Damiano v Republic (Criminal Revision E022 of 2024)
[2025] KEHC 650 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E022 OF 2024

DKN MAGARE, J

JANUARY 30, 2025

BETWEEN

DOUGLAS KABERIA DAMIANO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling over an application dated 8.3.2024 seeking review of the sentence of life imprisonment imposed upon the Applicant. The initial sentence imposed was a death penalty for which the Applicant appealed to this court and the court found that the conviction and sentence were proper. He also appealed to the Court of Appeal and the Court upheld the conviction and sentence. The sentence was subsequently commuted to a life sentence by the power of mercy committee.

2. It is in respect of the life sentence that the Applicant filed the instant application which is supported by his affidavit. He stated as doth:

    a. The Applicant was convicted of robbery with violence contrary to Section 296(2) of the *Penal Code* and convicted in Nyeri SPMCRC No. 976 of 1996.

    b. The Applicant was found guilty of the offence and upon conviction was sentenced to serve death.

    c. The Applicant exhausted all appeals on conviction and sentence.

    d. The original death sentence was commuted to life imprisonment in 2016.

    e. The Applicant was not granted fair trial of sentencing as required under Articles 25, 27, 28 and 50 of the *Constitution*.

    f. The Applicant is a first offender, remorseful and has rehabilitated.

3. In response to the application, the Respondent filed a Replying Affidavit dated and sworn by the Prosecution Counsel, Mr. David Mwakio on 23.10.2024. It was deposed that this court was functus officio and lacked the jurisdiction to entertain the application since a court of concurrent jurisdiction had ruled on the matter, rendering it *res judicata*.

4. It was further deposed that the aggravating factors far outweighed the mitigating factors in the circumstances of the commission of the offence.

Submissions

5. The Applicant filed submissions dated 2.5.2024. It was submitted that this court had jurisdiction. He cited *Shaban Salim Ramadhan & Others v DPP & Another* (2024) eKLR based on which it was submitted that the mandatory nature of the sentence was unconstitutional.

6. The Applicant also urged the court to consider mitigating factors including that he had underwent rehabilitation while in prison and had completed training and attained certifications. Further, that he was 27 years at the time of his arrest and was now 52 years old meaning he had served 25 years in prison.

7. The Respondent filed submissions dated 23.10.2024. It was submitted that this court lacked jurisdiction to entertain the present application. Reliance was placed *inter alia* the *Owners of Motor Vessel Lilian S' v Caltex Oil (Kenya) Limited* 1989 KLR 1 to canvass the point that jurisdiction is everything and without it a court should down its tools.

8. The Respondent also relied on the case of *Mombasa Bricks & Tiles Limited & 5 Others v Arvind Shah & 7 Others* (2018) eKLR to submit that the application was *res judicata* as the issue of sentence was previously decided by this court.

Analysis

9. The issue is whether the Applicant's sentence should be reviewed. The question of the death penalty is not before the court. It is thus irrelevant whether a declaration had been issued relating to unconstitutionality of the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the *Penal Code*. This is because the Applicant is not serving a death penalty.

10. The Supreme Court opined in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR that the mitigating factors that may reduce a sentence imposed by the law by no way replace judicial discretion. It is a settled principle that mandatory sentences deprive courts of discretion to impose appropriate sentences and are thus arbitrary and unconstitutional. However in view of subsequent directions limiting the applicability of the case of *Francis Karioko Muruatetu* (*supra*) to murder cases only, the said decision has no precedent value in this matter. None of the principles enunciated therein have been addressed by the Supreme Court vis-a-vis non murder cases.

11. The Objection by the Respondent was largely on the basis that the application was *res judicata* and this court was functus officio. I have perused the record in line with the Respondent's position and I do not agree that the application herein is *res judicata* and this court is functus officio. I note this Court dealt with the appeal and dismissed it. This was on the conviction and sentence of death. The Court of Appeal too dismissed the challenge on conviction and sentence. This meant that the conviction and sentence of death were sustained. However, the Applicant herein is not challenging the sentence of death on merits. He is not serving a sentence of death. He is serving life imprisonment following such commutal through a presidential decree.

12. Therefore, the death sentence originally meted out on the Applicant was subsequently commuted to life imprisonment pursuant to the presidential decree. He indicated that this happened in 2016. This was through the presidential pardon by the power of mercy committee. In my view, it is only the commuted sentence that is amenable for revision. It is however not merit based as merit has already been dealt with. The narrow window for the applicant was given by the Court of Appeal and various cases by this court.

13. The sentence the applicant is serving is a life sentence. This has not been dealt with by the courts handling the matter. The Court of Appeal has dealt with the life sentence in multifaceted way, the bottom line being that it is unconstitutional for not being a determinate sentence. In *Evans Nyamari Ayako v Republic Kisumu* CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported) translated life imprisonment to 30 years.

14. The Court of Appeal, differently constituted made the following decision in the case of *Barasa v Republic* (Criminal Appeal 219 of 2019) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), and stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*.

15. Indeterminate sentences are unconstitutional and the period the prisoner is supposed to serve should be specified. The Court of Appeal sitting in Malindi (Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment was unconstitutional and substituted the same with 40 years in the case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment). They pronounced themselves as hereunder:

> "We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in *Jackson Wangui*, *supra*, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...
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> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

16. It is therefore not the sentence that is reviewed as urged by the Respondent but translation to a determinate period. The guilt, mitigation, and any errors on procedure are not within the domain of the matters to be determined. It is thus the position as set out in binding precedent that the court is bound to translate life sentence to a determinate sentence. In other words, it is not the inherent merit of the sentence application but the sentence qua sentence. The Court of Appeal, did not however, give any guidance on the parameters to use. The court will therefore use its sentencing guidelines and also give a determinate sentence whose term shall run as per Section 333 (2) of the *Criminal Procedure Code* from date of arrest.

17. The discretion that this Court enjoys in sentencing permits a balanced and fair sentencing, which is also the hallmark of enlightened criminal justice. As was stated in *State v. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA:

> " The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person."

18. Therefore, it is beyond peradventure that it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*. As was elaborated by the persuasive Constitutional Court of Uganda in *Susan Kigula & 417 Others v. Attorney General*, Const. App. No. 3 of 2006:

> " The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*."
>
> 80. I therefore have no doubt that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *Sentencing Guidelines* are as follows: -
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> " 1.3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
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> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence

in future as well as to discourage the public from committing offences.

iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.

iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community

v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society"

19. I am consequently persuaded that a sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and so amounts to cruel, inhuman and degrading punishment. The Supreme Court of Appeal of South Africa in *S v Nkosi & others* 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. The Court stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the *Constitution of the Republic of South Africa* Act 108 of 1996. The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she]

> will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

20. It is the finding of this Court that death sentence or life imprisonment does not mean the natural life of the convict. This view has also been elucidated by the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) as follows:

> On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

21. The Applicant expressed remorse in his Supporting Affidavit. He also stated that he underwent rehabilitation programs while at the prison. He is now 52 years of age. Given the heinousness of his crime and the circumstances of the case, I shall equate the life sentence to 40 years. The same shall run from 26.5.1999, the date of arrest.

Determination

22. I therefore make the following orders: -

    a. The sentence of life is substituted with a sentence of 40 years imprisonment starting from the date of arrest on 26.5.1999.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JANUARY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Applicant – present

Ms. Atina for the State

Court Assistant – Jedidah