



REPUBLIC OF KENYA



KENYA LAW
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**Lemarleni v Republic (Criminal Petition E003 of 2024)
[2025] KEHC 7199 (KLR) (Crim) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL PETITION E003 OF 2024
SC CHIRCHIR, J
MAY 22, 2025**

BETWEEN

LTANKIYAN LEMARLENI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner's petition dated 24.4.2023 seeks reliefs as follows; that a declaration be made, subject to Section 216 and 329 of the *Criminal Procedure Code* and Article 50 (2) (P) of *the Constitution* that the petitioner herein be heard on his mitigating factors and appropriate sentence awarded which is commensurate to the offence committed
2. The petition is brought under the provisions of Article 2 (5) (6) (3) 19(3) 22, 23(1) (3), 26, 27(1) (2) (4), 28, 29 (d) (f), 50 (2) (p) and 160(1) of *the Constitution* as well as Section 216 and 329 of the *Criminal Procedure Code*.
3. The petitioner states that he was convicted of the offence of robbery with violence at the Magistrate's Court at Isiolo and sentenced to suffer death. His Appeal on both conviction and sentence to Meru High Court was dismissed.
4. The petitioner further states that his petition is informed by the directive of the Supreme Court in the Muruatetu case, in which the supreme court opened the door for convicts convicted of capital offences to challenge the constitutionality of the death sentence.
5. It is the petitioner's case that section 292(2) of the *Penal Code* deprives the Court discretion in matters of Life and Death; that it deprives the Court the exercise of discretion as provided under section 216 and 329 of the *Criminal Procedure Code*.



6. He also states that he is entitled to the least severe form of punishment in terms of Article 50(2) (p) of *the Constitution*.
7. The petition proceeded by way of written submissions.

Petitioner's submissions

8. It is the petitioner's submissions that pursuant to Articles 23(1) 160(1) and 165(3) (b) of *the constitution*, this court has the jurisdiction to hear and determine any issue touching on violations of the rights, including the constitutionality of the death sentence.
9. It is further submitted that the provisions of section 296(2) of the *Penal Code* does not conform to the principles of Fair Trial as provided for under Article 25(c) and 50(2) (p) of *the constitution*. That the mandatory death sentence denied the petitioner a chance to present his mitigation under the provisions of section 216 and 329 of the *Criminal Procedure Code*.
10. It is argued that not all robberies with violence are planned in a particular pattern, that the circumstances of each case vary and that the death penalty should be imposed only in exceptional and appropriate cases.
11. It is further submitted that treating all persons convicted under Section 296 (2) of the *Penal Code* in the same way is arbitrary and oppressive. It violates the right to dignity and denies a convict a chance to benefit from a less severe form of a punishment. The petitioner further submitted that section 296(2) denies the court to exercise their discretion upon mitigation and thus a violation of the right to fair trial; That a person convicted of robbery with violence may have committed the offence with varying degrees of gravity and culpability and this should attract individualized sentencing.
12. It is further submitted that sentencing is part of the principle of fair trial and therefore this principle of fair trial must be accorded to sentencing too.
13. It is finally submitted that the rationale in the Muruatetu case should be applied in the determination of the constitutional validity of section 296(2) of the *Penal Code*.

Respondent's submissions

14. It is the respondent's submissions that vide gazette Notice No. 9566 of 19/7/2023, the president committed the death sentence imposed on capital offenders as to life sentence. That contrary to the petitioner's assertion therefore, the petitioner is no longer serving a death sentence.
15. It is further submitted that the Muruatetu Case relied on, was only applicable to the offence of murder under section 204 of the *Penal Code* and that in any case the decision of the supreme court did not nullify the death sentence.
16. While setting out the purpose of the punishment, the respondent submits that the petitioner herein was deserving a death sentence as there was evidence that he used a gun against the victims.

Determination

17. I have considered the petition and the submissions of the parties and I have identified the following issues for determination:
 - a. Whether the petition is competent
 - b. Whether the prayers sought are warranted.



Whether the Petition is competent

18. In *Muruatetu & another Versus Republic Katiba institute & 4 others (Amicus Curiae)* (2012) KESC 31 (KLR) The supreme court gave certain directions : One such directive was as follows: “To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code* that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome may be reached.....”
19. The supreme court gave the aforesaid directions following their earlier decision in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR, which decision had apparently caused some uncertainty as to whether the court had declared death sentence generally, as being unconstitutional.
20. It is on the basis of the aforesaid directions that the present petition has been brought.
21. However, the respondent has raised a pertinent issue that needs to be addressed by way of preliminary. The respondent has argued that the petitioner is no longer under death sentence since his sentence has been commuted to life by the president under the power of mercy bestowed on him under Article 133 of *the constitution*.
22. The petition herein was filed on 26th April, 2023. However, on 19/7/2023 the president, while exercising the power of mercy under the above stated Article of *the constitution*, commuted death sentence imposed on all capital offences to life sentence as at 21/11/2022. This was done through a gazette Notice No. 9566 of 19/7/2023 and published on 21/7/2023 The Notice stated as follows: “it is notified for the general information of the public that in exercise of the powers conferred by Article 133 of *the Constitution* of Kenya and Section 23(1) of the *Power of Mercy Act* 2011 the President and the Commander – in – Chief of the Defence Forces of the Republic of Kenya, upon Recommendation of the Advisory committee on the Power of Mercy committed the death sentence imposed on every capital offender as at 21.11.2022 to a Life Sentence.”
23. Although the date of sentencing at the trial is not available on record, I have noted that the Appeal to High Court in Meru was dismissed on 9.11.2017. It follows that by 21.11.2022 the petitioner herein was among those facing death sentence, and was therefore among those whose sentences was committed to life sentence as per the above cited gazette Notice.
24. It further follows that, as at the time of hearing of this petition, the petitioner was no longer serving a death sentence. In other words, the death sentence imposed on him was nullified by the commutation to life sentence. His petition, though filed earlier than the date of commutation, has been overtaken by events.
25. Therefore, I agree with the respondent that the petitioner is no longer under life sentence, and to proceed to determine this Application would purely be an academic exercise.
26. The petition is hereby struck off.
27. Right of Appeal: 14 days

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 22ND DAY OF MAY, 2025.

S. CHIRCHIR



JUDGE.

In the presence of:

Roba Katelo- Court Assistant.

Ltankiyan – The petitioner.

