 OF 2025

(High Court Criminal Case No. 29 OF 2012, Court of Appeal. No. 89 of 2017 & High Court Misc. Application No. E016 of 2021)

JOSEPH KOMEN YATICH.....APPLICANT

VERSUS

REPUBLIC.....

RESPONDENT

RULING

1. The Applicant brought the Application pursuant to Rule 20 of Practice Directions on Standardization of practice & procedure in High Court Rules 2021 under the decongestion exercise pursuant to Chief Justice Memo of 7/12/2022 which provides inmates serving 3 years imprisonment or less or those serving long sentences but have a balance of 3

years or less maybe considered for non -custodial sentence.

2. The Applicant with 2 others herein were charged in **HCCR Case No. 29 of 2012**; with the offence of murder contrary to Section 203 as read with 204 of the Penal Code. After trial he was convicted and sentenced to suffer death penalty on 21/7/2016.
3. On 21st May 2025 the Applicant filed a Notice of Motion seeking the following order:

That the Court do grant him a review of the sentence and order that he serve the remaining sentence under community Service (Probation) pursuant to the Chief Justice's Memo dated 7/12/2022.

GROUND APPLICATION:

1. That the Applicant was charged before the High Court of Kenya at Nairobi vide Criminal Case No. 29 of 2012 with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
2. That the Applicant was then tried, and sentenced to suffer death on 21st July 2016.

3. That the Applicant lodged an Appeal at the Court of Appeal in Nairobi vide **COA. No. 89 of 2017** whereby his matter was remitted back to the Trial Court for Resentencing in 2021.
4. That the Applicant applied for resentencing at Nairobi vide **HCCR MISC APPL. No. E016 of 2021** whereby he was resentenced to 20 years from the date of Conviction on 21st July 2016.
5. That the Applicant has undergone various rehabilitation programs since his date of arrest.
6. That the Applicant is currently remaining with less than 3 years to serve.
7. That the Applicant applied to be granted order to serve the remaining sentence under Community Service (Probation) which was introduced by the Chief Justice of Kenya in a Memo Dated 7/12/2022 where the Chief Justice stated that anyone serving less than 3 years is eligible for non-custodial sentence.
8. That other mitigating factors will be produced during the hearing of the matter.

3. SUPPORTING AFFIDAVIT

1. That he was charged before the High Court of Kenya at Nairobi vide Criminal Case No. 29 OF 2012 with the offence of Murder Contrary to section 203 as read with Section 204 of the Penal Code.
2. That, he sought recourse from the Court for review of the 20 years which was granted to him on 13th March 2025 on terms outlined in the Application.

PRELIMINARY OBJECTION

4. On 10th November 2025, Mr. Mwandawiro from the Office of Public Prosecution (ODPP) raised Preliminary Objection that the matter was heard in Court of Appeal, in **Appeal No. 89 of 2017** and Court of Appeal remitted the matter for resentencing to the High Court via High Court **Misc. Appl. No. E016/2021**. The Court sentenced the Applicant to 20 years Imprisonment.
5. That this Court is *functus officio* as is has rendered itself. The Applicant cannot come back to the same Court to ask for review of conviction and competent jurisdiction. He can only go to the Court of Appeal.
6. The Applicant was charged and convicted in with the offence of murder which makes him not eligible

under the Community Service Order Act for non-custodial sentence.

PERUSAL OF THE COURT FILES

7. On 21st July Hon. Lady Justice S. Mutuku delivered Judgment and ordered as follows in HCT CR. Case No. 29 of 2021

In conclusion, it is my finding, after applying my mind to the evidence and the law, that the prosecution has proved beyond reasonable doubt all the ingredients of murder. It was submitted that motive has not been proved. Motive is not one of the ingredients of murder but presence of motive may be useful to the court to inform the court in understanding why the accused acted as he/she did or what led him/her to act as he/she did. Even so, in this case, I have stated that the events of what happened inside the Pub may have been a direct consequence of what may have happened outside between the 1st accused and the deceased. I also remind myself that the deceased accidentally, as testified by

Agnetta, knocked off the beer bottles and glasses down. This could have enraged the three accused persons in my view, Consequently, I find each of the three accused persons guilty of murder as charged and enter conviction against each of them. Orders shall issue accordingly.

8. On Appeal by the Applicant and others in the Court of Appeal; on 18th December 2020 Judges of the Court of

9. Appeal (Hon. Martha Koome (as she then was), Hon. D. K. Musinga and Hon J. Mohammed JJA) delivered Judgment and in part stated as follows in Court of Appeal No. 89 of 2017:

58. "Before the Trial Court passed sentence, each Appellant was given an opportunity to mitigate, Ms. Odembo, learned Counsel for the 2nd Accused during the trial who also held brief for Mr. Nyagito and Mr. Koech for the other co-accused, told the trial court that none

of the accused persons wished to offer any mitigation. The learned judge asked the appellants whether they wished to mitigate, and each responded: "I have no mitigation to make." In the circumstances, the learned judge remarked:

"In the matter before me, the accused persons have waived aside their right to mitigate. Even where mitigation is offered and received by the court, it does not play its intended role in informing the court of the proper sentence to pass in a murder trial just like in any other capital offence trial. The reason for this is obvious. There is only one sentence for murder, and it is death as provided under section 204 of the Penal Code"

The learned judge held that she had no discretion in the matter and therefore sentenced each of the appellants to death. We think that the appellants' failure to mitigate may have been informed by the fact that at the time of the conviction the law did not provide

any alternative sentence upon conviction for murder. The position has since changed, thanks to the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic (supra).

60. It is therefore in the interest of justice that we remit this matter to the trial court for re-sentencing only. To that extent, the appeal against sentence succeeds. For avoidance of doubt, the appeal against conviction is dismissed in its entirety.”

10. In the High Court on re-sentencing; on 13th March 2025 Hon. Justice K. Kimondo PJ delivered Ruling and stated as follows: (HC Misc Appl. No. E016 of 2021)

21. I accordingly re-sentence the Applicant to serve twenty (20) years in Jail. The sentence shall be deemed to run from 21st July 2016, the original date of their conviction. Further, and in accordance with Section 333 (2) of the Criminal Procedure Code, any period spent in remand custody from the date of their arrest (but excluding such period as when each of them was out on bail) shall be deducted from the sentence.

ANALYSIS & DETERMINATION

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR the then Court of Appeal (Masime Kwach Nyarangi JJA) with regard to Court's jurisdiction observed;

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited."

11. The High Court jurisdiction is spelt out in the Constitution in part reads as follows;

Article 165 (6) & (7) of the Constitution refers to the supervisory jurisdiction vested on the High court which is exercised to prevent miscarriage of justice.

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority

exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

11. **Section 362 as read with Section 364 of the Criminal Procedure Code** provides for the revisionary jurisdiction of the High Court. and provides that :-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

12. From the above outline chronology of trial process within the hierarchy of Court system, the instant Application cannot be heard and determined in the High Court as the High Court as Trial Court heard and determined the case/trial of

murder and exercised original jurisdiction. After the appeal was lodged in the Court of Appeal the matter was remitted to the High Court for resentencing following the landmark case Muruatetu¹. The High Court rendered itself again and resented the Appellants/Applicant to 20 years imprisonment and compliance with Section 333(2) CPC in computation of sentence.

13. **The Practice Directions on standardization of Practice & Procedures in the High Court 2021 (Kenya)** addresses the filing of appeals, bail applications, and references from subordinate courts, tribunals, and other bodies. With specific reference to Rule 20 it reads;

20. Criminal Revision

i. An application for revision may be by way of a notice of motion application accompanied by an affidavit or a letter to the Judge setting out the grounds for the order sought.

ii. The application may be placed before a Judge for directions on the same day.

21. Criminal Re- Sentence applications

i. An application for re- sentence ONLY from murder trials where sentences

have been passed may be by way of a notice of motion application accompanied by an affidavit or a letter to the Judge setting out the grounds for the order sought.

ii. The application may be placed before a Judge for

directions on the same day.

14. The High Court lacks jurisdiction to hear and determine the instant application, the High court lacks appellate powers especially where the appeal was heard and determined by Court of Appeal whose decision is binding precedent to this Court.

15. The High Court is vested with revision powers but are applicable to cases matters of /from Magistrate's Courts and/or Tribunals.

DISPOSITION

16. The High Court in this case already considered the application on re-sentencing as evidenced by Ruling of 13/3/2025. Therefore this Court is *functus officio* and the Applicant may pursue the application before the Court of Appeal.

**RULING DELIVERED SIGNED & DATED IN OPEN
COURT ON 13/11/2025 IN CRIMINAL DIVISION OF
THE HIGH COURT MILIMANI
VIRTUALLY/PHYSICALLY.**

**M.W. MUIGAI
JUDGE**

ORIGINAL