



**Gechu v Republic (Miscellaneous Criminal Petition E023 of 2021)
[2024] KEHC 749 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL PETITION E023 OF 2021**

F GIKONYO, J

JANUARY 25, 2024

**REVISION FROM ORIGINAL CONVICTION AND SENTENCE IN
NAROK CMCR NO. 998 OF 2011, AND NAROK HCCRA NO. 144 OF 2017**

BETWEEN

JOHN NJOROGE GECHU PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

Sentence re-hearing

1. Before the court is a notice of motion dated 22/10/2021. The petitioner is seeking a lenient definite sentence.
2. The application is expressed to be brought under articles 2(5) (6), 19, 20, 21, 22(1)(3) (d), 23(1)(f), 24, 25(c), 27,28, 29, 48,50(2)(q),159, 165, 259, and the sixth schedule(article 262 rule 7(1)) of the Constitution, articles 3 and 10 of the international covenant on civil and political rights.

Brief background of this case

3. The petitioner was charged, convicted, and sentenced to death for the offence of Robbery with violence contrary to section 296(2) of the Penal Code in Narok CMCR No. 998 of 2011. He filed an appeal Nakuru HCCRA No. 144 of 2017, which was dismissed.

Directions of the court.

4. The application was canvassed by way of written submissions. Both parties have filed.



The Petitioner's Submission

5. The petitioner submitted that a life sentence without the possibility of release is punitive and torturous to the life of a prisoner. He argued that comparative foreign case law has shown that the possibility of review of life sentences and the fixing of minimum terms to serve life sentences before parole or review is intrinsically linked with sentencing objectives. The petitioner questioned the sentencing objective of rehabilitation and whether one should be rehabilitated for life. The petitioner relied on paragraph 745(a) of the Criminal Code of Canada (CCC), the attorney general of Quebec, et al v Alexandre Bissonnette, Francis Karioko Muruatetu & Another V Republic [2017] eKLR, Vinter And Others V The United Kingdom (Applications No.S 66069/09, 130/10 and 3896/10) Laiszlo Magyar Hungary Application No. 73593/10, T.P. And A.T. V Hungary (Applications No.S 37871/14 And 73986/14), Jackson Maina Wangui & Another V Republic Criminal No. 35 Of 2012; [2014] eKLR, Dahir Hussein V Republic Criminal Appeal No. 1 of 2015; [2015] eKLR.

Respondent's submission.

6. The respondent submitted that there is no rational reason why the reasoning of the Supreme Court in the Muruatetu case, which holds that the mandatory death sentence is unconstitutional for depriving the courts of discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply the provisions of robbery with violence which do exactly same thing. The respondent relied on section 296(2), 204 of the Penal Code, Francis Kariko Muruatetu & Another Vs Republic, James Kariuki Wagana Vs Republic [2018] eKLR, S Vs Mchuru & Another (AR 24/11) (2012) ZAKZPHC 6, S Vs Scott Crossely 2008 (1) SACR 223(SCA), Mithu Singh Vs State of Punjab 1983 AIR 473, Kisumu Court of Appeal Criminal Case No. 166 Of 2016 Cyrus Kawai Vs Republic.
7. The respondent submitted that the trial magistrate without any mitigating factors and without putting into consideration that the petitioner did not use excessive force nor did they unnecessarily injure the complainant during the robbery went ahead to pass a death sentence as was prescribed by the law. The violence unleashed on the victim was not sufficiently serious. The mitigating and aggravating factors were not put into consideration and the trial magistrate was tied to the prescribed law that imposed a mandatory death sentence upon the petitioner who was then 26 years old. The applicant has shown through the filed court documents that he has undergone rehabilitation, has reformed, and if given a second chance could be a productive member of society. The respondent relied on the case of James Kariuki Wagana Vs Republic [2018] eKLR.
8. The respondent submitted that the life sentence commuted is an inappropriate sentence and thus conceded to the petition on review of both the death sentence and the life sentence. The respondent relied on the case of Julius Kitsao Manyeso Vs Republic [2023] eKLR.

Analysis and Determination

9. The application herein and the rival parties' written submissions raise three intertwined issues;
 - i. Constitutionality and imposition of mandatory death sentence without exercising any discretion;
 - ii. Constitutionality of life sentence; and
 - iii. The appropriate sentence in the circumstances of the case.



Nature and scope of Re-sentencing

10. The application before the court is a resentencing request. Re-sentence is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not therefore consider conviction. Ordinarily, in re-sentencing, the court will check on the legality or propriety or appropriateness of the sentence. Thus, resentence will be concerned with inter alia, the penalty law, mitigating or aggravating factors, and the objects of punishments.
11. The court is guided by the observation of the Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR that:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of *the Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”
12. Accordingly, this court has jurisdiction to adjudicate upon this sentence re-hearing or re-sentencing which is made based on the unconstitutionality of the mandatory sentence.

Alleged violation

13. The petitioner is challenging the mandatory nature of the death sentence in section 296(2) of the Penal Code for denying the court discretion to impose an appropriate sentence. He also prays for the life sentence to be set aside and for him to be given a definite lenient sentence. He claims that the life sentence is too harsh in light of the circumstances of the case.
14. In reacting to these submissions, the prosecution counsel has conceded to the application.

Nature of application

15. It is worth mentioning that, this proceeding is premised upon inter alia articles 22(1), 23(3), and 165 (3) of *the Constitution*. Therefore, an application for redress of denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
16. The applicant claimed violation of article 50(2)(p) of *the Constitution* which provides: -

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
17. It is now a principle that mandatory sentences deprive courts of discretion to impose appropriate sentences. Thus, arbitrary and unconstitutional. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right to appropriate or less severe sentence- a principle embodied in *the Constitution* including article 50(2) (p) of *the Constitution*.
18. Section 296(2) of the Penal Code provides: -

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. [Underlining mine and for emphasis]
19. The use of the term shall in Section 296(2) of the Penal Code discharge a mandatory command giving no room for any discretion by court in sentencing. Discretion in sentencing pertains to fair trial and justice. Therefore, the section, to the extent that it provides for a mandatory sentence of death, takes away the discretion of the court in sentencing, thus, inconsistent with *the Constitution*.
 20. However, *the Constitution* provided the courts with new tools and techniques- in construing existing law with such modifications, exceptions, adaptations, and alterations necessary to bring it in conformity with *the Constitution* (Section 7 of the Transitional Provisions, Sixth Schedule of *the Constitution*). There is therefore, no absolute necessity or strict requirement in law to strike down a provision in existing law such as section 296(2) of the Penal Code for being inconsistent with *the Constitution* unless it is wholly irreconcilable with *the Constitution*. These techniques were specially designed to avoid paralysis and confusion in the application of law which may ensue upon down-right striking out of provisions of existing law, but also giving the legislature time to remove the offending elements aligning it to *the Constitution*.
 21. In this case, section 296(2) of the Penal Code is interpreted to prescribe death as the maximum sentence- this brings it into conformity with *the Constitution*.
 22. Having stated that, re-sentencing purports to provide an effective remedy to such injustice arising from a violation of a right or fundamental freedom as was aptly explained by Majanja J in *Michael Kathewa Laichena & Another -v- Republic* (2018) eKLR that:

“...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.”
 23. In addition, the authority of the court in articles 165(3) and 23 of *the Constitution* to, inter alia, uphold and enforce the Bill of Rights also formally and gives the court power of consistently structuring, developing, and deploying progressive jurisprudence on enforcement of rights and fundamental freedoms across time and space under the command in article 20(3) of *the Constitution*, that: -

In applying a provision of the Bill of Rights, a court shall—

 - a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
 - b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Sentence

24. Applying the test, does the sentence herein violate the rights of the petitioner?
25. Every person should enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
26. The death sentence was imposed because it was mandatory sentence. Nothing shows that the trial court exercised discretion. Therefore, the sentence of death is set aside.
27. The court is aware that the President commuted the death sentence to life imprisonment. The petitioner seems to argue that life sentence is unconstitutional for its indeterminate nature and does not give the convict any prospects of rehabilitation and re-integration into society.



28. Opinion is divided on the unconstitutionality of life sentence. There has been a view that, the issue should be what life sentence translates into. But, even here, some hold the view that fixing of the determinate period of life imprisonment is the business of the legislature.
29. Be that as it may, in a rather bold decision, the Court of Appeal, in the case of Evans Nyamari Ayako vs Republic Kisumu Court of Appeal Criminal Appeal, No 22 Of 2018, Okwengu, Omondi & Joel Ngugi, JJ. A held that;
- ‘On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.’
30. But, the circumstances of the case should determine the appropriate sentence.
31. The Judiciary Sentencing Policy Guidelines list the objectives of sentencing on page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, and the nature and type of weapon used by the petitioner to inflict harm.
32. What are the relevant circumstances of this case?
33. The court has considered the mitigating factors; his age, rehabilitation as well as family needs. Nevertheless, in the circumstances of this case, a deterrent sentence is most appropriate. Accordingly, the petitioner is sentenced to 30 years imprisonment. The offence is serious and the sentence herein is lenient. The sentence will commence from the date he was first sentenced by the trial court following re-trial.
34. Orders accordingly.
35. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 25TH DAY OF JANUARY, 2024.

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HON. F. GIKONYO M.

JUDGE

In the presence of: -

Otolo C/A

Petitioner

M/s Rakama for DPP

