



**Kiyai & another v Republic (Criminal Petition E063 of 2021)
[2024] KEHC 4046 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E063 OF 2021
JRA WANANDA, J
APRIL 26, 2024**

BETWEEN

ROBIN ANALO KIYAI 1ST PETITIONER

TITO WEKESA 2ND PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Application herein (handwritten and dated 27/06/2021) seeks re-sentencing pursuant to the now famous Supreme Court decision in the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (commonly referred to as Muruatetu 1).
2. The Petitioners and another accused person were charged in Eldoret Chief Magistrate's Court Criminal Case No. 3185 of 2009 with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*.
3. The particulars of the offence were that on 17/05/2009 at Majengo Village in Lugari District within the then Western Province, jointly being armed with dangerous weapons, namely panga, slasher and timber robbed one Pius Chibaso Kibao Nabutse of several items, both household and commercial, and valued at Kshs 24,850/- and at or immediately after the time of such robbery, threatened to use actual violence to the said complainant.
4. There were other alternative charges for handling stolen goods contrary to Section 322(2) of the *Penal Code*.
5. The 3 accused persons, including the two Petitioners, all pleaded not guilty and the matter then proceeded to full trial. Upon considering the testimonies of the witnesses and the evidence tendered in Court, on 16/09/2009, the trial Magistrate convicted each one of them for the offence of robbery



with violence and sentenced each to death. In addition, they were each convicted and sentenced to 10 years imprisonment for the alternative counts of handling stolen goods.

6. Aggrieved with the decision, all the 3 accused persons, including the Petitioners, instituted respective Appeals to this High Court, namely, Eldoret Criminal Appeal No. 156, 157 and 158 of 2009 against both conviction and sentence. The Appeals were consolidated and by the Judgment delivered on 19/10/2011 by the a 2-Judge bench (J.K. Karanja and A. Mshila JJ), the conviction and sentence on the charge of robbery with violence were upheld and the appeal thereon dismissed in entirety. However, the conviction and sentence on the charge of handling stolen property was found to have been unlawful and was quashed. The Petitioners have now returned to this Court seeking Review of the sentence as they claim that the death penalty imposed against them is unconstitutional. The Application is one but the Petitioners filed separate written Submissions.
7. The Respondent did not file a formal response to the Application but in her Submissions presented orally, Prosecution Counsel Ms. Okok, supported the Application. She agreed that recent decisions from the Court of Appeal and also the High Court are to the effect that then death sentence in respect to convictions for robbery with violence offences can be reduced as it is unconstitutional. She in fact supplied to the Court a recent authority, namely, Eldoret Court of Appeal No. 260 of 2019, *Oprodi Peter Omukanga v Republic* in which the Court of Appeal applied that principle to a robbery with violence case and reduced the penalty of death sentence. She stated further that from the proceedings of the trial Court, although the Petitioners were armed with dangerous weapons, it is apparent that they did not use those weapons and did not injure the complainant or his wife, and that the property stolen has also been fully recovered. She therefore agreed that the death sentence can be reduced.
8. Further, Ms. Okok graciously brought it to my attention that the third accused and convicted person, one Hillary Chedi Mmboi successfully filed a similar Application before this Court, namely, Eldoret High Court Criminal Application No. 90 of 2019 and has since been released from prison. Indeed, I have been supplied with a copy of the Judgment delivered on 10/06/2021 by Hon. Lady Justice O. Sewe.

Determination

9. The issue for determination herein is “whether this Court should review the death sentence imposed by the trial Magistrate’s Court.”
10. The offence or robbery is defined under Section 295 of the [Penal Code](#) as follows;

“ Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”
11. Section 296(2) of the [Code](#) then defines “robbery with violence” and also sets out the sentence to be meted out to the offender as follows;
 - (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.
12. It is therefore clear that the prescribed mandatory maximum sentence for the offence of “robbery with violence” as per the provisions of Section 296(2) of the [Penal Code](#) is therefore the death sentence.



However, it is now generally agreed that in spite of the mandatory language employed by the statute, the Courts nevertheless still possess discretion in sentencing of offenders convicted of the offence. It is on this basis that in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR) the Supreme Court of Kenya declared the mandatory death sentence unconstitutional.

13. I am also guided by the Court of Appeal decision in the case of *Paul Ouma Otieno -Vs- Republic* (2018) eKLR where the Court applied the *Muruatetu* decision *mutatis mutandis* to the provisions of Section 296(2) of the *Penal Code* which imposes the mandatory death penalty for the offence of robbery with violence and substituted the death sentence for a similar offence with a sentence of 20 years imprisonment.
14. Closer home, the High Court, too, in the case of *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the death sentence 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 further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder.
15. Regarding sentence, Majanja J, quoting *Muruatetu 1*, in the case of *Michael Kathewa Laichena & another v Republic* [2018] eKLR, stated as follows:

“The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the *Muruatetu* Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;

 - (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.
16. Applying these guidelines, the Court of Appeal has on several occasions reduced sentences imposed on convicts for the offence of robbery with violence. For instance, in *Wycliffe Wangusi Mafura v Republic* ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal set aside a death sentence and substituted it with a prison sentence of 20 years. The Court noted that the robbery was at a Mpesa shop, considered the circumstances of how the robbery was committed and took into account the fact that although the Appellant was armed with a gun, with which he threatened the Mpesa attendant, he was subdued before he used it.



17. Similarly, in *Paul Ouma Otieno alias Collera and Another v Republic* (*supra*), as aforesaid, the Court of Appeal set aside a sentence of death and substituted it with one of 20 years imprisonment. This is despite the Court observing that the the Appellants were armed with guns.
18. Coming back to this matter, as aforesaid, the third accused person, one Hillary Chedi Mmboi is said to have already successfully filed a similar Application before this Court, namely, Eldoret High Court Criminal Application No. 90 of 2019 and has since been released from prison based on the Muruatetu principle. From the copy of the Judgment supplied to the Court by Ms. Okok and delivered on 10/06/2021, this is what Hon. Lady Justice O. Sewe stated:
- “ [18] In this case, the facts show that though the applicant was in the company of two other persons and that, though armed with a panga, slasher and timber, they did not wound or inflict any sort of force on the complainant
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- [19] In the premises, having taken into account all the factors mentioned herein above, I am of the view that the period served by the applicant herein is sufficient retribution for the subject offence. I would therefore allow his application, and order, which I hereby do, that the applicant’s death sentence be substituted with imprisonment for the period served; and he be released forthwith unless otherwise lawfully held.”
19. Having been sentenced on 16/09/2009, the Petitioners are now serving their 15th year in prison. Their co-accused convicted and jailed with them over the same transaction having already been released as aforesaid after serving the lesser term of 12 years in prison on the basis of the same *Muruatetu* reasoning pleaded herein, *vide* the Orders made on 10/06/2021 and upon filing a similar Application, it is only fair that the Applicants, too, now benefit from a similar Ruling.
20. In the circumstances, having taken into account all the factors mentioned hereinabove, I, too, am of the view that the period served by the Petitioners is sufficient retribution for the subject offence.

Final Orders

21. The upshot of the foregoing is therefore as follows:
- i. The sentence of death imposed by the trial Court against the Petitioners upon conviction for the offence of robbery with violence, is hereby set aside and substituted with a prison sentence of fourteen (14) years.
 - ii. Evidently, the Petitioners have both already now served such fourteen (14) years in prison in full. If that is the case, then I direct that the Petitioners be now be released forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2024.

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WANANDA J. R. ANURO
JUDGE

