



**Ngugi v Republic (Miscellaneous Criminal Application E025 of 2021)
[2024] KEHC 1842 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2021
F GIKONYO, J
FEBRUARY 26, 2024**

BETWEEN

FRANCIS NGUGI APPLICANT

AND

REPUBLIC RESPONDENT

*((Revision from Original Conviction and Sentence in Narok CMCR No. 599 of 2003,
Nakuru HCCRA NO. 263 of 2004, and Nakuru Court of Appeal No. 463 of 2007))*

JUDGMENT

Sentence review

1. Before the court is an application dated 17/09/2021 for sentence review. The applicant is seeking a lenient definite sentence as provided for under article 50(2)(p)(q) of the [Constitution](#), and consideration of time spent in remand in accordance with section 333(2) of the [Criminal Procedure Code](#).

Brief background of this case

2. The applicant 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. 599 of 2003.
3. The applicant filed his first appeal, Narok HCCRA No. 263 of 2004, which was dismissed in its entirety.
4. The applicant filed a second appeal to the court of appeal vide court of appeal no. 463 of 2007 which was also dismissed.
5. He filed HCCRMisc Appl. No46 of2018 which was dismissed for want of prosecution.



6. He again filed HCCR Misc App No. 98 of 2018 which he withdrew to give way to the instant application.
7. The applicant has now filed the instant application seeking re-sentencing before this court.

The Applicant's submissions

8. The applicant submitted that the death sentence is cruel, inhuman, and degrading punishment. The applicant urged this court to declare that the death sentence imposed on him is inconsistent with article 50(2)(h)(p) of the Constitution and section 329 of the Criminal Procedure Code. Further that section 296(2) of the Penal Code is inconsistent with article 26(1), 27(1)(2), 28, 48, 50(1)(2)(p) of the Constitution.
9. The applicant submitted that the death sentence is unconstitutional when given without discretion and contravenes articles 2(5)(6), 25(c), and 50 of the Constitution. He argued that his mitigation was not considered under section 296(2) of the Penal Code as he was awarded the sentence set that is the death sentence. The applicant relied on Article 10 of the universal declaration of human rights, article 25(1), 20(3)(4), 19(3)(a), 20(1)(2), 28, 131(1)(e), 50(2)(q), 2(1)(5)(6), 26, 27 of the Constitution, article 14 of the ICCPR, sections 216 and 329 of the Criminal Procedure Code, Edwin Otieno Odhiambo v Republic [2009] eKLR, Godfrey Ngotho Mutiso v Republic Criminal Appeal No. 17 of 2008, Sammy Wanderi Kugotha Appeal No. 17 of 2018, Susan Kiguta And 416 Others v A.G. (2005), Constitutional Petition Number 6 of 2003, Francis Kafantayeni and 5 Others v AG (2007) MWNCI9 Roberts v Louisiana, 431 US 633(1977) A Louisiana, Exersley Thomas v St Vincent Communication Number 806/1998 UN DOC CCPR/70/806/1998(2000).
10. The applicant submitted that article 50(1)(2)(p)(q) entitles the accused to the benefit of the least severe of the prescribed punishment for an offence. Section 295 as read with 296(2) of the Penal Code prescribes the least severe sentence of 14 years for an offence of robbery. He invites the court to settle the ambiguity in his favour. The applicant relied on Mwaura Njuguna & 2 Others V Republic [2013] eKLR, Martin Bahati & Another v Rep [2018] eKLR Page 115 Para 2, George Munyinyi Kibugu v Republic [2018] eKLR Page 98, Michael Kathewa Laichena & Ano v A.G. [2018] eKLR Page 119, John Katgia M'itobi v Rep [2018] eKLR Page 101, Joseph Mwangi Ngige & Another v Rep [2018] eKLR Page 106, Lawrence Nkonge Mwiandi Misc Cr. App. No. 72 Of 2018 Nakuru (UR) Page 113, Samson Njuguna Njoroge v Republic H. C. Cr. App No. 150 Of 2016(UR) Delivered On 1st February 218 Pg 130, And John Kirema Kaibi v Republic [2018] eKLR Page 133.
11. The applicant urged this court to find the sentence awarded to him is unconstitutional and award a definite sentence and consider that the time served is sufficient.

The Respondent's submissions.

12. 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.
13. 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

Of death sentence

14. The applicant submitted that the death sentence is cruel, inhuman, and degrading punishment. But, he did not provide any sufficient material to support his arguments, leaving them powerful in appearance but weak in substance. A court of law should only determine such question of monumental significance to the law and the nation, upon cogent evidence and proof of the serious breach of a right. The issue constitutes a public debate now rife in Kenya on whether death sentence is cruel, inhuman, and degrading punishment. Therefore, the less said about this terse submission the better.

Be warned of possible abuse of process

15. Following the Muruatetu decisional law, Courts have received all manner of applications for resentencing. Some are merited. Others are purely contrived abuse of process. And, courts have lamented of the fragrant abuse of the process of the court in the name of resentencing.
16. Every time the court encounters multiplicity of applications for re-sentencing, rings high a work of the court in *Baragoi Rotikenu. R* [2022] eKLR on the state of affairs in court following Muruatetu decisional law, as follows: -

Great flood came...

Following the landmark decisional law in Muruatetu case, the motion of cases in which convicted persons sought for reduced or lesser sentences on the basis of the principle laid down therein, resembled the tides rising in the sea. Each successive wave rushes forward, breaks, and rolls back; but the great flood is steadily coming in. At the initial glance, the waters seem retiring; so did the applications. When you look a little longer on the waters, you think the waves were rushing capriciously to and from; so was with the applications. But, we kept looking over time, and saw the sea mark disappear one after another; minimum and mandatory sentences in *Sexual Offences Act* and other offences constantly dissipated on the basis of the principle laid down in the Muruatetu decisional law. There was now no illusion that the applications will not cease coming. It also became clear to the precedent-setting court- the Supreme Court of the Republic of Kenya- of the general direction in which the ocean is moving- and that it was no longer a mere recoil of a wave which regularly follows every advance, but a great general ebb of monumental proportions; a great flood steadily coming in.

Turning the tide

Extraordinary determination was necessary to stop the tide causing the flood. On 6/7/2021; in an attempt to turn and stem down the tides, the Supreme Court, hemmed application of Muruatetu decisional law to sentences in murder cases only. The Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute, and accordingly cautioned as follows: -

“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution”.

A sigh of relief; applications founded on Muruatetu decision, but which did not relate to section 204 of the *Penal Code*, were now deemed to be incompetent, and were consequently



dismissed. However, the repose was ephemeral; the directions were not a foreclosure of the applicant's right to seek appropriate remedy or reduced sentence through the appellate process or on the basis of the Constitution. Now, courts are again faced with a great number of applications or petitions based on the Constitution in which arguments similar to those in Muruatetu case are being advanced in respect of all sentences which deny court discretion in sentencing. The application before me is one of such type. Aluta continua....

17. But, now the great flood is coming inland with dangerous debris. Inmates are using resentencing to abuse the process of the court and defeat the course of justice.
18. The Court of appeal expressed utter disgust of abuse of court process by inmates, and even prescribed some guidelines to stem the abuse in the case of *Ogwoka v Republic* (Criminal Appeal 171 of 2018) [2023] KECA 564 (KLR) (12 May 2023) (Judgment)) Kiage, Tuiyott & Ngugi, JJA.
19. It is time a signage is erected:

‘Liberal access to justice does not mean access to chaos and indiscipline’

(The Supreme Court of India in *D Nyandeo Sabaji Nail and Another v Mrs. Pranya Prakash Khadekar and others* (Petition Nos. 25331-33 of 2015, Dr D Y Chandrachud J).
20. And, any application that is found to be an abuse of the process of the court should be met with what Chandrachud J (supra) warned: -

‘This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly.’
21. Be that as it may, the applicant seems to found his application on unconstitutionality of mandatory sentence for depriving the court discretion in sentencing. Section 296(2) of the Penal Code prescribes mandatory sentence. And, the word ‘shall’ have been interpreted by the court to mean ‘may’ in order to remove the offending mandatory sentence, and leaving the sentencing court to exercise discretion in determining the appropriate sentence. The said interpretation makes death the maximum sentence, thus, bringing the section into conformity with the *Constitution*. For that reason, the death sentence is hereby set aside.
22. From the information provided by the applicant, is serving life sentence upon commutation of the death sentence by the president. Therefore, the submission by the DPP that life sentence he is currently serving was imposed by the Court of Appeal is not correct.
23. The jurisprudence coming through from the Court of Appeal, is that, the court may fix a definite period of imprisonment where a person has been imprisoned for life or the law prescribes life sentence. The appropriate sentence will, however, depend on the circumstances of the case.
24. This is a case of robbery with violence. It is a felony. And, therefore, serious offence. The applicant and his co-accused attacked the victim until he lost consciousness. They left him for dead. The victim also lost six teeth. They also robbed him of a sum of Kshs. 400. The circumstances of this case call for a deterrent sentence whilst also giving the offender an opportunity for re-integration back into the society. Accordingly, the applicant is sentenced to serve 40 years imprisonment. The sentence shall commence from the date he was first arraigned in court. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 26TH DAY OF FEBRUARY, 2024.



F. GIKONYO M.

JUDGE

In the presence of:-

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

