



**Kurgat v Republic (Miscellaneous Criminal Application  
E033 of 2020) [2025] KEHC 5723 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL APPLICATION E033 OF 2020**

**JM NANG'EA, J**

**MAY 6, 2025**

**BETWEEN**

**BERNARD KIPKOSGEI KURGAT ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged jointly with others with four counts of the capital offence robbery with violence contrary to section 296 (2) of the *Penal Code* before the Chief Magistrate's Court at Nakuru in Criminal Case File No 102 of 1999. The trial court did not find the violent robbery charges proven in respect of the first and second counts and instead convicted the offenders of the lesser charge of robbery contrary to section 296 (1) of the *Penal Code*, commonly referred to as simple robbery, pursuant to section 179 of the *Criminal Procedure Code* thereon. The convicts were subsequently sentenced to 7 years imprisonment each. On appeal to this court vide Criminal Appeals Nos. 24 & 25 of 2001, the sentences were set aside and substituted with death sentences. A second appeal was lodged in the Court of Appeal which upheld the conviction and sentence of this court.
2. The Applicant, by legal submissions, is once again praying for re-sentencing and requests for a chance to offer mitigation submissions on the ground that the death sentence is unconstitutional in light of the Supreme Court's decision in the famous case of *Francis Karioko Muruatetu 1* which declared the then mandatory death sentence in murder cases as unconstitutional. He contends that the death sentence is degrading and therefore unconstitutional.
3. The prosecution Counsel filed written submissions opposing the application. Citing inter alia the recent Supreme court's decision in Constitutional Petition No 018 of 2023 ( *Republic v Joshua Gichuki Mwangi & others*, the learned Counsel points out that the apex court has clarified that the *Francis Karioko Muruatetu 1* decision only applied to murder cases and that the mandatory and/or minimum



- non-discretionary sentences in other offences including robbery with violence under section 296 (2) of the Penal Code remain lawful.
4. I am aware that in Machakos High Court case, Philp Mucke Maingi & others v Republic, and William Okungu Kittiny v Republic (2018) eKLR inter alia it was declared in the spirit of the Francis Karioko Muruatetu 1 decision that mandatory minimum sentences are also unconstitutional.
  5. Further, the Court of Appeal in Manyeso v Republic being Malindi Criminal Appeal No 12 of 2024 declared life imprisonment as unconstitutional for its indeterminate nature and thus degrading and inhuman effect. The Constitutional and Human Rights Court's decision in consolidated Petitions Nos. 5 and 6 of 2022 (Ramadhan & 8 Others v Attorney-General and another 2024 KEHC 1173 (KLR) (6 February 2024) (Judgement) also reached the same conclusion that mandatory sentences are unconstitutional for fettering the court's discretion to determine an appropriate sentence based on the peculiar facts and circumstances of each case.
  6. The issue arising for determination is whether this court has jurisdiction in law to revisit decisions of superior courts or those of concurrent jurisdiction in the circumstances of this matter. The case of Daniel Otieno Oracha v Republic (2019) eKLR embodies the important principle of stare decisis which prohibits relitigation of a matter that has been before another court of similar or higher jurisdiction. By dint of this principle, this court would be bereft of jurisdiction to resentence the Applicant as desired or at all.
  7. Moreover, the Supreme Court in the Francis Karioko Muruatetu 2 decision clarified that its earlier judgement in the Francis Karioko Muruatetu Case 1 declaring the mandatory nature of the death sentence for the offence of murder as unconstitutional only applied to murder cases. The apex court's more recent decision in Constitutional Petition No 018 of 2023 (Republic v Joshua Gichuki Mwangi & others) referred to by the Prosecution Counsel reiterates the position and exhorts litigants wishing to challenge laws prescribing mandatory and/or minimum sentences for offences other than murder to mount the challenge from the High Court, and if necessary escalate the dispute to the Court of Appeal, for a final decision to be made.
  8. The Applicant was charged with and convicted of the capital offence of robbery with violence contrary to section 296 (2) of the Penal Code. The Supreme Court's decision in the Francis Karioko Muruatetu 1 case does not therefore apply for the reasons given.
  9. Before I pen off, it is noted that sometimes the applicant seems to argue this application as a constitutional petition challenging the death sentence in violent robbery cases. If this was the intention, a substantive constitutional petition ought to have been instituted enjoining relevant offices including the Director of Public Prosecutions and the Attorney-General. As it is, this is a Miscellaneous Criminal Application seeking review of the sentence meted out against the Applicant.
  10. The upshot is that the application is dismissed. This ruling applies to Miscellaneous Criminal Application No E166 of 2023 brought by Stephen Njenga Mukiria who had similarly been convicted and sentenced alongside the Applicant herein.

**J. M. NANG'EA, JUDGE.**

**RULING DELIVERED THIS 6<sup>TH</sup> DAY OF MAY 2025 IN THE PRESENCE OF:**

The Prosecution Counsel, Ms Sang

The Applicant Miscellaneous Criminal Application No E033 of 2020.

The Applicant in Miscellaneous Criminal Application No E166 of 2023.



The Court Assistant, Jeniffer

**J. M. NANG'EA,**

**JUDGE.**

