



REPUBLIC OF KENYA



**Wambugu v Republic (Criminal Petition E009 of 2021)
[2024] KEHC 1841 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E009 OF 2021
F GIKONYO, J
FEBRUARY 27, 2024**

BETWEEN

JOHN KAMAU WAMBUGU PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction and Sentence in Narok CMCR No. 1570 of 2004,
Nakuru HCCRA NO. 118 of 2007, and Nakuru Court of Appeal No.152 of 2009)*

JUDGMENT

Sentence review

1. In the application dated 06/08/2021, the applicant is seeking review of sentence into a lenient definite sentence as provided for under article 50(2)(p)(q) of the [Constitution](#). He also seeks for the period spent in remand to be factored in the sentence to be awarded as provided for under section 333(2) of the [Criminal Procedure Code](#).

Brief background of this case

2. 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. 1570 of 2004.
3. The petitioner filed his first appeal, Nakuru HCCRA No. 118 of 2007, which was dismissed.
4. The petitioner further appealed to the Court of Appeal vide Criminal Appeal No. 152 of 2009 which was also dismissed.
5. The petitioner is now seeking for revision of sentence.



The Petitioner's submissions

6. The petitioner submitted that this court is seized of the jurisdiction to hear and determine this matter. The applicant has relied on *The Owners of Motor Vessel Lillian's v Caltex Oil (Kenya) Ltd* [1989] KLR 1 At Page 14, *Samuel Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* Application No. 2 Of 2011, Articles 23(1) And 165(3) of the *Constitution*, *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others* [2013] eKLR.
7. The petitioner submitted that mandatory provisions of section 296(2) of the *Penal Code* take away the decisional independence of this court. Article 27, 25(i), 50(2)(k) and (p), *Dakar declaration* and recommendation on the right to a fair trial in Africa, *Natash Singh v CBI* [2013] 5 SCC 741 *Zabira Habibullah Sheikh & Another v State Of Gujarat & Others* AIR 2006 SC 1367, *State of M.P. Bablu Natt* [2009] 2 SCC 272 Para 13, *Alister Anthony Pereira v State Of Maharashtra* [2012] 2 SCC 648 Para 69, *S v Jansen* 1999(2) SACRA 368 At 373 (A)-(H), *S v Toms* 1990 (2) SA 802(A) At 806 (H) -807(B), *S v Mofokeng* 1999 (1)SACR 502 (W) At 506(D), Paragraph 4.1 of the *Judiciary Sentencing Policy Guidelines* Section 329 Of *Criminal Procedure Code*, Joseph Kaberia Kahinga & 11 Others v Attorney General [2016] eKLR, *Ismael Hamisi Ndiragu & Another v Republic* [2021] eKLR.
8. The petitioner submitted that he was arrested when he was 26 years and is now 42 years old. He hopes to find a family and build the nation. He has taken advantage of rehabilitative programs in prison. He urged this court to find time already served is sufficient.
9. The petitioner urged this court to pass a more lenient sentence than the life sentence that was commuted by the president considering the time spent while in remand custody as provided for in section 333(2) of the *Criminal Procedure Code*.

The Respondent's submissions.

10. The respondent submitted that the court of appeal sentenced the applicant to life sentence and as such this court cannot interfere with the decision of the Court of Appeal. The respondent relied on the cases of *David Mutai V Republic* [2021] eKLR, And Meru High Court Misc. Application No. 6 Of 2020 *David Mugambi M'maunga v Republic*.
11. The applicant submitted that the death sentence imposed was lawful and not unconstitutional. *Muruatetu* case held that the mandatoriness of the death sentence was unconstitutional but in appropriate cases, the death sentence can be meted. Further death sentence is still prescribed in the law. The respondent relied on *Francis Kioko Muruatetu & Another V Republic* [2017] eKLR, and article 26 of the *Constitution*.

Analysis And Determination

12. From the information by the petitioner, he is now serving a life sentence which was imposed by the President in exercise of Power of Mercy by 'substituting a less severe form of punishment' (article 133(c)). If that is the case, the submission by the DPP that the petitioner was sentenced to life imprisonment by the Court of Appeal is not correct.
13. The petitioner has premised his petition on the principle that mandatory sentence takes away the discretion of the court in sentencing, thus, inconsistent with the *Constitution*. These arguments target section 296(2) of the *Penal Code* which has been construed to prescribe for maximum sentence in order to bring it in conformity with the *Constitution*.



14. However, the death sentence was substituted with life sentence. Thus, those arguments on section 296(2) of the Penal Code, may not profit much his quest for a definite sentence from the life sentence. The court notes that, it has become fashionable for petitioners to found their re-sentencing applications on the principle in Muruatetu case in the hope of clothing their application with the armor of proprietor, blurring any mischief or abuse.
15. Perhaps of relevance to his application is the submission that he was arrested when he was 26 years and is now 42 years old. He hopes to find a family and build the nation. He has taken advantage of rehabilitative programs in prison. He urged this court to find time already served is sufficient.
16. The petitioner urged this court to pass a more lenient sentence than the life sentence that was commuted by the president considering the time spent in remand custody as provided for in section 333(2) of the *Criminal Procedure Code*.

Of power of mercy

17. Before closing, power of mercy is a judicial tool for criminal justice and is predominantly in service of restorative justice. Parliament should think of engendering a complete parole system under the power of mercy which is best placed to deal with post-sentence issues like rehabilitation and re-integration of offenders back in society. The fact that the process may ‘take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President’, adds to its substantive and procedural benefits in the administration of justice. These are hallmarks of an effective parole system. It should also be linked to all relevant institutions such as probation office, children office, prisons, office dealing with matter of person living with disability and marginalized, DPP, rehabilitation experts, Medical fraternity, lawyers.
18. Having said that, jurisprudence coming through from the Court of Appeal suggests that a court of law may impose a definite period of imprisonment for life sentence.
19. This is a case of robbery with violence. It is a felony and therefore, serious offence which calls for a deterrent sentence whilst giving the offender an opportunity to be re-integrated back into society. In the circumstances of this case, the petitioner is sentenced to serve 35 years in prison. The sentence is lenient and will therefore start from the date of initial sentence herein.
20. Right of appeal explained.
21. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27TH DAY OF FEBRUARY, 2024.

F. GIKONYO M.

JUDGE

In the presence of:

- 1. Court Assistant – Otoro**
- 2. Petitioner – Present**
- 3. M/s Rakama for DPP - Present**

