



**James v Republic (Criminal Petition E005 of 2023)
[2023] KEHC 25882 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL PETITION E005 OF 2023
WM MUSYOKA, J
NOVEMBER 27, 2023**

BETWEEN

ASILI JAMES PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petition and application, dated 7th August 2023, principally seek re-sentencing. The petitioner had been convicted, in Busia CMCCRC No. 1843 of 2009, of robbery with violence, contrary to 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 1st April 2011. His appeal to the High Court, in Busia HCCRA No. 39 of 2011, was unsuccessful on conviction, but the sentence of death was substituted with life imprisonment. He did not appeal to the Court of Appeal, although his co-accused, Allan Barasa Obada, had an appeal there, being Kisumu CACA No. 20 of 2013, where his conviction was quashed, on grounds that he had not been found in possession of the stolen goods, and that it was the petitioner herein who was found hiding in the house where the goods were found.
2. The petition and the application, no doubt, rides 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 has since 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 & Ouoko, 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, and not any other.



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.
4. The petition and 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 by the High Court, on 6th March 2012. 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.
5. The petitioner invites me to put him on a non-custodial programme, given that he has reformed, and he has attached documents to show that he has done theology studies. The petitioner was convicted of robbery with violence, an offence so serious and heinous that the State prescribed a death penalty for it. He is serving a life sentence currently merely because there has been law reform, with respect to mandatory sentences. For offences as grave as robbery with violence, custodial sentences are still the best deterrent, to keep violent offenders out of the market, and secure the community. In the circumstances, the petitioner would not qualify for consideration of a non-custodial measure.
6. Violence was visited on the victim of the robbery, for which the petitioner was convicted, going by the medical records presented at the trial. I shall take that into account. Consequently, I shall, hereby, impose on the petitioner, an imprisonment sentence of 30 years. The time spent in custody shall be reckoned in the computation of sentence. Plea was taken on 18th November 2009. He was convicted and sentenced on 1st April 2011. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 27TH DAY OF NOVEMBER 2023

WM MUSYOKA

JUDGE

