James v Republic (Petition 33 of 2019) [2025] KEHC 4691 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

PETITION 33 OF 2019

REA OUGO, J

MARCH 27, 2025

BETWEEN

DESTERIOUS SAMUEL JAMES ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

(IN THE MATTER IMPUGNED UNDER ARTICLE 23 (1), 165 (3) (B) (D) (I), 50 (2), 25 (c) (D), 51 (1) AND 163 OF THE CONSTITUTION OF KENYA 2010 AND SECTION 296 (2) OF THE PENAL CODE AND IN THE MATTER OF ARTICLE 20(1) (2) (4), 21 (1), 48, 258 (III) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 25 (a) (c), 26 (1), 27 (1) (2), 28, 29 (d) (f) (2) AND ARTICLES 23(1) UNDER SECTION (3) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER ARISING FROM SECTION 295(1) AS READ WITH SECTION 296 (2) OF THE PENAL CODE)

JUDGMENT

1. By way of background, the appellant was charged with the offence of robbery with violence in Bungoma Chief Magistrate's Court Criminal Case No 1625 of 2012. He was convicted and sentenced to death. The appellant filed an appeal at the High Court in Criminal Appeal No 84 of 2014, which sustained both the conviction and sentence.

2. The appellant in this petition therefore seeks the following orders:

    a. A declaration that the death sentence imposed by the trial court was inconsistent with Article 25 (b) and Articles 50 of *the Constitution* of Kenya and Articles 329 of the *Criminal Procedure Code*.

    b. A declaration that the imposition of mandatory death penalty constitutes too cruel and inhumane treatment thus inconsistent with Article 25 (b) and Article 50 of *the Constitution*.

c. A declaration that section 296 (2) of the *Penal Code* is inconsistent with section 26 (i), 27 (1), 48, 50 (2) of *the Constitution* of Kenya.

d. A declaration that the constitutional rights of the petitioner were highly violated in sentencing him to suffer death.

e. An order rendering the petitioner's case to the trial for mitigation and determination of resentencing to an appropriate sentence that is in line with Article 50 (2) of *the Constitution* of Kenya.

f. A declaration in the alternative for review of the petitioner's case in the interest of justice.

g. An order that the death sentence is cruel, inhumane and degrading thus unconstitutional.

h. That no cost to this petition as the petitioner is a pauper and has no money.

3. The petition was canvassed by way of written submissions. The appellant argues that he has been in custody for 12 years and served the purpose of sentencing. During the commission of the crime, no life was lost and he was barely 20 years old and he committed the crime due to peer pressure. He was not a repeat offender.

4. The sentence imposed should take into account the need to accord the applicant an opportunity and chance to be rehabilitated in line with Article 10 (3) of the ICCPR on the essential aims of imprisonment as:

> " ...shall be to reform the offender and promote social rehabilitation."

5. In Francis Opondo v Republic [2017] eKLR, the court observed that:

> 12. As to what the principles of sentencing are, I stated in Dalmas Omboko Ongaro v Republic [2016] eKLR that:
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> "10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:
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> > "In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (Makanga v R. Criminal Appeal No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118)."
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> > The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism."

6. The petitioner states he has had opportunities to take part in rehabilitation programs and has trained in carpentry and a joinery course as well as a tailoring course.

7. The petitioner urged the court to consider that courts in Kenya have declared the mandatory minimum nature of the death sentence unconstitutional as it offends Article 19 (2), 20 (1), 22 (1), 23 (1), 25 (c), 26 (1) (4), 28, 50 (2) (q) of *the Constitution*. In Shaban Salim Ramadhan & 9 Others v Republic, Constitutional Petition No 5 of 2022 eKLR the court declared mandatory death sentences as provided under section 296 (2) of the *Penal Code* are unconstitutional. He also cited the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR. The petitioner urged the court to apply its discretion to reduce the sentence imposed on the petitioner.

8. The respondent in his submissions argued that the death sentence was not declared unconstitutional in its totality and therefore Article 26(3) of *the Constitution* on the right to life was not disturbed. In Francis Karioko Muruatetu & Another v Republic [2017] eKLR the court held that the mandatory nature of the death sentence as provided for in section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of *the Constitution*. Article 26 (3) provides that a person shall not be deprived of life intentionally except to the extent authorized by this constitution or other written law.

9. The respondent also urged the court to consider the petitioner's ruthless attack on the victims and the grave injuries sustained by the victims. In Republic v Jospeph Kuria Irungu & Another (2016) eKLR, the learned judge in meting out a death sentence noted that sentencing is judgment where the accused is compelled to bear the legal consequences of his acts or omissions; Punishment in criminal cases has five goals, retribution, deterrence, restoration, rehabilitation and incapacitation. In Republic v Jospeph Kuria Irungu (supra) the court held that death sentence is still available, valid and constitutional.

ANALYSIS AND DETERMINATION

10. I have considered the petition and the rival submissions. The issues before the court are whether a mandatory death sentence for robbery with violence is constitutional and whether the petitioner is entitled to the orders sought. By dint of Article 165 (3) of *the Constitution*, this court is clothed with the requisite jurisdiction to determine the questions before it. Section 296(2) of the *Penal Code* provides that:

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

11. The trial court and this court on appeal sentenced the petitioner to death as provided by law in compliance with the mandatory death sentence. The two courts did not take into account the petitioner's mitigation. The Supreme Court of India in State of Punjab vs Dalbir Singh on 1 February, 2012, stated that:

> " The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their

eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death.

Equity and good conscience are the hallmarks of justice. The mandatory sentence of death prescribed by Section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values.

For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

12. The Supreme Court in Francis Karioko Muruatetu & another vs Republic [2017] eKLR in holding that the mandatory nature of the death sentence in murder cases is unconstitutional held as follows:

> " 47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse.
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> 48. Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of *the Constitution*; an absolute right.
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> 49. With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.
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> 50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the rights to dignity. Failing to allow a judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

> 53. If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

13. The Supreme Court later issued directions that their holding in the Francis Karioko Muruatetu case (supra) could not be directly applied to mandatory death sentence in offences such as robbery with violence under section 296 (2) of the *Penal Code*. The court directed that the constitutional validity of the mandatory death could only be considered through the filing of a constitutional petition, as has been done here.

14. Therefore, this court would be correct to apply the ratio decidendi in Francis Muruatetu case (supra), that is, the mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. This was the holding by the Court of Appeal in Charles Karai Vs Republic Kisumu Criminal Appeal No. 166/2015 at para 25 of the judgment where the court stated:

> "There is no doubt that the prescriptive ration decidendi in Muruatetu -1- applies to cases beyond murder. When the Supreme Court reasons that, the mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases, it applies in equal force to all cases where the mandatory death penalty is imposed. Similarly, when the Supreme court assails the mandatory death penalty in Section 204 of the *Penal Code*, as "a mandatory sentence (which) treated the offenders as faceless, undifferentiated mass to be subjected to blind infliction of the penalty of death thereby dehumanizing them" that indicted holds with equal force to both section 204 as well as section 296 of the *Penal Code* because both sections imposed a mandatory death sentence without individualized sentence hearing. Finally when the Supreme Court held that the dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without any chance to mitigate, that holding is true, would be true for all mandatory death sentences not just for murder. It follows therefore, that while the Supreme Court was dealing with the narrow question of the mandatory death sentence for murder in Section 204, of the *Penal Code* in Muruatetu 1 as the principles of common law require and it could only determine the narrow question before it, its reasoning is applicable in future cases beyond the narrow confines of Section 204 of the *Penal Code*."

15. The Court of Appeal in the case of Onzere v Republic (Criminal Appeal 166 of 2016) [2023] KECA 643 (KLR) observed that:

> "32 ...In an appropriate case where the constitutional issue is preserved and appropriately raised, this court would be entitled to analogously apply Muruatetu 1 to the facts of the case."

16. In a similar case before the High Court, Mbugua & 9 others v Attorney General & 3 others [2025] KEHC 1248 (KLR), where the petitioner questioned the constitutionality of the death sentence under section 296 (2) of the *Penal Code* the court in held as follows:

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> "48. As the Petition herein was a subject of Section 296(1) of the *Penal Code* on the offence of robbery with violence whose mitigating circumstances were impeded by the mandatory nature of sentence under Section 296 (2) of the *Penal Code* which prescribed death sentence as the only punishment, the mandatory nature of the sentence was unconstitutional as it was discriminative in nature. This Petition therefore constituted a valid challenge as contemplated by the Supreme Court in Muruatetu II.
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> 49. ..
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> 50. Having taken into consideration the above factors, this court was of the considered view that Sections 296(2) and 297(2) of the *Penal Code* under which the Petitioners herein were charged and convicted, in so far as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, those Sections were deficient as they did not give those administering the justice system unfettered discretion to mete out proportionate sentences depending on the gravity of the offence.
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> ...
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> 66. To the extent that it was now settled that murder convicts did not suffer death as a mandatory sentence, there was no reason why the persons who had been convicted for the offence of robbery with violence under Section 296(2) and 297(2) of the Penal code had to suffer death as a mandatory sentence. Both offences were capital in nature. The subsisting discrimination against convicts of robbery with violence offended the provisions of Article 27(1) of *the Constitution* of Kenya.
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> 90. It was therefore 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 enjoy that right. In the words of 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 have a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders."

17. Similarly, the court in Ngatia v Republic [2024] KEHC 429 (KLR) held as follows:

> "The court has made a finding that mandatory sentence prescribed in section 296(2) of the *Penal Code* is unconstitutional. The applicant suffered deprivation of exercise of discretion by the trial court to impose appropriate sentence or less severe sentence. Therefore, a denial

or violation of his right and fundamental freedoms. The death sentence is therefore set aside."

18. The failure to consider the petitioner's mitigation during sentencing, while non-capital offenders are afforded this right, is discriminatory and contravenes Article 27(1) of *the Constitution* of Kenya, which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

19. The mandatory sentence of death prescribed by section 296 (2) of the *Penal Code* with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is unconstitutional. Consequently, the death sentence against the petitioner is set aside. Petitioner will be allowed to address the court and re-sentencing to determine his appropriate sentence will be done once this court hears his mitigation.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF MARCH 2025.

R.E. OUGO

JUDGE

In the presence of:

Desterious Samuel James -Petitioner

Miss Matere -For the Respondent

Wilkister -C/A