



**Mathenge v Republic (Criminal Miscellaneous Application  
E078 of 2024) [2025] KEHC 2133 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2133 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL MISCELLANEOUS APPLICATION E078 OF 2024**

**LN MUTENDE, J  
FEBRUARY 4, 2025**

**BETWEEN**

**SIMON NJUGUNA MATHENGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Simon Njuguna Mathenge, the Applicant, together with four (4) others, were charged with Nine (9) Counts of Robbery with Violence contrary to Section 296(2) of the *Penal Code*. He was convicted and sentenced to death on two counts; Life imprisonment on three counts; and ten (10) years imprisonment on one (1) count which were to be held in abeyance.
2. Dissatisfied, he approached the Court of Appeal through an application dated 26<sup>th</sup> March 2024, seeking extension of time to appeal against the judgment of the High Court, an application that was granted by Mativo JA on 20<sup>th</sup> June, 2024. He was required to file a Notice of Appeal within 14 days from the date of the Ruling.
3. Through another application dated 8<sup>th</sup> April, 2024, he sought extension of time to appeal against the judgment of the High Court. The Court of Appeal presided by Korir JA allowed the application.
4. The application before me is a Notice of Motion dated 12<sup>th</sup> November, 2024, where the applicant seeks re-sentencing. The application is premised on grounds that the mandatory nature of the sentence imposed for Robbery with violence is unconstitutional. That the sentence is harsh and excessive hence the court could consider time already served to be sufficient as the applicant is remorseful.
5. At the hearing, the applicant urged that his appeal having been dismissed, he did not proffer a second appeal, hence he was seeking re-sentencing.



6. The application is opposed by the Respondent through learned Prosecution Counsel, Mr. Obutu, who urge that the court lacks the jurisdiction to re-consider the matter, and the applicant should have approached the court through a Petition.
7. In considering the application, I am guided by the case of Republic v Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) Petition No. E018 of 2023 (2024) KEC 34 KLR where the Supreme Court stated that;

“The ratio decidendi in the decision was summarized as follows:

“Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.” (Emphasis added).

8. That notwithstanding, this is a matter that was determined by the High Court which calls into play the principle of finality or functus officio. This court having finally exercised its authority in the case and determined the appeal; it would have no jurisdiction to re-open the case. The doctrine of “functus officio” was clearly stated in *Telcom Kenya Ltd v John Ochanda* (2014) eKLR. The court delivered itself thus;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered a final decision.”

9. The upshot of the above is that I have no power to grant orders sought. Accordingly, the application is dismissed.
10. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF FEBRUARY, 2025.**

**L.N. MUTENDE**

**JUDGE**

