Muluma v Republic (Criminal Revision E130 of 2024)
[2025] KEHC 4024 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4024 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION E130 OF 2024

RC RUTTO, J

MARCH 26, 2025

BETWEEN

JAIRO NATO MULUMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant has moved Court seeks *inter alia* the following orders:
    a. That the Court be pleased to order the applicant to a probationary sentence or community service order.
    b. That the Honourable Judge be pleased to issue any other orders it may deem necessary.
2. The aapplication is supported by an affidavit, sworn by Jairo Nato Muluma, the Applicant herein, wherein, he deposed inter alia that he was found guilty and sentenced to death and upon appeal, the death sentence was set aside and substituted with a sentence of 30 years imprisonment. That he is seeking a non-custodial sentence since he had served 12 years from the date of arrest; he was not contesting the merits or demerits that may have occurred in the trial court but rather imploring on this Court to balance between his mitigating factors vis a vis the aggravating factors and grant the relief sought.
3. The applicant filed his submissions while counsel for the state did not file any submissions.
4. The Applicant in his submissions relied upon Article 50 (2) (q) of the *Constitution* as well as the case of *Francis Kariako Muruatetu & Another v Republic* eKLR to urge the Court to re-sentence him to a non-custodial sentence since he had reformed while in prison and that he be granted a second chance in life. He contended that according to section 8 (2) of the *Community Service Order*, it was clear that offenders can seek revision and the Court can make an order for community service. He relied on

the cases of *Republic v Godfrey Muchanji Ojiambo* (2019) KLR; *Tobias Kipchumba v Republic* [2021] eKLR; and *Mulamba Ali Mabanda* Criminal Appeal No 12 of 2013.

5. I have considered the application, the Supporting Affidavit, and submissions by the applicant. The applicant was charged with the offence of robbery with violence contrary to sections 295 as read together with section 296(2) of the *Penal Code* and an alternative charge of handling suspected stolen goods contrary to section 322(1) as read with section 322(2) of the *Penal Code*.

6. He was found guilty and convicted to death by the trial court at Mavoko. Following this, he lodged an appeal which was unsuccessful. Thereafter, and pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* (2017)eKLR (Muruatetu 1), he applied for re-sentencing before the High Court being Machakos High Court Criminal Appeal No 82 of 2019 .

7. The re-sentencing application succeeded to the extent that the death sentence was set aside and substituted with a sentence of 30 years imprisonment from the date of arrest namely 17th December 2012. The applicant now seeks that this Court grants a probationary sentence or community service order.

8. I will address this application in two-fold; first is whether this Court can grant a probationary sentence or community service order in the circumstances and secondly whether the application before court is competent.

9. The Court in addressing the first issue, acknowledges the Supreme Court pronouncement in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Muruatetu 2) provided clarification that the decision in *Muruatetu 1* applied solely to murder cases under section 204 of the *Penal Code*. The apex Court stated in particular, thus:"(t)he decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*". This Supreme Court decision in Muruatetu 2 closed the door that court had opened following Muruatetu 1 where the courts were re-sentencing all convicts sentenced to death either upon conviction for murder or robbery with violence. Evidently, the appellant herein is a beneficiary of that window that was opened, his death sentence having been set aside and a term sentence of 30 years imposed.

10. Consequently, it follows that following the jurisprudence in *Muruatetu 2,* the death sentence statutory prescribed for the offence of Robbery with violence is still the legal and only valid. Thus, with this development, the question that ought be addressed is whether the 30 years imprisonment imposed upon the applicant is valid?

11. This Court finds that the 3o years imprisonment is illegal as the proper sentence ought to be death. So that while the applicant is seeking that this Court interfere with the 30 years sentence and mete out a non-custodial sentence, being bound by the Supreme Court decision, this Court first finds the sentence illegal. Should this Court proceed and impose the legal sentence?

12. In determining this issue, I am guided by the Court of Appeal decision in *J.J.W. v Republic* [2013] eKLR, where the Court held as follows on enhancement of a sentence by the High Court;

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or

at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

13. Consequently, as there was no notice of enhancement issued to the applicant before this Court, this court will maintain the status quo. This alone is enough to dispose off this application.

14. Be that as it may, on the second limp, this Court notes that the applicant herein seeks to review the decision of High Court vide Judgment delivered on 17th September 2020 by Hon Justice D. Kemei, which allowed the appeal, reducing the sentence from death to 30 years imprisonment. This Court is being called upon to review a decision of a similar, competent and concurrent jurisdiction. This Court has no jurisdiction to exercise such a mandate. On that ground also, the application before this court is incompetent.

15. The upshot of the above is that the application is dismissed.

16. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF MARCH, 2025

In the presence of;

Accused present from Machakos main prison

Wanyoike Court Assistant