REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E065 OF 2024

LAWRENCE CHAMWADA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant herein was charged with another on two (2) Counts. Count I was on the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was also charged with an alternative count of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. On Count II, he was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006. He was further charged with the alternative charge of indecent act of a woman contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. He was convicted and sentenced to death on Count I. The sentence on Count II was held in abeyance.
2. Being aggrieved by the said decision, he lodged first appeal at Kakamega **HCCRA No 53 of 2015**. The court dismissed his appeal and upheld his conviction and sentence. He did not appeal to the Court of Appeal.
3. Being aggrieved by the said decision, he lodged a Constitutional Petition at Kakamega **Petition No 38 of 2018** and **Petition No 32 of 2019.** The court reduced the sentence to thirty (30) years

imprisonment. The sentence for the offence of gang rape was held in abeyance.

4. On 27th May 2024, he filed a Notice of Motion application dated 14th May 2024 seeking review of his sentence. He pleaded with the court to consider that the time he had served in prison was enough for retribution. He asserted that he had reformed and had undergone rehabilitation programs. He prayed for a non-custodial sentence.
5. His Written Submissions were dated 17th February 2025 and filed on 27th May 2025 while those of the Respondent were dated 2nd September 2025 and filed on 10th September 2025. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

6. The Applicant submitted that he had undergone various rehabilitation programs within the prison including having achieved Grade III in welding and electrical engineering, Bible Certificate from Lamp and Light and Voice of Prophecy and had a Certificate for Resource-Oriented Development from RODI-Kenya. He believed that with the acquired skills he was ready to join the society as a changed person.
7. He asserted that this court had a discretion in sentencing which discretion permitted a balanced and a fair sentencing. He added that the sentencing should be one that meets the end of justice and

ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.

8. He pointed out that he was a young man who was still energetic and who could be of great help to the society being that he had gained skills while in prison. He argued that serving the thirty (30) years in prison meant wasting such skills yet he was a changed person that the society could gain from. He asserted that it was clear from his mitigation at the Trial Court that he was a first offender, remorseful, he did not have parents and came from a poor family.
9. He contended that it was important that his sentence be reviewed so that he could either be released to serve a non-custodial sentence or have a lenient custodial sentence that could allow him go back home within a reasonable time and take care of his young family having lost a wife. He pleaded for the court's mercy and urged it to consider the general circumstances of the case, his mitigation, rehabilitation he had gone through and the skills that he had acquired and review his sentence to a lesser sentence.
10. He faulted the Trial Court for having sentenced him without calling for a Pre-Sentence Report during the Covid-19 pandemic. He believed that if the said Report had been furnished to the court, he could have been given a non- custodial sentence and not death or the thirty (30) years imprisonment that he was sentenced to. He averred that the said Pre-Sentence Report would have been able to show the pathetic home environment.

11. He placed reliance on the case of **Mueke Maingi & Others vs Republic Petition No E17 of 2021** (eKLR citation not given) where it was held that there was nothing which prevented the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases were finalised. He urged this court to review the thirty (30) years imprisonment and invoked Section 333(2) of the Criminal Procedure Code seeking that his sentence run from the date of his arrest.

12. In opposition to the present application, the Respondent cited Section 361 (1)(a) of the Criminal Procedure Code and 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 of offenders and that of **Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others Succession Cause No 920 of 2009** (eKLR citation not given) where it was held that abuse of court process created a factual scenario where a party pursuing the same matter by two (2) court processes was in some sort of gamble to get the best in the judicial process.

13. It further invoked Section 362 and 364 of the Criminal Procedure Code and Article 165 of the Constitution of Kenya, 2010 and noted that the powers of the High Court on revision were to be exercised only over subordinate courts and not over the High Court with respect to its own decisions. It argued that a convicted person

could not unsuccessfully file an appeal at the High Court and seek review of the sentence twice at the High Court as the same was an abuse of the court process.

14. It averred that the Applicant filed Kakamega **HCCRA No 53 of 2015** which was dismissed. It added that he then filed Kakamega **Constitutional Petition No 38 of 2018** were his death sentence was substituted with a thirty (30) years imprisonment. It pointed out that he had now filed the present application seeking a sentence review. It submitted that the only remedy that was open to him was to seek redress from the Court of Appeal as was held in the case of **John Kagunda Kariuki vs Republic [2019] eKLR**.

15. It was emphatic that the Applicant could not once again seek review of this court and hence, it argued that his application herein lacked merit and should be, therefore, dismissed.

16. 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.

17. 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.

18. 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)."

19. 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

20. 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."

21. 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.

22. Having said so, this court had been reviewing the sentences of convicts of the offence of robbery with violence who had been serving mandatory death sentences mostly commuted to life imprisonment by the Executive. The court has basically been reducing the sentences to thirty (30) years for robbery with violence cases. With regard to the Applicant herein, his death sentence had already been reviewed by the High Court in Kakamega which was a court of equal jurisdiction to this court and, therefore, this court could not sit on a second review or appeal of its decision. The only option the Applicant had was to lodge an appeal and/or review at the Court of Appeal.

23. Going further, this court was mandated to consider the period the Applicant spent in remand while his trial was ongoing as provided in Section 333(2) of the Criminal Procedure Code. The said Section 333(2) of the Criminal Procedure Code stipulates that:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)**”**.

24. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

"The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:…

Time already spent in prison by the convict…"

25. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another vs Republic[2018]eKLR.**

26. As the Applicant's death sentence imposed by the Trial Court was indefinite sentence, Section 333(2) of the Criminal Procedure Code, Cap 75 (Laws of Kenya) was inapplicable. However, as the same was reviewed to a definite sentence by the High Court, it became a definite sentence and the said Section ought to have applied.

27. Be that as it may, a perusal of the decision in **Petition No 38 of 2019** cited as **Lawrence Chamwada vs Republic [2020] KEHC 4559 (KLR),** indicated that Musyoka J rendered himself as follows:-

"In the spirit of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, I shall quash the sentence of death

that was imposed on the Petitioner by the trial court, and confirmed by the High Court. I shall substitute that sentence with one of thirty (30) years imprisonment, to run from the date of conviction on 31st January 2014. It is so ordered."

28. As the Learned Judge had pronounced himself as to when the sentence should run, this court could not sit on appeal or review of his decision as the court he presided over had equal jurisdiction to this court.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 14th May 2024 and filed on 27th May 2024 was not merited and the same be and is hereby dismissed.

30. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **19th** day of **March** 2026

J. KAMAU
JUDGE