



REPUBLIC OF KENYA



**Apopo v Republic (Criminal Petition E013 of 2023)
[2025] KEHC 6429 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL PETITION E013 OF 2023
WM MUSYOKA, J
MAY 23, 2025**

BETWEEN

HARRISON SANDE APOPO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner herein was convicted of robbery with violence, contrary to section 296(2) of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to death, in Busia CMCSOC No. 456 of 2014. He filed an appeal against his conviction and sentence, in Busia HCCRA No. 36 of 2018, which was dismissed, on 28th May 2018.
2. He has now approached this court for review of sentence, and he basis himself on Edwin Wachira & 9 others vs. Republic Mombasa HCPet. Nos. 57, 88, 97 and 98 of 2021 and Mwangi vs. Republic [2022] KECA 1106 (KLR), arguing that mandatory sentences are unconstitutional.
3. As indicated above, the petitioner filed an appeal to the High Court against his conviction and sentence by the trial court. That appeal was considered by the High Court (Kiarie, J), and was dismissed. The petitioner is now inviting me to re-consider the matter of sentence, which was before my brother, Kiarie J, was considered and dismissed. I cannot sit on appeal, on what my colleague, who exercised a complementary jurisdiction to what I am vested with, decided on. If the petitioner was aggrieved, by the determination on the sentence, he should have appealed.
4. I note that the decision in Busia HCCRA No. 36 of 2018 came after Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), which appeared to suggest that the mandatory death sentence was unconstitutional. However, Kiarie J did not follow it, and was vindicated when Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu



- DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) came, which clarified that Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was limited to murder cases.
5. I see that the petitioner relies on Edwin *Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021*, reported as Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J), where it was declared that mandatory sentences were unconstitutional, for they took away discretion. Those decisions were made with respect to sentences under the *Sexual Offences Act*, but the principle was the same. See also Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J).
 6. However, the Supreme Court has, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), declared that the decisions in Wachira & 12 others [2022] KEHC 12795 (KLR) (Mativo, J) and Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J), are not good law, and that the punishments prescribed in the applicable statutes remain lawful. The Court of Appeal made similar decisions, with respect to the unconstitutionality of life sentences, in Manyeso vs. Republic [2023] KECA 827 (KLR) (Nyamweya, Lesiit & Odunga, JJA) and Ayako vs. Republic [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA), and the said decisions were struck down by the Supreme Court in Republic vs. Manyeso [2025] KESC 16 (KLR) (Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) and Republic vs. Ayako [2025] KESC 20 (KLR)(Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), on grounds that whatever sentence is prescribed by statute is lawful and constitutional, and the courts, in the spirit of separation of powers, ought not to change or alter the same.
 7. Consequently, I would have no basis for revisiting the sentence imposed, for Wachira & 12 others [2022] KEHC 12795 (KLR)(Mativo, J), and the other decisions that followed it, in that spirit, are no longer available.
 8. Decisions of the Supreme Court bind me, sitting, as I hereby do, as the High Court. I am obliged to bend to the legal position stated 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 & Ouko, SCJJ) and Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ).
 9. The petitioner should strive to benefit from the administrative reliefs of prerogative of mercy and remission, which are under the Executive, and which he can access through the prisons system. Otherwise, as a court, the matter is out of my hands,
 10. The Petition and the Motion are without merit, and I hereby dismiss them. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Harrison Sande Apopo, the petitioner, in person.

Advocates



Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

