



REPUBLIC OF KENYA



**Musembi v Republic (Criminal Revision 23 of 2024)
[2024] KEHC 6153 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 23 OF 2024**

DR KAVEDZA, J

MAY 30, 2024

BETWEEN

ISAAC MUNYAO MUSEMBI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted on two counts for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#), cap 63 Laws of Kenya. He was sentenced to death on both counts *vide* Kibera Chief Magistrate’s Court Criminal Case no. 1281 of 2007. He filed an appeal before this court challenging his conviction and sentence. On January 31, 2019, this Court dismissed his appeal *vide* Criminal Appeal No. 149 of 2009. He is currently serving a life sentence.
2. He has now filed the present application seeking resentencing. The grounds raised are that the sentence was in contravention of his constitutional rights. That since incarceration, he has developed respiratory problems and further cannot be able to feed properly, he is the sole breadwinner of his family, he is remorseful and undertakes to become a law-abiding citizen if released.
3. The Judiciary [Sentencing Policy Guidelines, 2023](#) provides as follows on who can apply for re-sentencing.
4. 8.16 A resentencing application can be made:
 - i. After the completion of the trial process and where a sentence has been issued.
 - ii. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for resentencing upon being satisfied that the appeal has been withdrawn.



12. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the *Constitution of Kenya*, 2010.
13. Furthermore, it is significant to emphasize that the decisions in the Supreme Court and Court of Appeal cases *Muruatetu*, *Manyeso* and *Nyamari* (*supra*), recognize that indeterminate sentences deprive a convict of the opportunity to be heard in mitigation, while convicts facing lesser sentences are granted such an opportunity. The deprivation constitutes unjustifiable discrimination, is unfair, and contravenes the principle of equality before the law as enshrined in article 27 of the *Constitution*. Additionally, an indeterminate life sentence, amounts to inhumane treatment and violates the right to dignity under article 28 of the *Constitution*. It is also a principle of international law that all prisoners serving life sentences should be afforded the possibility of rehabilitation and the prospect of release if such rehabilitation is achieved. (See the decisions of the European Court of Human Rights: *Vinter and others v. United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) and *Murray v the Netherlands* [GC], no. 10511/10, (26 April 2016)
14. In the instant case, the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and was sentenced to death as per the law, which sentence was commuted to life imprisonment. However, I am guided by the recent court of appeal decision in the case of *Nyamari* (*supra*) where life imprisonment was construed to mean a maximum of 30 years imprisonment, I hereby set aside the life sentence and substitute it with a sentence of thirty (30) years' imprisonment from the date of the applicant's arrest, May 11, 2006 pursuant to section 333(2) of the *Criminal Procedure Code*.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Applicant Present

Ms. Tumaini for the Respondent

Joy Court Assistant

