



**Makuti v Republic (Miscellaneous Criminal Application
E200 of 2023) [2024] KEHC 6296 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E200 OF 2023**

A. ONG'INJO, J

MAY 30, 2024

BETWEEN

HAMISI KAZUNGU MAKUTI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged, convicted and sentenced to 50 years imprisonment for the offence of murder contrary to Section 203 as read with 204 of the [Penal Code](#) in Mombasa High Court Criminal Case No. 2 of 2010.
2. The Applicant then appealed in Malindi Court of Appeal Criminal Appeal No. 252 of 2011 vide judgment delivered on 25th September 2014 where the appeal was dismissed, conviction upheld and sentence of 50 years imprisonment set aside and substituted with sentence of death.
3. That the said penalty of death was commuted to life imprisonment which the applicant is currently serving.
4. Vide an application filed on 28th November 2023 pursuant to Section 397 of the [Criminal Procedure Code](#) as well as submissions filed on the same date, the Applicant now seeks for a review of his sentence.
5. The Applicant submitted on severity of the sentence by relying on the decision of the High Court at Malindi in the case of *Katana Mangi v Republic*, Petition No. 18 of 2015 where it was held as follows: -

“ ... he only knows how long he has suffered, but cannot predict how long the suffering will last. This is inhuman and degrading punishment which should not be allowed to continue in a democratic society which believes in human dignity and freedom from inhuman and degrading punishment...”



6. The Applicant further cited the case of *Garama Chengo v Republic*, Criminal Appeal No. 34 of 2015 where it was held: -

“... for the foregoing reasons this appeal lacks merit on both conviction and sentence. We however take cognizance of recent developments in law regarding sentencing in the case by *Francis Karioko Muruatetu v Republic* (2017) eKLR where the Supreme Court of Kenya pronounced that the mandatory aspect of death sentence was unconstitutional. That judgment therefore removed the fetters on the court’s discretion when passing in cases where the death penalty was the only one prescribed by law. In the instant appeal, the appellant was treated as a first offender and although he did not mitigate (perhaps well aware that the only sentence that was prescribed by law then was death). We also note that the appellant was a young man, a nephew of the deceased thus by serving a death sentence the family in essence would be deprived of two members. For those reasons, we are of the view that the appellant should benefit from the decision, and in the event we interfere with the death sentence and substitute it thereto with 25 years imprisonment. It is so ordered.”

7. The Applicant urged the court in reviewing his sentence to consider his mitigating factors indicated in his submissions namely: -

- i. That he undertook a course in Carpentry and Joinery where he attained Grades I, II and III, which equipped him with skills and moral values to be reintegrated back in society.
- ii. That he regrets and condemns the offence as his long stay behind bars ruined his life and that of his family.
- iii. That he left behind a housewife and 5 children who are living in despair due to his absence.

8. The Applicant prayed that this court also takes into account the period spent in remand custody pursuant to Section 333 (2) of the *Criminal Procedure Code*.

9. The Applicant was charged with a capital offence prior to the promulgation of *the Constitution*. He was in remand throughout his trial and his sentence ought to have factored in the remand period.

10. In consideration of the holding in *Julius Kitsao Manyeso v Republic* (2020) eKLR that life sentence is unconstitutional, the said life sentence is reverted to 50 years initially passed to run from 7th January 2010 when the Applicant was arrested 10 days after 28.12.2009. The last 3 years of the sentence to be served on probation to ensure he does not repeat offence.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 30TH DAY OF MAY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the Respondent

Applicant present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

