Terer v Republic (Miscellaneous Criminal Application E314 of 2024) [2025] KEHC 5309 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E314 OF 2024

RN NYAKUNDI, J

APRIL 29, 2025

BETWEEN

MOSES KIBET TERER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 8th July 2024 where the Applicant is seeking the following orders:

    a. That the Applicant is seeking to be allowed to file an appeal out of time in Criminal Case File No 2245 Of 2011 At Eldoret Magistrate Court in which he was charged with an offence of Robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to death.

    b. That may the court be pleased to consider this appeal out of time and give it priority.

2. The Application is based on the grounds on the face of it among others:

    a. That the Applicant was charged with an offence of Robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to Death at Eldoret Magistrate Court Vide Criminal Case No 2245 of 2011.

    b. That the trial Magistrate erred in law by convicting the appellant but failed to note that evidence of identification was not proved beyond reasonable doubts.

    c. That the trial Magistrate erred in law by convicting and sentencing the appellant but failed to note that, the elements of the offence charged were never proved against the appellant to the required standards.

d. That, the trial Magistrate erred in law by convicting and sentencing the appellant without adequately analyzing the appellant's defense.

e. That, the trial Magistrate erred in law by convicting and sentencing the appellant without considering the fact that the entire evidence was marred with inconsistencies thus contravening section 165 of the *Evidence Act* Cap 80 Laws of Kenya against the appellant.

f. That, the appellant was not supplied with the copy of the original high court's proceedings and its judgment to enable him appeal on time but had intention to appeal.

g. That due to the appellant's earlier intention to appeal, he begs leave of this Honourable Court for an extension of time to appeal out of time.

3. The Application is supported by the annexed affidavit sworn by Moses Kibet Terer, the Appellant/ Applicant herein which affidavit echoes the grounds of the application.

Analysis and Determination

4. Having carefully considered the grounds in support of the Application together with the affidavit, it is my view that the main issue for determination is leave to appeal out of time.

5. The legal framework on this nature of application is grounded under Sections 348A as read with Section 349 of the *Criminal Procedure Code* which provide as follows:

> " 348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."
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> "349. An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:
>
> Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefore."

6. It is evident from a reading of the above provisions that an appeal to a higher court shall be preferred within fourteen (14) days from the date of the delivery of judgment or order of the court. Where there has been non-compliance, the Applicant has a window to petition the court to file the appeal out of time. The discretion to extend time is unfettered on the part of the court save that in exercising such jurisdiction, it must be on sound basis and judiciously considered.

7. In the case of Michael Onyango Owala v Republic [2018] eKLR, RE Aburili J held that;

> Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the *Criminal Procedure Code* to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an 'appeal' is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof.

Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.

8. As a rule, in the administration of justice, time is an essential element of case management which is to be enforced jealously and consistently. Section 349 of the *Criminal Procedure Code* provides for a time limit of fourteen days within which to file an appeal. Clearly, the Applicant is out of time for filing its intended appeal. The same provision allows this court to admit an appeal out of time if the appellant demonstrates that it was failure to comply with the provision was because of his inability or of his counsel to obtain a copy of the judgment or order appealed from, and a copy of the record, within reasonable time. The present application was filed on 8th July2024. The Applicant was sentenced on 18th May 2012. As per the provisions of Section 349 of the *Criminal Procedure Code*, the Applicant herein was to file the appeal on or before 1st June 2012.

9. It is clear that all the applicant's grounds in support of his application are not recognized by section 349 of the *Criminal Procedure Code*. This section only recognizes only one ground namely the inability of the applicant to obtain the judgement and proceedings within the 14 days to enable him to appeal. This ground has always been recognized by the court. For instance, in Abdulla Lule v R (1960) EA 21, the applicant's application to appeal out of time was allowed because he did not obtain the judgement and proceedings of the lower within 14 days to enable him to appeal.

10. In view of the foregoing statutory provisions, resort to other laws is necessary to judicially resolve this application. First, the right of the applicant to appeal has been constitutionalized in article 50 (2) (q), which reads: "Every accused person has a right to a fair trial, which includes the right- if convicted, to appeal to, or apply for review by, a higher court as prescribed by law." Second, Article 159 (2) (d) of the 2010 Constitution of Kenya mandates this court to administer substantive justice without undue regard to procedural technicalities.

11. In view of the above constitutional provisions, although the grounds in support of his application are not recognized by the provisions of section 349 of the *Criminal Procedure Code*, this court is entitled to consider the grounds advanced by the applicant to decide whether his application is merited. This is more so because the provisions of the *Criminal Procedure Code* are not comprehensive, since they are defective for not recognizing other grounds that may entitle a convicted person to apply to appeal out of time. The Applicant averred that he was not supplied with the copy of the original high court's proceedings and its judgment to enable him appeal on time but had intention to appeal. It therefore follows that the delay of about 13 years in filing the application was not unreasonable.

12. Furthermore, the application raises substantial issues of law namely whether the plea of guilty is unequivocal. Additionally, the other issue raised is whether the sentence imposed is lawful or not in view of the provisions of section 28 (2) of the *Penal Code* (Cap 63) Laws of Kenya. These two legal issues in themselves constitute good causes that warrant the application to be allowed. In the circumstances, I find that the applicant has made out a case for the grant of the orders sought.

Substantive merits of the Appeal

13. Notwithstanding, this case calls for substantive review of the merits of the Appeal as the Appellant averred that he would rely on the grounds supporting the Notice of Motion Application. The issues for determination as I can deduce from the Grounds of Appeal are:

    a. Whether the prosecution proved its case beyond reasonable doubt.

    b. Whether the identification of the accused was sufficient.

c. Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstance of the case.

14. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

15. Similarly, in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond reasonable doubt.

16. The offence of Robbery with Violence is provided for under Section 296(2) of the *Penal Code* as follows:

> " 296. Punishment of robbery- (2) 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."

17. The ingredients of this offence were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. in the case of Johana Ndungu Vs Republic CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery

are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:

I. If the offender is armed with any dangerous or offensive weapon or instrument; or

II. If he is in company with one or more other person or persons;

III. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person." [See also Oluoch v Republic [1985] KLR].

18. In the case herein, PW1 testified that he does casual jobs and that he knows the Appellant who was his former work mate in another company. That on 1/6/2011 at about 8.30 p.m. he was heading home riding his bicycle and at the gate while riding his bicycle, he heard a kick on his back and fell down. He testified that he recognized it was the Appellant through his voice and he said Kibet and in that moment, the Appellant cut him on the eye using a knife.

19. PW1 testified that he screamed for help and his neighbour Masika responded and that is when the Appellant and an accomplice disappeared into the maize plantation and he lost Kshs. 470/= and they damaged his clothes by tearing them. He testified that he left the clothes at the police station.

20. Accordingly, the prosecution proved beyond reasonable doubt that;

(i) the offenders were armed with dangerous and offensive weapon or instrument;

(ii) the offender were in company with one or more person or persons; and

(iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence against PW1. [See Paul Njoroge Ndungu v Republic [2021] eKLR].

Whether identification of the Accused was sufficient

21. It is given that in a case as this, identification is key given that it is the link that connects an accused person to an alleged act that constitutes an offence. Identification has been defined by the Black's Law Dictionary 2nd Edition as:

> " Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them –'Identitas vera colligitur ex multitu- dine signorum'".

22. Nonetheless, as the incident occurred, care should be taken to ensure the appellant was positively identified as the perpetrators of the offence. The court in Wamunga v Republic (1989) KLR 424 at 426 had this to say:

> " Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

23. I have interrogated the circumstances herein, and from the evidence of PW1 on cross examination testified that he knew the appellant for a long time. That the Appellant was his former work mate and he knew him by his voice. Therefore, the identification of the Appellant as the perpetrator cannot be in doubt.

24. I note that there was no prosecution witness who saw or identified the appellant herein and as the respondent has also conceded that calling other witnesses who responded to the call of the complainant would have had no probative value to the prosecution case. It is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt [see Sawe v Republic [2003] KLR 364].

25. It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else [see Teper v Republic [1952] ALLER 480 and Musoke v Republic [1958]EA 715].

26. Sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

> 111.
>
> (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."
>
> 119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

27. From the evidence adduced by the appellant herein, nothing adduced to cast any shadow of doubt upon the evidence by the prosecutor.

Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstance of the case.

28. The appellant was sentenced to death which I find that the same is lawful as given that nothing has been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or

patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic [2021] eKLR].

29. In the case of Joseph Ochieng Osuga v Republic [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court cited the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR where it was stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

30. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor vs R, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky (1912) CCA 28TLR 263)."

31. In the case of Wanjema v R [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

32. In the case of Francis Karioko Muruatetu & Another v Republic (2017) eKLR, the Court held that:

> 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.

33. Sentencing is a discretion of the trial court. In Ambani –Vs- Republic (1990) KLR 161, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence.

34. In Republic –Vs- Jagani & Another (2001) KLR 590, it was held that:

> " The purpose of sentence is 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 to and to society in general. This is also seen as promoting a source of responsibility in offenders."

35. The question is whether this court should interfere with the sentence. In James Kariuki Wagana –v- Republic (2018) eKLR Prof. Ngugi.J (as he then was) stated:

> 'while the sentence of death is the maximum penalty for both murder and robbery with violence the court has the discretion to impose any other penalty that it deems fit and just in the circumstances.' He argued that death penalty should be reserved for most heinous levels of robbery with violence.

36. In another persuasive decision Gikonyo J in Paul Ndung'u Njoroge-v- Republic (2021) eKLR considered a long term of imprisonment as appropriate where the violence did not cause death or grievous harm. In this case the ingredients of the offence of robbery with injury inflicted was grievous harm. The trial magistrate opined that his hands were tied to pass the death penalty. It is my view that the discretion of the trial magistrate was unfettered.

37. Having read the record and the circumstances of this offence at a glance just a mention of the words robbery with violence invites a trial court to direct its mind towards the mandatoriness of the death penalty, notwithstanding it is no longer the trending jurisprudence in Kenya in the scheme of things to do with sentencing. I also bear in mind that the sentencing principles and objectives provide for deterrence, rehabilitation, reparation, retribution, uniformity, parity, totality and proportionality. It is clear from the legal regime on sentencing that none of these principles and objectives are to carry more weight than the other. It is placing the acts of the case on some kind of weighing scale so as to meet the ends of justice within the administration criminal justice. Why is this important? Penal law as stipulated is for protection of society and community by removing the bad elements by incarceration to sustain the rule of law once they have been found guilty of wrong doing. For a longtime, the country has been struggling with the minimum mandatory sentences as provided by the legislature in our various penal statutes which create certain perceived or conceived felonies.

38. In the same breadth, trial courts are obligated to exercise discretion in sentencing so as to individualize each circumstances and individual offenders hence the reason of some kind of disparity sentencing orders which seem to arise from the same offences. The facts of this case do not scream in line with the prescribed offence under section 296(2) of the *Penal Code*. For purposes of clarity, the allegations which were set to be proven before the trial court were that: "On the 1st day of June, 2011 at D-Block Kabongo Village, Ngeria Location in Wareng District within the Rift Valley province, jointly with another one not before this court while armed with dangerous weapons namely knives robbed James Ekitela of his cash Ksh. 470/= and immediately before the time of such robbery wounded the said James Ekitala."

39. People have a sense that punishments scaled to the gravity of the offence are fairer that punishments which are not compliant. The objective here is for the courts to express themselves by punishing reprehensible conduct by imposing long custodial sentences as a response that the period imposed must be commensurate with the harm caused to the public or victims of the offence. In determining these questions, one of the key objectives being ignored is one of application of reasonable proportionality. Proportionality can thus be seen as rooted in respect for the basic human rights

enshrined in Chapter 4 of *the Constitution* of those before the various criminal courts. In the case of crime, though punishment maybe deserved as against an offender whose case has been proved beyond reasonable doubt, the fundamental values of the law restrain excessive, arbitrary and capricious punishment. Hence, the drafters of common law brought into perspective the doctrine of proportionality as one of the means by which that restraint is to be enforced by the trial courts. I therefore hold a strong view that in calculating the type and quantum of the penalty to be imposed, the elements of the gravity of the offence and the degree of responsibility of the offender or the accused must be weighted so as to produce a just outcome of the case. In the case at bar, the victim of the offence of Robbery with violence appeared to have suffered soft tissue injuries and the item of the robbery was quantified at a value of Kshs. 470/=. If I was sitting as a trial court, I could have invited the basic principles of sentencing law one of which is that a sentence of imprisonment to be imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the offence. There is a difference between calling for sentences to fit the crime and using the concept of proportionality to provide a ceiling in punishing the offender and making the provision of rehabilitation within a punitive framework like the one provided for by the legislature under section 296(2) of the *Penal Code*.

40. The seriousness of a crime like the one before this court has two (2) elements. First, the degree of harmfulness of the conduct of the person charged with that offence and the extent of his culpability. Secondly, the court must form a picture of the surrounding circumstances of the offence and weigh variable features of the crime so as to determine how grave was that offence so as to give rise to a particular sanction. The concept of harm is obvious an adjective circumstance but the problem usually forgotten by the courts is to weigh that harmfulness of that criminal behaviour and the extent upon which the victims trespass to his or her physical integrity, personal privacy, proprietary rights, public order, moral standards set by that victim and the role if any the victim may have played in instigating the crime in question. In reference to this Appeal/review jurisdiction, the effects of the imposed sanctions on the applicant/appellant are such that the sentence imposed and later commuted to life is by this nature excessive and punitive given the mitigation offered during the sentencing hearing which really outweigh the aggravating factors of the gravity of the offence. The better view I take of this matter is to review the sentence of Life which is indeterminate period of unknown to a known determinate 13 years' custodial sentence. In this respect, one truth has been revealed by this distressing case where a theft of kshs. 470/= and soft tissue injuries lacerations were features legally weaponized to sentence the Applicant/Appellant to a death penalty.

41. It is not lost to this court that judicial officers have an inherent right to exercise discretion to temper their conceptual framework on justice deliverables with mercy. Together with the application of the doctrine of proportionality, sentences imposed will be presumed to be fair, just and proportionate to the offence. As I reaffirm the order on conviction for the offence committed by the Applicant/Appellant, I am persuaded as stated elsewhere in this decision, the review of sentence and the tailored period of 13 years' custodial sentence ordains this court to set the Applicant/Appellant free for the sentence served already is just for the offence. As a consequence, he is to be set free unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH APRIL 2025

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R. NYAKUNDI

JUDGE