



**Malcha v Republic (Criminal Revision E013 of 2024)
[2025] KEHC 6088 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E013 OF 2024
AN ONGERI, J
MAY 16, 2025**

BETWEEN

JAMES KILUNGU MALCHA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The two petitions no. 7 and 8 of 2018 were consolidated since they both emanate from Voi SRM Cr. Case no. 220 of 2008.
2. The two petitioners were charged with robbery with violence c/s 296 (2) of the [Penal Code](#) and they were both sentenced to death.
3. The particulars of the charge were that on 1st March 2008 at 7pm at Mackinon Road Area, Kwale District, the two petitioners jointly while armed with dangerous weapons namely iron rods robbed Nyamawi Mwakelela Nyamawi of ksh.3800 and at or immediately before or immediately after the time of such robbery injured the said Nyamawi Mwakalela Nyamawi.
4. The petitioners appealed to the High Court against both the conviction and sentence and the appeal was dismissed by a two Judge bench on 18/9/2012 at Mombasa.
5. The petitioners filed these consolidated petitions in 2018 seeking sentencing following the Muruatetu case.
6. The High Court referred the petitions to the PM's court at Voi for resentencing.
7. The court deemed that to be the fairest way to proceed to ensure the petitioner's first appeal to the High Court if they deem it necessary.



8. However, the Supreme Court has since clarified in what is dubbed the Muruatetu 2 decision in 2021 that the Muruateru 1 decision is not applicable in robbery cases and defilement cases.
9. The Muruatetu decisions by Kenya's Supreme Court significantly altered the legal landscape on the mandatory death penalty.
10. The first ruling, *Muruatetu 1*, delivered on 14 December 2017, declared the mandatory death sentence for murder under Section 204 of the *Penal Code* unconstitutional.
11. The Supreme court held that judges must have discretion to consider mitigating and aggravating factors before imposing the death penalty, though it did not abolish capital punishment altogether.
12. This decision opened the door for thousands of death row convicts to seek resentencing.
13. However, questions arose over whether the ruling applied to other capital offences, such as robbery with violence under Section 296(2).
14. The Supreme Court addressed these concerns in *Muruatetu 2*, issued on 6 July 2021, clarifying that the 2017 decision only applied to murder cases and not to other crimes carrying mandatory death sentences.
15. The Supreme court also laid down guidelines for resentencing, requiring convicts to file individual applications in the High Court, with the involvement of the DPP and victims, while judges were to weigh relevant factors before deciding on new sentences.
16. In summary, *Muruatetu 1* ended the automatic death penalty for murder, while *Muruatetu 2* confined its application strictly to murder cases, excluding other offences. The death penalty remains lawful in Kenya, but its imposition is no longer mandatory, giving courts flexibility in sentencing based on the circumstances of each case.
17. The current legal position in Kenya regarding the application of the Muruatetu decision is therefore that while the Supreme Court's landmark ruling in *Francis Karioko Muruatetu & Another v Republic* (2017) declared the mandatory death penalty for murder unconstitutional, the principles of this decision do not extend to other offences such as robbery with violence and defilement.
18. The Supreme Court, in subsequent rulings and clarifications, has emphasized that Muruatetu was specifically confined to the offence of murder under Section 204 of the *Penal Code* and cannot be automatically applied to other capital offences.
19. In the case of *Jared Koita Injiri v Republic* (2019), the Court of Appeal held that the mandatory death penalty for robbery with violence under Section 296(2) of the *Penal Code* remains valid, as Muruatetu did not invalidate mandatory sentences for other crimes.
20. Similarly, in defilement cases under the *Sexual Offences Act*, courts have maintained that mandatory minimum sentences apply, and judicial discretion to impose lesser sentences is not permitted.
21. The judiciary has thus drawn a clear distinction, affirming that *Muruatetu* does not grant judges blanket authority to disregard mandatory sentences across all offences.
22. While the *Muruatetu* decision has paved the way for resentencing hearings in murder cases, its applicability remains limited, and legislative or further judicial intervention would be required to extend its principles to other crimes.
23. The position, as it stands, is that the mandatory sentences for robbery with violence and defilement remain intact, and courts are bound to impose them as prescribed by law.



24. I find that the consolidated petitions have been overtaken in the circumstances and the same are accordingly dismissed.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI THIS 16TH DAY OF MAY, 2025.

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A. N. ONGERI

JUDGE

In the presence of:

Court Assistants: Maina/Millicent

