REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E070 OF 2024

BONIFACE AGOLOMBA ALIAS NANDAWA CHENELWA…….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 60 of 2009**. The appellate court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged a second appeal at Kisumu **Criminal Appeal No 187 of 2012**. The Court of Appeal dismissed his appeal and once again upheld his conviction and sentence.
4. On 27th June 2024, he filed this Notice of Motion application dated 14th June 2024 seeking review of his sentence. He said that he had been in prison from 28th April 2005 when he was arrested and had undergone various rehabilitation programs. He sought for a lenient sentence preferably probation and that the period that he had remained in custody since his arrest be taken into account.

5. His Written Submissions were dated 23rd December 2024 and filed on 24th December 2024. He also filed Supplementary Submissions dated 17th February 2025 and filed on 18th February 2025. The Respondent's Written Submissions were dated 7th February 2025 and filed on 10th February 2025. It also filed Supplementary Written Submissions dated 17th February 2025 and filed on 18th February 2025. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

6. Right from the onset, this court noted from the proceedings that the Supplementary Written Submissions by both parties had been filed pursuant to the Applicant's Advocate oral application that the court converts the application herein into a constitutional petition, which application was found not to be viable by the court as it held that it did not raise any constitutional issues. In the premises, this court only focused on the first submissions that had been filed in respect of the application.
7. The Applicant submitted that life imprisonment that was commuted from death sentence was unconstitutional as it did not respect human rights and fundamental freedoms in the Bill of rights. He cited Paragraph 1.2.6 of the Judiciary Sentencing Policy Guidelines, 2023 and Article 27(1) and (2) and Article 28 of the Constitution of Kenya, 2010 and asserted that many prisoners who were serving the death sentence that was commuted to life imprisonment were

released after what was referred to as Muruatetu 1 decision of the Supreme Court. He submitted that it would, therefore, be discriminatory if this court failed to observe the same principle in this instant case, with equal force in respect of Article 163(7) of the Constitution of Kenya.

8. He also relied on Article 2(5) and (6) of the Constitution of Kenya and argued that in Kenya and internationally, sentencing was not only to be used for retributive purposes but that it was also for the rehabilitation of the prisoner. In this regard, he pointed out that the death sentence contravened the International Covenant on Civil and Political Rights (ICCPR) and Article 25(a) of the Constitution of Kenya.

9. He pointed out that under Article 20 and Article 165(3) of the Constitution of Kenya, this court was mandated to determine whether the imposed life sentence would meet the long-term objectives of sentencing. He asserted that when a prisoner was incarcerated without the prospect of release or his sentence being reviewed, there was greater risk that he could not atone for his offence.

10. He implored the court to consider that sentencing a young man of his age to death and/or life imprisonment was tantamount to rating him as an inferior human being undeserving of equal treatment to the footing as envisaged in Article 19(2), 25(a), 27(1), (2), 28 and 29(d) and (f) of the Constitution of Kenya and that by the time he left prison, he would have wasted his life. He argued that

although any sentence that was imposed had to have deterrent and retributive force, it ought not sacrifice an applicant on the altar of deterrence.

11. He submitted that there was recent emerging development of the law and relied 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 was translated to mean an imprisonment not exceeding thirty (30) years. He also urged the court to consider the time he spent in custody during trial pursuant to Section 333(2) of the Criminal Procedure Code and Section 38 of the Penal Code.

12. On its part, the Respondent placed reliance on the case of **Republic vs Jagani & Another (2001) KLR 590** where it was held that the purpose of sentence was to assist in rehabilitation. It argued that the sentence that was meted out on the Applicant was lawful and was intended to instil a sense of responsibility for his actions and also allow for his rehabilitation.

13. It pointed out that this court lacked the jurisdiction to review the sentence imposed upon the Applicant as he had appealed to this court and the Court of Appeal. It invoked Article 165(3) and (6) of the Constitution of Kenya, 2010 and Sections 362 and 364 of the Criminal Procedure Code and asserted that the supervisory powers of this court did not extend to superior courts.

14. It further relied on the case of **John Kagunda Kariuki vs Republic[2019]eKLR** where the court held that an applicant could

not return to the High Court for review of the sentence that was imposed by the High Court but that he was at liberty to approach the Court of Appeal. It added that where an accused person was aggrieved by the court's decision, he could either appeal or seek review of the sentence but could not appeal and seek review at the same time. It urged the court to dismiss the Applicant's application herein.

15. 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.

16. 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.

17. 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)."

18. 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

19. 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."

20. 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.

21. 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.

22. 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.**

23. 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 the Applicant herein to mitigate and then re-sentence him 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 his death sentence on appeal.

24. In this regard therefore, it 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.

25. 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 the lower court file.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 14th June 2024 and filed on 27th June 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 30th January 2026.**
b. **THAT the Probation Office file a Pre-Sentence Report by 30th January 2026.**
c. **THAT the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 26th February 2026.**

27. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **18th** day of **December** 2025

J. KAMAU
JUDGE