



**Ouma v Republic (Criminal Petition E016 of 2023)
[2024] KEHC 6168 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL PETITION E016 OF 2023
WM MUSYOKA, J
MAY 31, 2024**

BETWEEN

DAVID OUMA PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The application, dated 10th November 2023, principally seeks re-sentencing. The petitioner had been convicted, in Busia PMCCRC No. 882 of 2008, on 2 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 8th July 2009. He filed an appeal, in Busia HCCRA No. 39 of 2009, which was dismissed, on 10th November 2011, and the sentence of death was affirmed. He filed a second appeal, in Kisumu CACRA No. 15&16 of 2012, which was also dismissed, on 4th March 2016. 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 application appears 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 2 counts of robbery with violence, which is a heinous crime. He and his accomplices do not appear to have been armed with offensive weapons, and appear to have used minimal personal or physical violence on their victims. The petitioner pleads that he was young at the time of the commission of the offence, at 18 years. He also states that he was a first offender, which is supported by the proceedings of 8th July 2009. He also expresses remorse, for what happened. I have not seen a report from a social worker, which would have been useful for assisting the court to gauge the extent to which the petitioner has been rehabilitated. I shall, however, take everything 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 20 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. David Ouma, the petitioner, in person.

Advocates

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

