REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E050 OF 2024

HUMPHREY MADEBE MUZAMBU.....1ST APPLICANT

STEPHEN AYODI MADUVI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. The Applicants herein were both charged with the offence of robbery with violence contrary to Section 295(1) as read with Section 296(2) of the Penal Code and an alternative charge of handling stolen property contrary to Section 322(1) and (2) of the Penal Code. They were also charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No 3 of 2006 and an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No 3 of 2006.
2. They were both convicted of the offence of robbery with violence and were sentenced to death. The 1st Applicant was also convicted of the offence of gang rape and was sentenced to fifteen (15) years imprisonment.
3. Being aggrieved by the said decision, they lodged an appeal at the High Court in **Kakamega HCCRA No 73 of 2017** which upheld their conviction and sentence.

4. On 13th March 2024, they filed a Notice of Motion application dated 31st August 2023 seeking to have their sentences reduced to least severe sentences preferably the period of six (6) years that they had already served. They also sought for an order that the sentences of the 1st Applicant be made to run concurrently. In that regard, they relied on Section 12, 14 and 37 of the Criminal Procedure Code.
5. They invoked Article 25(c) and 50(2)(q) and (p) of the Constitution of Kenya, 2010 and contended that the nature of sentence under Section 296(2) of the Penal Code was unconstitutional and not warranted. They also urged this court to consider the time they spent in custody during trial pursuant to Section 333(2) of the Criminal Procedure Code.
6. They pointed out that they were young men of twenty-two (22) and twenty-three (23) years old during the commission of the offence hence required social justice pursuant to Article 19(2) of the Constitution of Kenya, 2010. They pleaded for a second chance to re-integrate with community.
7. They pointed out that they had undergone several reformation and rehabilitation programmes while in prison and promised to be law-abiding citizens and ambassadors of peace if granted orders sought.
8. Their respective submissions were both dated 5th August 2024 and filed on 21st August 2024 while those of the Respondent were dated and filed on 22nd November 2024. This Ruling is based on the said Written Submissions that parties relied on in their entirety.

LEGAL ANALYSIS

9. The Applicants invoked Articles 25(c), 50(2)(p), 24(1)(e), 19(2), 29(f) of the Constitution of Kenya, Section 12, 14, 323, 361(7), 362, 363, 364, 365, 366, 333(2), 329 and 216 of the Criminal Procedure Code, Cap 75 (Laws of Kenya) and paragraphs 2.3.23, 1.3, 8.22, 4.8.20, 4.5.3, 5.2.21 and 4.5.6 of the Judiciary Sentencing Policy Guidelines revised, 2023 and placed reliance on the case of **Republic vs Anderson Mabvuto Criminal Case No 66 of 2009 (UR)** and **Republic vs Jamuson White Criminal Case No 74 of 2008(UR)** where the common thread was that the maximum punishment must be reserved for the worst of the offenders in the worst of cases.

10. They further relied on the case of **Petition No 5 of 2022(as consolidated with Constitutional and Human Rights Petition No 6 of 2022) Shaban Salim Ramadhan & 9 Others** (sic) (eKLR citation not given) where it was held that the mandatory nature of death penalty as provided under Section 296(2) and 297(2) of the Penal Code was unconstitutional.

11. The 1st Applicant asked this court to consider that he was only twenty (20) years old and still in school in Form Four when he committed the offence. He averred that he was single and had no child of his own. He cited Article 19(2) of the Constitution of Kenya but did not elucidate what his argument was. He added that he was born in a polygamous family and his step mother and brothers had grabbed his land while he was in prison.

12. In respect of the gang rape, he submitted that the general rule under the Sexual Offences Act was that the higher the age of the victim the lesser the punishment to the accused. In this regard, he pointed out that the victim of gang rape was sixty (60) years old and still had her husband. He added that although he was armed with a panga, he did not injure or harm her. It was his contention that all the above were sufficient mitigation on his part for the offence not to be termed as the worst offence and hence pleaded for a least prescribed sentence preferably the term already served.

13. On his part, the 2nd Applicant pointed out that he was only twenty-three (23) years old when he was arrested. He was married with one child and that he was the sole-breadwinner of his family. He said that he was an orphan and that his family had broken due to his incarceration and his wife re-married.

14. Both Applicants stated that it was the folly of their youth and peer pressure of wrong company that led them astray. They contended that they were remorseful, reformed, rehabilitated and had been socially re-adapted and would not cause a threat to the public.

15. They argued that the balance between justification for detention was not necessarily static and could shift in the course of the sentence and that it was only by carrying out a review of the justifications for continued detention at an appropriate time during the sentence that such factors or shifts could be properly evaluated.

16. They pointed out that if a prisoner was incarcerated without the possibility of having his life sentence being reviewed, then there was risk that he could not atone for his offence and that whatever he did in prison, however exceptional his progress towards rehabilitation, his punishment remained fixed and unreviewable.

17. They submitted that they were first offenders and that the property alleged to have been stolen were of modest value of Kshs 10,000/= and was recovered and returned to the owner.

18. In this regard, they relied on the case of **Vinter and Others vs United Kingdom(Application Nos 66069/09, 130/10 and 3896/10**) where it was held that it was inhuman treatment for applicant who was remorseful and rehabilitated to remain in prison for the rest of his life.

19. They both placed reliance on the case of **Willy Joel Makudo vs Republic[2019]eKLR** where the court in finding the appellant guilty of the offence of robbery with violence but taking into account his mitigation held that it had considered that the appellant did not beat, wound or injure any person during the robbery despite being armed and that the value of the stolen items was modest in the circumstances. They urged this court to allow their application.

20. On its part, the Respondent placed reliance on the case of **Francis Kariokor Muruatetu & Another vs Republic Petition No 15 and 16 (consolidated) of 2015** (eKLR citation not given) where it was held that death penalty was not unconstitutional and could still be applicable discretionary maximum sentence. It further

relied on the case of **James Kariuki Wagana vs Republic[2018]eKLR** where it was held that while the death sentence was the maximum penalty for both murder and robbery with violence the court had the discretion to impose any other penalty that it deemed fit and just in the circumstances. The court also added that death sentence should be a reserve for most heinous levels of robbery with violence.

21. It further submitted that this court was *functus officio* for having pronounced itself on appeal lodged by the Applicants. It was emphatic that the sentences that were imposed on them and upheld by the appellate court were lawful and no grounds had been placed before this court to warrant a re-sentence.

22. In this regard, it relied on the case of **Benard Kimani Gacheru vs Republic[2002]eKLR** where it was held that sentence was a matter of discretion of the trial court and that it depended on the facts of each case. The court therein further held that the appellate court would not interfere with sentence unless that sentence was manifestly excessive in the circumstances or the trial court overlooked some material factors or acted on a wrong principle.

23. It also placed reliance on the case of **Republic vs Jagani & Another (2001) KLR 590** where it was held that the purpose of sentence was usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in

rehabilitation of offenders and in rehabilitation by providing for reparation for harm done to victims in particular and to society in general. It was emphatic that the sentences meted upon the Applicants were lawful and commensurate to their blameworthiness. It urged this court to uphold the same.

24. Notably, the 1st Applicant was sentenced to fifteen (15) years imprisonment for the offence of gang rape. Section 10 of the Sexual Offences Act states that:-

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.”

25. In the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**, the Court of Appeal reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** where it held that Section 8 of the Sexual Offences Act had to be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

26. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic** (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

27. Given that this court was bound by the decisions of courts superior to it in the principle of *stare decisis*, this court's hands were tied and could not reduce the 1st Applicant's sentence of fifteen (15) years imprisonment for the offence of gang rape as the offence of gang rape was punishable with an imprisonment for a term of not less than fifteen (15) years which was a mandatory minimum.

28. Turning to robbery with violence, in the case of **Mbugua & 9 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 enjoy that right.

29. It observed that 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 had a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.

30. 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)."

31. Sewe J also reached a similar conclusion as this court 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)** when

she declared the mandatory nature of the death penalty as provided for under Section 296(2) and 297(2) of the Penal Code unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

32. This court noted the 1st and 2nd Applicants' arguments and submissions on the review of their sentences of death on the offence of robbery with violence. However, it found it prudent that the Applicants file their documents in support of their mitigating factors such as the certificates on programmes they have undergone in prison leading to their rehabilitation and their respective officers' in-charge prisons recommendation letters as this court had stated were necessary before an application for re-sentencing could be considered.

33. In **Constitutional Petition No E002 of 2024 Mbugua & 6 Others vs The Hon Attorney General** as consolidated with **Constitutional Petition No E003 Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others** , this court 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."

88. As it had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of the Constitution of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q**)** of the Constitution of Kenya, to avoid further delays in this matter, this court found it prudent to consider the mitigation and re-sentencing of the Appellant herein as it already had the lower court file.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated 31st August 2023 and filed on 13th March 2024 be and is hereby allowed in the following terms:-

a. **THAT the conviction of the offence of robbery with violence against the 1st and 2nd Applicants be and is hereby upheld as the same was safe.**
a. **THAT the conviction of the gang rape against the 1st Applicant be and is hereby upheld as the same was safe.**
b. **THAT the 1st and 2nd Applicants do provide documents to support their mitigation by 15th May 2025.**

c. **THAT the Probation Office file Pre-Sentence Reports in respect of the 1st and 2nd Applicants by 30th May 2025.**

d. **THAT the 1st and 2nd Applicants be and are hereby directed to appear before this court for mitigation and sentencing on 16th July 2025.**

35. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **30th** day of **April** 2025

J. KAMAU
JUDGE