



REPUBLIC OF KENYA



**Mbogo v Republic (Criminal Petition E002 of 2024)  
[2025] KEHC 5956 (KLR) (Crim) (12 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ISIOLO  
CRIMINAL  
CRIMINAL PETITION E002 OF 2024  
SC CHIRCHIR, J  
MAY 12, 2025**

**BETWEEN**

**SILAS MBOGO ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Through the petition dated 24.4.2023 the petitioner seeks for a declaration that “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 premised on Articles 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* and Section 216 and 329 of the *Criminal Procedure Code*.
3. The petitioner states that he was charged and convicted of the offence of robbery with violence at the Magistrate Court at Isiolo , in criminal case No. 540 of 2011 and sentenced to death. He appealed to the high court in Meru and the high court dismissed the Appeal, on both conviction and sentence.
4. He has brought this petition challenging the constitutional validity of the death sentence. He states that indeed, while dismissing the Appeal, the Judge in Meru High court indicated that the Applicant was at liberty to petition the court seeking for the aforesaid declaration
5. It is the petitioner’s case that section 296(2) of the *Penal Code* deprives the Court of judicial discretion not to impose death sentence in appropriate cases, after receiving such evidence as it deems fit in terms of the provisions section 216 and 329 of the *Criminal Procedure Code*. He further states that having



been convicted under section 296(2) of the penal code, he was entitled to benefit from the least severe form of punishment.

6. He has relied on the following decisions:
  - a). Francis Karioki Muruatetu & Ano vs R ( Supreme court PetitionNo. 15 &16 consolidated
  - b). Charles Kabwi Laibon vs DPP ( Meru High court petitionNo. E019 of 2022)
  - c). Taratisio Mutembei vs DPP( Meru High court petition No. E026 of 2023
7. The petition proceeded by way of written submissions.

#### **Petitioner's submissions**

8. The petitioner submits that pursuant to Articles 23(1) ,160(1) and 165(3) (b) of *the constitution*, this court is clothed with the jurisdiction to hear and determine any petition on infringement of rights . Consequently, he argues, this court has jurisdiction to determine the constitutional validity of the death sentence as provided for under section 296(2) of the penal code.
9. It is further submitted that section 296(2) of the *Penal Code* does not conform to the principles of fair Trial which is an absolute right under Article 25( c ) 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 section 296(2) ignores the fact that not all acts of robbery with violence follow a particular pattern as circumstances of each case vary. He contends 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; that it violates the right to dignity , subject one to inhuman and degrading treatment, and denies a convict from benefiting from a less severe form of a punishment. That 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 the principle of fair trial must be accorded to sentencing too.
13. It is finally submitted that the rationale in the Muruatetu case (supra) should be applied in determining the constitutional validity of section 296(2) of the penal code.

#### **Respondent's submissions**

14. It is the respondent's submissions that the petitioner's sentence has been commuted to life sentence by the president ; that the commutation was done under gazette Notice No. 9566 of 19/7/2023, and consequently the petitioner is no longer under death sentence as alleged.
15. It is further submitted that the Muruatetu Case relied on (supra), was only applicable to the offence of murder under section 203 as read with section 204 of the *Penal Code*. That in any case, the decision of the supreme court did not nullify mandatory or minimum sentences or death sentence as it applies to other capital offences.
16. It is finally submitted that the petitioner herein was deserving a death sentence as there was evidence that crude weapons were used during the robbery.



## Determination

17. I have considered the petition and the submissions of the parties and in my view the following issues arise for determination:
- a). Whether the petition is competent
  - b). Whether the prayers sought should be allowed.

## Whether the Petition is competent

18. In *Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR), the supreme court declared that the mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is unconstitutional. The court however clarified that the declaration did not disturb the validity of the death sentence as contemplated under article 26(3) of *the Constitution*.
19. In what has come to be commonly referred to as “Muruatetu 2”, that is *Muruatetu & another Versus Republic Katiba institute & 4 others (Amicus Curiae)* (2021) KESC 31 (KLR) (Directions) The supreme court gave directions 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.....”
20. The petitioner has stated, correctly, that his petition is informed by the aforesaid directions.
21. However, the respondent has submitted that contrary to his assertion, the petitioner is no longer under death sentence as his sentence has since been commuted to life imprisonment by the president. In view of this submission, I will first proceed to determine the competency of the petition.
22. On 21/7/2023 Gazette Notice number 9566 dated 19/7/2023 was published. It stated: “it is notified to 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 commuted the death sentence imposed on every capital offender as at 21.11.2022 to a Life Sentence”. (Emphasis added)
23. The present petition was filed on 4/9/2024 while the above stated gazette Notice was issued on 19/7/2023. The petitioner was sentenced by the trial court on 9/8/2012. Consequently as at 21/11/2022 he was already under death sentence and hence among the convicts referred to in the gazette Notice 9566 of 19/7/2023. Therefore am in agreement with the respondent that pursuant to the above stated gazette Notice, the petitioner was no longer under death sentence but life imprisonment.
24. The president was exercising a constitutional mandate under Article 133 of *the constitution*. That exercise effectively nullified the death sentence that had been imposed on the petitioner.
25. The petition was therefore misplaced, since at the time it was filed, the petitioner was not under death sentence. It is hereby struck off.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 12<sup>TH</sup> DAY OF MAY, 2025.**



**S. CHIRCHIR**

**JUDGE.**

In the presence of:

Kashane Gollo- Court Assistant

Silas Mbogo – The Applicant

Mr. Ngetich- For the Respondent

