



REPUBLIC OF KENYA



**Ndung'u v Republic (Criminal Miscellaneous Application E451 of 2023)
[2025] KEHC 2855 (KLR) (Crim) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E451 OF 2023
AB MWAMUYE, J
FEBRUARY 6, 2025**

BETWEEN

JAMES KAMAU NDUNG'U APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. James Kamau Ndung'u, the Applicant herein, was charged with the offence of Robbery with violence contrary to Section 296(2) of the *Penal Code* and another count of being in possession of an imitation of a firearm contrary to section 34 (1) (3) of the *Firearm Act*.
2. He was tried and convicted at the Kikuyu Magistrate's Court. He was sentenced to suffer death for the offence of Robbery with violence and 7 years imprisonment for offence of being in possession of an imitation of a firearm .
3. The Applicant was dissatisfied with his conviction and sentence. He appealed to the High Court. His appeal was dismissed in its entirety. The conviction and sentence were affirmed.
4. The Applicant is now back in the High Court with a new application. He seeks for a review of his death sentence.
5. The Applicant has grounded his Application on the Muruatetu doctrine. This was the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* [2017] Eklr.
6. The prosecution Counsel neither filed a reply nor made submissions to the Application.
7. The Trial Court while sentencing the appellant to death noted that "the sentence provided by the law is one and it is death sentence...." The appellate Court on its part while confirming the sentence noted



that the sentence was lawful. I cannot fault the two Courts in passing and confirming the sentence of death because this was the law then.

8. However, the recent judicial development from this Court, the Court of Appeal and the Supreme Court has changed the tides in as far as mandatory statutory sentences are concerned. It is on this basis that I accept the invitation by the appellant to intervene on the sentence.
9. In the Muruatetu Case, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.
10. The reasoning in Muruatetu Case respecting section 204 of the Penal Code (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences; and that was in William Okungu Kittiny v R [2018] eKLR.
11. The provisions of Section 333(2) of the Criminal Procedure Code requires the Court when passing sentence to take into account the period already spent in custody by the accused. The Sentencing Policy Guidelines issued by the Kenyan Judiciary in 2016 at paragraph 23.9 provides for how to conduct a balancing act between the aggravating and mitigating circumstances during sentencing.
12. The Applicant disclosed that his sentence has been commuted to life imprisonment. Paragraph 23.10 of the guidelines provide that even in instances calling for life sentence, Courts should still endeavor to impose a sentence in keeping with the spirit of these guidelines, which includes the promotion of consistency and certainty in the sentencing process hence enhancing delivery of justice and promoting confidence in the judicial process.
13. In this matter, the aggravating factors were that the Applicant had an object resembling a gun that he used to hit Pw4, the driver of the matatu while ordering him to stop. However, the mitigating circumstances are that the level of violence involved was not extreme. The violence did not cause death or grievous harm. The Applicant was also a first offender. In the circumstances, cognizant that the statutory sentence is a death sentence, and in consideration of the mitigating and aggravating factors, a 30 years jail term is a reasonable sentence.
14. The upshot of the foregoing is that the Applicant's application is hereby allowed. The death sentence (already commuted to life imprisonment) is hereby set aside. The Applicant is instead sentenced to 30 years imprisonment. Further, and in line with the provisions of Section 333(2) of the Criminal Procedure Code, I direct that the sentence shall run from the date the Applicant was first in custody.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE

