



**Kimathi v Republic (Criminal Petition E006 of 2023)  
[2024] KEHC 13174 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL PETITION E006 OF 2023  
AK NDUNG’U, J  
OCTOBER 30, 2024**

**BETWEEN**

**PETER KIMATHI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. In his undated chamber summons application, the Petitioner herein, Peter Kimathi, claims that he was convicted of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death vide Nanyuki Criminal Case No 957 of 2014. The death sentence was later commuted to life imprisonment by Presidential clemency. He claims that he appealed to this court vide Criminal Appeal No. 61 of 2015 against both conviction and sentence and his appeal was dismissed. (The high court judgment is not on record). His second appeal to the Court of Appeal at Nyeri (Criminal Appeal No 106 of 2016) was also dismissed. I have seen the Court of Appeal judgment attached to his application.
2. He states that the petition is filed pursuant to the directions given by the Supreme Court on 06/07/2021 in Francis Karioko Muruatetu & Another vs Republic (2017)eKLR and seeks for sentence hearing and interpretation of mandatory application of the death sentence for robbery with violence cases. The petition is brought under Article 22(1), 23(1), 25(c), 27, 28, 50(2) (p)(q), 159(2) 160(1) and 165 of *the Constitution*, Clause 7(1) of the Transitional and Consequential Provisions and sections 216, 329 and 333(2) of the Criminal Procedure Code.
3. He avers that the Supreme Court order of 06/07/2021 left it open for the High Court to hear any petition that maybe brought challenging mandatory minimum sentences and did not hold that the High Court should not apply the previous reasoning in Muruatetu 1. He therefore prays that;



- i. The court be pleased to review the sentence to a lenient definite sentence informed by his mitigation and the unique facts and circumstances of the case pursuant to Article 50(2)(p)(q) of *the Constitution*.
  - ii. That the period spent in remand be computed into eventual sentence to be awarded pursuant to the provisions of sections 333(2) of the Criminal Procedure Code and pursuant to *Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020)* [2021] KEHC 457 (KLR).
  - iii. That should the eventual computation result into a balance of three years or less, the hounarable court be pleased to grant him probation orders.
  - iv. Any other order that the court may deem fit to grant.
4. His application is supported by an affidavit dated 09/05/2023. He averred that he was sentenced to death without consideration of his mitigation or the unique facts and circumstances of his case. He stated that court should have unfettered discretion in relation to sentencing and absence of discretion is prejudicial to an accused person. Further, mandatory sentences are discriminatory in nature because they give differential treatment to a convict under the impugned provisions distinct from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences and so mandatory sentences violate an accused right under Article 27 of *the Constitution*. Further that this court has jurisdiction under Article 165(3)(b) of *the Constitution* to hear the matter.
5. The application is opposed and counsel for the Respondent has filed a notice of preliminary objection dated 24/01/2024 on account that the application is incompetent since it is unsupported in law, the court lacks jurisdiction to hear and determine the application and that the same is an abuse of the court process.
6. The Applicant filed written submissions in support of his application. He submitted that by virtue of Article 165(3) of *the Constitution*, this court is clothed with jurisdiction to hear the application. He stated that life sentence is unconstitutional for it contravenes Article 26 on right to life, does not protect or respect the dignity of a person as per Article 28, it contravenes Article 29 as it is a cruel and degrading punishment, does not take regard to equality treatment under the law and thus it contravenes Article 27, further, it does not take into account the objectives of punishment which is not only ensuring deterrence but also afford the reform and rehabilitation and goes contrary to sentencing policy guidelines. He relied on the case of *Manyeso vs Republic (2023) KECA 827 (KLR)* which declared life sentence as unconstitutional and *Boniface Keya vs Republic Misc Criminal Application No. E007 of 2023* among other cases.
7. He submitted that he is remorseful and has rehabilitated as he has acquired several certificates while in prison which he attached to his submissions. In mitigation, he stated that he was a first offender, he is a family man aged 59 years old, that he has been behind bars since 28/10/2014, there were no aggravating circumstances as there was no use of fire arm and nobody was injured. He urged the court to substitute the life sentence to an appropriate sentence from the date of his arrest.
8. Counsel for the Respondent in her oral argument argued that the court of appeal and the high court pronounced itself on the sentence and therefore, this court has no jurisdiction. She argued that in *Petition No. 5 of 2022* as relied by the Petitioner herein, the main prayer was that the mandatory death sentence was unconstitutional whereas in *criminal Revision No. 93 of 2023*, the applicant in that case had not filed an appeal to the court of appeal thus those cases were different to the Petitioner's case herein since he had filed an appeal to the court of appeal which was determined and therefore, the jurisdiction of this court is ousted.



9. I have considered the rival arguments by the parties. Following the declaration by the Supreme Court of Kenya in the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR that the mandatory nature of the death sentence under section 204 of the Penal Code for the offence of murder contrary to section 203 of the Penal Code was unconstitutional, courts applied in equal measure the reasoning of the apex court in the mandatory nature of the death sentence under section 296(2) of the Penal Code for the offence of robbery with violence.
10. However, on 06/07/2021, the Supreme Court made it clear that the Francis Muruatetu decision was only applicable in Murder cases and inapplicable to other cases where the law provides for mandatory sentences. The Supreme Court stated inter alia:
- “To clear the confusion in regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason and robbery with violence, that a challenge of those sentences should be properly filed in court”.
11. The court further said that the cases filed should be presented and fully argued before the High Court and escalated to the Court of Appeal if necessary at which a similar outcome as Muruatetu may be reached. It stated:
- “Muruatetu cannot be the authority for stating that all the provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the constitution*,”
12. That new development effectively locked out all other petitioners including the applicant herein. However, the petitioner has petitioned this court by parity of the directives given on 06/07/2021 in Muruatetu case as seen above that a challenge on sentences in robbery with violence should be properly filed in court.
13. The Petitioner has now filed this constitutional petition but the jurisdiction of this court has been challenged by counsel for the Respondent. The jurisdiction of this court is being challenged on account that the Petitioner filed an appeal to this court and the court of appeal which dismissed his appeal on conviction and the sentence and therefore, this court cannot revisit the same.
14. As to whether this court has jurisdiction to hear and determine the Petitioner’s application for resentencing, I refer to the Judiciary Sentencing Policy Guidelines, 2023 which provides as follows on who can apply for re-sentencing;
- “Paragraph 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.
  - iii. Alternatively, a resentencing application can be made once an applicant has received judgment on appeal, and where it is submitted that neither the High Court nor the Court of Appeal considered the mitigating and circumstances of the case. (emphasis added)



- iv. In regard to the development of the law, it is expected that trial courts shall have considered the current jurisprudence arising from the superior courts under the principle of stare decisis.”
15. As to the which court is clothed with jurisdiction to hear application for resentencing, paragraph 4.8.18 of Sentencing Guidelines states thus;  
  
“Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”
16. I have perused the court of appeal judgment. The appeal by the Applicant at the Court of appeal was dismissed. Though the issue of sentence is not specifically mentioned in the Court of Appeal decision, the fact that the appeal was dismissed was an affirmation of both the conviction and sentence. Thus, following the Resentencing Guidelines, paragraph 4.8.18, jurisdiction to hear application for resentencing in this matter lies with the Court of Appeal.
17. In the premises therefore, I agree with the Respondent’s submission that this court has no jurisdiction to revise a sentence that was passed by the Court of Appeal.
18. With the result that the application herein fails and is dismissed.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

**A.K. NDUNG’U**

**JUDGE**

