



**Mwenesi v Republic (Criminal Miscellaneous Application  
E065 of 2023) [2025] KEHC 7483 (KLR) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7483 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL MISCELLANEOUS APPLICATION E065 OF 2023**

**JN KAMAU, J**

**MAY 26, 2025**

**BETWEEN**

**BENARD IGUNZA MWENESI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein was jointly charged with another person on Count I with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and on Count II on the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006.
2. He was convicted of the two (2) counts and sentenced to death for Count I while the sentencing for Count II was held in abeyance.
3. Being aggrieved by the said decision, he lodged an appeal at Kakamega High Court, HCCRA No 405 of 2011, which was dismissed in its entirety and his conviction and sentence upheld.
4. On 21<sup>st</sup> December 2023, he filed a Notice of Motion application dated 24<sup>th</sup> October 2023 seeking to have his death sentence that was commuted to life imprisonment, reduced to least severe sentence pursuant to Article 50(2)(p)(q) of the *Constitution*.
5. He placed reliance on the case of *Manyeso v Republic* [2023] KECA 827 (KLR) which declared life sentence unconstitutional and averred that the same was embraced by the High Court in the case of *Boniface Keya v Republic* Miscellaneous Application No E007 of 2003 (eKLR citation not given). He added that the directions issued by the Supreme Court on 6<sup>th</sup> July 2021 in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR left it open to the High Court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination. He also placed reliance on the case of *Oprodi Peter Omukanga v Republic* Criminal Appeal No 260 of 2019 (eKLR citation not given).



6. He further averred that in case the eventual computation after reduction of his sentence resulted in a balance of three (3) years or less, then this court should grant him probation orders. He was emphatic that this court was seized of competent jurisdiction under Article 165(3)(b) of the Constitution of Kenya to hear and determine this matter.
7. His undated Written Submissions were filed on 4<sup>th</sup> September 2024 while those of the Respondent were dated 7<sup>th</sup> November 2024 and filed on 11<sup>th</sup> November 2024. This Ruling is based on the said Written Submissions that parties relied on in their entirety.

### **Legal Analysis.**

8. The Applicant submitted that he was seeking remedy from this court for the breach of his fundamental rights and freedoms under Articles 21(1)(2)(4)(a), 22(1)(2)(b), 23, 25(a)(c), 26(1)(3), 27, 28, 48, 50(1)(2)(p)(q) of the Constitution of Kenya, 2010 by being sentenced to mandatory death sentence which was commuted to life imprisonment by the President.
9. He invoked Paragraph 4.8.14, Paragraph 4.8.16, Paragraph 4.8.18, Paragraph 4.8.26 of the Sentencing Policy Guidelines, 2023 and Article 165(3)(A) of the Constitution of Kenya and submitted that in Muruatetu II, the court held that a Petition for resentencing arising from a trial before the High Court could only be entertained by the High Court which had jurisdiction to do so and not the subordinate court.
10. He averred that he had exhausted all his avenues for appeal and did not have pending appeal before any superior court thus a legitimate candidate for resentencing. He cited Articles 22(1), 23(1) and 25(a) and (c) of the Constitution of Kenya and urged this court to consider his mitigation and proceed to direct that the period he had served was sufficient to warrant his release.
11. He added that the death sentence was a cruel form of punishment and that he was denied the right to mitigate his circumstances before sentence. He pointed out that even if he had exercised his right to mitigate his circumstances before sentence, the same would not have been considered given that the mandatory death sentence did not allow the exercise of discretion on the part of the court.
12. He contended that he had been in lawful custody for fifteen (15) years and sought for a lenient definite sentence. He pointed out that the trial court breached his right to fair trial as enshrined in Articles 25(c) and 50(2) of the Constitution of Kenya.
13. He placed reliance on the case of Petition No 5 of 2022 as consolidated with Petition No 6 of 2022 Shaban Salim Ramadhan & others v Republic (eKLR citation was not given) where it was declared that the mandatory death sentence for the offence of robbery with violence contrary to Section 296(2) and attempted robbery with violence contrary to Section 297(2) of the Penal Code were unconstitutional. He further cited the case of Omukanga v Republic [2023]KECA 430 (KLR) where the Court of Appeal reviewed the appellant's death sentence to a definite sentence.
14. He was categorical that the indeterminate life sentence was contrary to Article 28, 29 (d) and (f) and 50 of the Constitution of Kenya. He cited Article 2(6) of the Constitution of Kenya and Article 10(3) of the International Covenant on Civil and Political Rights of 1966 and argued that although the Judiciary released elaborate Sentencing Policy Guidelines, there were no specific provisions for the sentence of life imprisonment, because it was an indeterminate sentence.
15. He pointed out that he had acquired Certificate of outstanding discipline and show of rehabilitation from the Officer in Charge Manyani Prison, Certificate in Imam and Quran Teachers Course,



Certificate on Alcohol and Drug Abuse and Recommendation letter by the Officer in Charge, Manyani Maximum Security Prison.

16. He was emphatic that he deserved a definite lenient sentence as he was a first-offender at the time of the commission of the offence, no life was lost during the said offence, he had been in prison for fifteen (15) years, he had been rehabilitated, there was no rehabilitation for life as there must be an end to rehabilitation and that he ought to be re-integrated back into the society.
17. He reiterated the holding in *Manyeso v Republic* (*supra*) which declared life imprisonment unconstitutional. He further reliance on several cases amongst them the cases of *James Kariuki v Republic* [2018] eKLR where it was held that the death sentence should be reserved for the highest and most heinous levels of robbery with violence, *Simon Kimani Maina v Republic* [2019] eKLR where it was the court considered the circumstances of the case and the appellant's mitigation and sentenced him to fourteen (14) years imprisonment and *Martin Bahati Makokha & another v Republic* [2018] eKLR where the appellants were resented to the term served being ten (10) years and two (2) days. He was remorseful and urged this court to find that he had atoned for his sins.
18. He invoked Section 333(2) of the *Criminal Procedure Code* and placed reliance on the cases of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR and *Jona & 87 others v Kenya Prison Service & 2 others* [2021] KEHC 457 (KLR) where the common thread was that a sentencing court must consider the period spent in custody awaiting trial.
19. On its part, the Respondent submitted that the decision in the case of Supreme Court Petition No 15 and 16 (Consolidated) of 2015 *Francis Karioko Muruatetu & another v Republic* (eKLR citation not given) did not outlaw the death penalty which was applicable as discretionary maximum penalty. It argued that having pronounced itself on the appeal by the Applicant, the court was functus officio. It asserted that no grounds had been raised herein to warrant a resentence and that the Court of Appeal considered all issues raised.
20. It pointed out that the provision of Section 333(2) of the *Criminal Procedure Code* was not applicable to the Applicant's case herein. It contended that the sentence meted out to the Applicant was lawful and commensurate to blame worthiness and urged the court not to interfere with the same.
21. Notably, in the case of *Mbugua & 9 others v Attorney General & 3 others* (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment), this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoy that right.
22. It observed that in the words of Article 27(1) of the *Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they had a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.
23. The court's decision was in line with the directions of the Supreme Court on 6<sup>th</sup> July 2021 in *Francis Karioko Muruatetu and another v Republic* [2017] eKLR (commonly now known as Muruatetu II) that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the High Court and thereafter escalated to the Court of Appeal, if necessary. It rendered itself as follows:-

“ 46. 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 as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases (emphasis court).”

24. Sewe J also reached a similar conclusion as this court in the case of Ramadhan & 8 others v General & another (Petition 5 of 2022 & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024) (Judgment) when she declared the mandatory nature of the death penalty as provided for under Section 296(2) and 297(2) of the Penal Code unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications
25. This court noted the Applicant’s arguments and submissions on the review of his sentence of death on the offence of robbery with violence. However, it found it prudent that he files his documents in support of his mitigating factors such as the certificates on programmes he had undergone in prison leading to his rehabilitation and his respective officer’ in-charge prisons recommendation letter as this court had stated were necessary before an application for re-sentencing could be considered. Although, he had mentioned the said documents in his submissions, a perusal of the court file showed that he had only filed his Certificate of Recognition for the year, 2022.
26. In Constitutional Petition No E002 of 2024 Mbugua & 6 others v The Hon Attorney General as consolidated with Constitutional Petition No E003 Alfred Eyase Kinamundu & 2 others v the Hon Attorney General & others, this court rendered itself as follows:-

“67 The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.

The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners’ right to dignity contrary to Article 28 of the Constitution of Kenya....

For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of the Constitution of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q) of the Constitution of Kenya.

Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a



higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction.”

27. As this court had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of the Constitution of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q) of the Constitution of Kenya, to avoid further delays in this matter, it court found it prudent to consider the mitigation and re-sentencing of the Applicant herein as it already had the lower court file to avoid further delays herein.

**Disposition.**

28. For the foregoing reasons, the upshot of this court’s decision was that the Applicants’ Notice of Motion application dated 24<sup>th</sup> October 2023 and filed on 21<sup>st</sup> Dec 2023 be and is hereby allowed in the following terms:-
- a. That the conviction of the offence of robbery with violence against the Applicant be and is hereby upheld as the same was safe.
  - b. That the conviction of the gang rape against the Applicant be and is hereby upheld as the same was safe.
  - c. That the Applicant do provide documents to support his mitigation by 26<sup>th</sup> June 2025.
  - d. That the Probation Office file Pre-Sentence Report in respect of the Applicant by 26<sup>th</sup> June 2025.
  - e. That the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 16<sup>th</sup> July 2025.

It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26<sup>TH</sup> DAY OF MAY 2025**

**J. KAMAU**  
**JUDGE**

