



REPUBLIC OF KENYA



**Otieno v Republic (Criminal Petition E015 of 2023)
[2024] KEHC 6233 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL PETITION E015 OF 2023
WM MUSYOKA, J
MAY 31, 2024**

BETWEEN

WILLIAM OWINO OTIENO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petition and application, dated 21st August 2023, principally seek re-sentencing. The petitioner had been convicted, in Busia CMCCRC No. 57 of 2007, on 4 counts of robbery with violence, contrary to section 295, as read with section 296(2), of the *Penal Code*, Cap 63, Laws of Kenya, which attracts, upon conviction, the death penalty, and the trial court had imposed that sentence, on 3rd December 2009. He was also convicted of a lesser offence, of being in possession of a firearm, without a licence, and was sentenced to 3 years imprisonment. He filed an appeal, in Busia HCCRA No. 74 of 2012, which was dismissed. He avers that his sentence was later commuted to life imprisonment.
2. The petition and the application, no doubt, ride on the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle, that all mandatory sentences were unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been imposed, with a view to revising or reviewing them. The Supreme Court re-visited the issue, in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was of application only in murder cases.
3. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did



not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of the Constitution of Kenya of 2010. The offence, that the petitioner was convicted in respect of, attracts a mandatory sentence. The principle laid out in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), declaring mandatory sentences unconstitutional, was boosted by that of the Court of Appeal, in Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), with respect to the unconstitutionality of the life sentence. Recently it was held, in Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), that life imprisonment translated to 30 years.

4. The petition and application appear to be informed by Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), now that his death sentence was commuted to life imprisonment. As sentences of life imprisonment have been pronounced unjust and unconstitutional, then it stands that the sentence imposed on the petitioner herein is no longer tenable. I hereby set it aside. I shall proceed to consider the appropriate substitute sentence, guided by Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported).
5. The petitioner was convicted on 4 counts of robbery with violence, which is a heinous crime. He was armed with a gun, and personal violence was actually used on 2 of his victims. The fact of being armed with a firearm aggravated that offence, for, in the event of a mishap, a life could easily have been lost. The accused pleads that he is elderly, and has been in prison for over 17 years now. I have not seen a report from a social worker, neither have I seen any material suggesting that the petitioner is remorseful. I shall, however, take that into account.
6. Upon review of everything, I am not persuaded that the petitioner is deserving of a non-custodial measure. However, he is entitled to benefit from Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported). I shall, hereby, impose upon him an imprisonment sentence of 30 years, to be calculated from the date of his arrest. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 31ST DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. William Owino Otieno, the petitioner in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

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