



**Okoko v Republic (Criminal Miscellaneous Application
E028 of 2022) [2024] KEHC 535 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION E028 OF 2022**

FR OLEL, J

JANUARY 29, 2024

BETWEEN

JOSPHAT MACHIWA OKOKO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The applicant together with his co accused one Patrick Muinde was charged and convicted of the offence of Robbery with violence contrary to section 296(2) of the [Penal code](#) at Makindu CMCC Cr Case No 421 of 2007. They were found guilty and sentenced to suffer death as provided for in law, the applicant appealed to the high court being Machakos High Court Criminal Appeal No 145 of 2009, where his appeal against conviction and sentence was dismissed on 4th April 2012. The appellant further did file an appeal to the court of Appeal but vide his letter dated 2nd December 2019, withdrew the said appeal, to allow him file for resentencing in light of the new jurisprudence which had emerged by then based on the [Francis Karioko Muruatetu case](#) (Supra).
2. The applicant did file this application/petition under provision of Article 19, 20, 21, 22, 23, 27(1), (2), 28, 28 and 52(2)(q), and 165 of the [Constitution](#) of Kenya and seeks that this Honorable court be pleased to re consider the sentence he was serving (death sentence) based on the new jurisprudence surrounding sentencing and especially based on the fact the his co- accused before the trial court; Patrick Muinde had also filed an application for re sentencing at Makueni High court vide HCCR Review Application No 2 OF 2020 where the same was considered by Justice George Dulu and vide a Ruling dated 21st July 2021 his sentence was reduce to a prison term of 20 years.
3. There had been new developments in the law regarding sentencing and specifically in the case of John Sila Mutua Petition no 18 of 2020 at machakos , and the judiciary sentencing policy which allowed this court to resentencing him.



4. Further the applicant did submit that current jurisprudence abhors mandatory sentences as this infringed on the judicial independence of the court, which ought to consider each case on its own merit and also allow the accused to mitigate. Reliance was placed on the case of *Geoffrey Ngogho Mutiso v Republic* (2010) eKLR, *Joseph Njuguna Mwaura & Another* and Petition No 618 of 2010 Joseph Kaberia Kahinga & 11 others v Attorney General.
5. This application was not opposed by the state counsel who noted that the court had discretion to resentence and that the petitioners co accused had his sentenced reviewed downward and he was resented to serve 20 years in Makueni Hccr Review no 2 of 2020 *Patrick Munide v Republic*. The resentencing could be allowed but he urged the court to melt out a higher sentence of 30 years

C. Analysis of Law

Nature and scope of resentencing

6. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.
7. It bears repeating that, the High Court has the mandate under Article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the constitution A further leapfrog development; under article 50(2)(p) of the *Constitution*: 50(2) Every accused person has the right to a fair trial, which includes the right—
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
8. The high court had wide and unfettered original jurisdiction to handle matters involving fundamental rights of individual and had an obligation to protect against any violation of the same. In Sabastina Okwengu Murefu, petition No 151 of 2012 HCC at Kakamega, the court had upheld that it had the powers to review sentences even if the petitioner had exhausted all his appeals.
9. The applicant has approached the court on the basis of the decisional law in Muruatetu and Joseph Kaberia petitions (supra). The said decisions were made after the appellants appeal had been determined and obviously did not benefit from the same. There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.
10. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga v Republic* (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in the Constitution. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.



11. In *Michael Kabwera Laichena & Another v Republic* (2018) eKLR Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

C.Sentencing

12. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi v Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

13. See also *Francis Karioko Muruatetu & Another v Republic* (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary *Sentencing Policy Guidelines* lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

D.Determination

14. In the circumstances of this case, the petitioner co accused has been resentenced to 20 years. In law persons convicted for the same offence should not be treated differently when it comes to sentencing, unless good reason exists why that should be so. Secondly as Judge George Dulu noted in Makueni Criminal Revision Petition No 2 Of 2020, *Patrick Muinde v Republic* when he re sentenced the applicant herein co accused, that nobody was injured during the robbery and luckily most of the items stolen were recovered on the same night at Emali town. The sentence was harsh and excessive and thus could be reviewed.

15. The applicant and must benefit from equal protection of the law and equal benefit of the law. He therefore has to benefit from equal sentence melted out to his co accused. The mitigating circumstance being the same as his co accused and also considering the recent development in law on re sentencing.

16. I do therefore exercise my discretion and set aside the death sentence imposed on the petitioner herein vide the judgment dated 4th August 2007 in Makindu PMCR No 421 of 2009 and instead substitute the sentence imposed for the applicant to serve a term of twenty (20) years imprisonment from the date he was sentenced by the trial court.

17. It is so ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 29TH DAY OF JANUARY, 2024.

In the presence of;

Appellant present from Kamiti prisons

Mr. Mungare for ODPP

Sam - Court Assistant

