REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

PETITION NO.E015 OF 2024

MARTIN NJENGA NDUNGU……..PETITIONER

-VERSUS-

REPUBLIC…….……RESPONDENT

(Arising from Kikuyu Principal Magistrate's Court Criminal Case No.9 of 2015 and Kiambu HCCRA No. 154 of 2017)

JUDGMENT

1. Before this Court is a petition by the Petitioner, **Martin Njenga Ndungu**, seeking a review of the sentence presently being served by him following his conviction for the offence of R**obbery with Violence contrary to Section 296(2) of the Penal Code**. The Petition is framed as a plea for sentence review, leniency, proportionality, and recognition of the period already spent in custody.

2. The Petitioner has invoked, among other provisions, **Articles 22, 23, 25(a), 27, 28, 48, 50(2)(p) and (q), and 165N all of the Constitution**, together **with Sections 216, 329 and 333(2), all of the Criminal Procedure Code**. In substance, he urges this Court to revisit the sentence of twenty-five (25) years'

imprisonment imposed upon him after re-sentencing, contending that the same remains harsh, cruel, disproportionate, and inconsistent with constitutional standards of fairness and dignity.

3. The background to the Petition is not in dispute. The Petitioner was charged before the **Principal Magistrate's Court at Kikuyu in Criminal Case No. 9 of 2015** with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code.** Upon trial, he was convicted and, on **11th May, 2017**, was sentenced to serve a **life imprisonment**.

4. He appealed to this Court vide **Kiambu High Court Criminal Appeal No. 154 of 2017** wherein in a Judgment delivered on **27th June, 2018**, J. Kamau upheld the conviction, but in light of the then prevailing jurisprudential developments following the **Francis Karioko Muruatetu & Another -vs- Republic**, remitted the matter back to the trial Court for re-sentencing. Upon re-sentencing, the Petitioner was sentenced to **twenty-five (25) years' imprisonment**. He did not lodge a further appeal to the Court of Appeal against that sentence, but has instead approached this Court through the present Petition.

5. In the present Petition, the Petitioner contends that *the twenty-five(25) year*

sentence is cruel, inhuman, and degrading; that he has already been in lawful custody for about nine(9) years; that he was a first offender; that he is remorseful; that he has reformed in prison; that he has reconciled with himself and with God and that he has used his time in custody to mentor fellow inmates and pursue vocational and moral rehabilitation. In view of all these, the Petitioner has urged that the Court ought to impose a more proportionate and definite sentence or otherwise take into account the period he has already spent in custody. He also prays that, if the balance of sentence is found to be short, the Court may consider him for probation or any other merciful relief. Thus, his supporting grounds repeatedly return to three themes: remorse, rehabilitation, and proportionality.

6. The Petitioner's mitigation is set out with unusual openness. He acknowledges the pain caused to the complainant and his family, apologises, states that he has deeply regretted his actions, and says the years spent in custody have transformed him. He further states that he was about twenty-eight (28) years old at the time of the offence, had no prior conviction, and that imprisonment has visited hardship not only upon him but also upon his wife, children, and wider family. He urges the Court to look at him not merely as the author of an offence, but as a human being who has undergone reflection, reform, and

maturation in custody.

7. The Respondent did not file any response by way of a Replying Affidavit or submissions in opposition to the Petition. However, that silence does not entitle the Petition to succeed by default since a plea for sentence review is not a ceremonial gate that swings open merely because the prosecution has not objected. Sentencing remains a judicial function governed by law, principle, proportionality, and the facts of each case hence this Court must determine the Petition, on the basis of the record, the law, and the material placed before it.

Analysis and Determination

8. From the Petition, the record as presented, and the applicable law, three broad issues arise for determination. *First, whether this Court is properly moved to re-open the Petitioner's sentence after he has already benefited from a re-sentencing exercise and did not appeal further to the Court of Appeal. Secondly, whether the sentence of twenty-five (25) years' imprisonment is unlawful, unconstitutional, manifestly excessive, or otherwise meriting interference. Thirdly, whether, even if the term itself is not disturbed, this Court should correct the sentence to ensure compliance with* **Section 333(2) of the Criminal Procedure Code** *by properly crediting the period already spent in*

custody.

9. Before turning to those issues, it is useful to restate the legal position on the offence. **Section 296(2) of the Penal Code** provides for the definition and ingredients and penalty of the offence of Robbery with Violence and states that the offender **"shall be sentenced to death."** Yet, this sentence shifted after the post-2010 constitutional re-examination of mandatory capital punishment. In the case of **William Okungu Kittiny –vs- Republic [2018] KECA 851 (KLR),** the Court of Appeal held that the reasoning in **Muruatetu** applied, *mutatis mutandis*, to **Sections 296(2) and 297(2) of the Penal Code**, with the result that the death sentence penalty provided for under those provisions is to be treated as a **discretionary maximum punishment** and not a mandatory one.

10. The first issue is whether this Court should entertain yet another substantive re-sentencing exercise after the Petitioner has already undergone one. Courts have repeatedly warned that sentence review should not become an endless staircase with no landing. In the case of **Ngige –vs- Republic (Miscellaneous Criminal *Application 16 of 2020) [2023] KEHC 24278 (KLR)***, *the High Court held that "where an Applicant had already benefited from the principles later associated with re-sentencing jurisprudence, he could not seek a second bite of the cherry*

through a fresh application". The Court regarded such an effort as an abuse of process.

11. This Court respectfully agrees with that principle, though with one important qualification. Finality in litigation is indispensable, but it is not a shield for illegality. A court may be slow to reopen the merits of a sentence already reconsidered, yet still be obliged to intervene where there is a demonstrable legal error, such as a failure to apply the provisions of **Section 333(2) of the Criminal Procedure Code,** or where the sentence is plainly illegal or founded on a wrong principle. The judicial task, therefore, is to distinguish between an impermissible second attempt to open re-sentencing and a legitimate correction of a legal defect.

12. The Petitioner argues, in part, that the twenty-five (25) year term is unconstitutional and disproportionate. He has invoked **Article 50(2)(p) of the Constitution** which secures for an accused person, the benefit of the least severe of the prescribed punishments if the prescribed punishment for an offence changes between the commission of the offence and sentence. He has also invoked dignity, equality, fair trial, and access to justice.

13. In this Court's view, although, **Article 50(2)(p)** is indeed a constitutional

guarantee, it does not operate like a magic key that always opens the shortest available prison door. Instead, it protects a convicted person where the law has changed in a way that prescribes a lesser punishment. It does not mean that every person convicted of a grave offence must, upon invoking the provisions of this Article, receive the shortest sentence he proposes. Sentencing remains an exercise in judicial discretion, guided by the seriousness of the offence, the aggravating and mitigating circumstances, the offender's personal situation, the protection of the public, and the broader objects of the punishment.

14. The **Judiciary Sentencing Policy Guidelines** recognise the principal objectives of sentencing as *retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation*. The guidelines also state that the proviso to **Section 333(2) of the Criminal Procedure Code** obligates courts to take into account time already served in custody, since failure to do so may result in excessive and disproportionate punishment.

15. Sentencing, then, is a balancing act performed under constitutional light and one must neither trivialize a serious violent offence nor extinguish the possibility of reform. The sentence must not become a blunt instrument of vengeance, but neither should it wilt into an invitation to lawlessness. Robbery

with violence is among the gravest offences in our criminal law since it ordinarily involves theft fused with force, threat, weapons, or actual violence.

16. This Court has considered the Petitioner's plea that he is remorseful, reformed, and a first offender. It has also considered his age at the time of the offence, the hardship visited upon his family, and his assertion that he has maintained good conduct in prison and sought to mentor fellow inmates. Those are all relevant factors. Indeed, the Supreme Court in the **Muruatetu Directions,** listed age, first-offender status, character and record, remorsefulness, and the possibility of reform and social re-adaptation as material considerations in a re-sentencing hearing, albeit in the murder offences context. Those factors remain generally instructive in the exercise of sentencing discretion.

17. The difficulty, however, lies elsewhere. Although this Court directed the Deputy Registrar to call for and avail the original trial court file, the file that was eventually placed before the Court was not the correct one. Instead of the **Kikuyu Principal Magistrate's Criminal Case No. 9 of 2015** relating to the Petitioner, the file availed was **Kikuyu SPM Criminal Case No. 9 of 2025, Republic v Peter Denis Wairimu**, concerning an unrelated charge under the **Alcoholic Drinks Control Act**. That procedural mishap notwithstanding, the Court is not left entirely in the dark. From the **typed proceedings forming part**

of the Record of Appeal, together with the Judgment in **Criminal Appeal No. 153 of 2017**, it is possible to glean the broad factual circumstances surrounding the commission of the offence and the nature of the injuries sustained by the Complainant.

18. In particular, the record shows that **PW1, the complainant,** testified that she was attacked during the commission of the offence, while PW2 confirmed that he examined and treated PW1 for injuries caused by blunt and sharp objects. PW2 classified those injuries as **"harm"** not as maim, grievous harm, permanent disability, or life-threatening trauma. The violence was therefore real and punishable, but it did not fall at the most aggravated end of the spectrum.

19. In this Court's view, this distinction is important in sentencing. Robbery with Violence covers a broad range of factual situations. At one end, are cases involving extreme brutality, firearms, multiple assailants, grave physical injuries, or lasting psychological and bodily harm. At the other end, are cases where the ingredients of the offence are technically met, but the degree of violence actually inflicted, though unlawful and condemnable, is comparatively less grave. Sentencing must thus remain alive to those distinctions, for the law does not punish in bulk or by stereotype but in proportion to the circumstances of the particular case.

20. Having regard to the material available, this Court is persuaded that this case, while undoubtedly serious, does not fall within the most aggravated category of robbery with violence cases that would justify the maintenance of a sentence as high as twenty-five years. The complainant was injured, yes, but the injuries were medically classified as **harm**. There is no indication on the material presently before the Court that the complainant suffered grievous harm, permanent incapacitation, or injuries of a catastrophic nature. That factual position materially softens, though it does not erase, the gravity of the sentence that ought fairly to be imposed.

21. The court has also considered that the Petitioner is a first offender, has expressed remorse, has stated that he has reformed while in custody, and has already spent a substantial period in incarceration. A sentence must mark the Court's condemnation of the offence, but it must also remain just, measured, and tailored to the actual wrongdoing proved.

22. From these arguments, this Court is therefore unable to agree that the only proper sentence in the circumstances is the twenty-five-year term presently being served by the Petitioner. While that sentence may not have been illegal *per se*, the court is persuaded that it was on the higher side when measured

against the facts disclosed by the record, the Petitioner's status as a first offender, and the evolving sentencing approach in comparable robbery with violence cases.

23. In the Court's considered view, a sentence of **fifteen (15) years' imprisonment** would sufficiently meet the ends of justice. Such a sentence would still mark the seriousness of the offence, vindicate the complainant's suffering, and serve the objectives of deterrence and punishment, while at the same time reflecting the facts in this case and the injuries sustained by the Complainant.

24. A custodial term of fifteen (15)years would also bring the sentence into closer alignment with the principle of proportionality that underpins fair sentencing. It would avoid the risk of over-penalising the Petitioner in circumstances where the violence, though present and punishable, was not shown to have reached the highest threshold of brutality. In this Court's view, justice in this matter would not be undermined by such reduction; rather, it would be better served by a sentence that is firm but calibrated.

25. Accordingly, this Court finds merit in the Petition to the extent that the sentence of twenty-five (25) years' imprisonment ought to be interfered with. The same

is hereby set aside and substituted with a sentence of **fifteen (15) years' imprisonment**, which sentence shall run from the date the Petitioner was first placed in lawful custody in connection with **Kikuyu Principal Magistrate's Criminal Case No. 9 of 2015**, in compliance with **Section 333(2) of the Criminal Procedure Code**.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF MARCH, 2026.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Magero counsel for the State

Petitioner in person = present at Manyani G. K. Prison

Court Assistant – Martin/Sakina