Njogu v Director of Public Prosecutions (Miscellaneous Criminal Application 101 of 2018) [2025] KEHC 6545 (KLR) (20 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

MISCELLANEOUS CRIMINAL APPLICATION 101 OF 2018

CM KARIUKI, J

MAY 20, 2025

IN THE MATTER OF ARTICLE 22(1), 23(1), 165, 163(7) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SUPREME COURT JUDGMENT PETITION NO 15 OF 20I5 AT NAIROBI FRANCIS KARIOKO MURUATETU AND ANOTHER.

AND

IN THE MATTER OF COURT OF APPEAL NO. 100 OF 2OO9 AT NAKURU

AND

IN THE MATTER OF HIGH COURT AT NAKURU CRIMINAL APPEAL, NO 65 OF 2007 AND

IN THE MATTER OF CM'S COURT NAROK CRIMINAL APPEAL NUMBER 6I5 OF 2007

BETWEEN

JAMES MWAURA NJOGU ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

RULING

20/05/2025

1. Before this court for determination is an undated notice of motion filed on 19/01/2018 seeking rehearing of the sentence in criminal case no. 615 of 2007 and for this court to consider his mitigation in respect of the death sentence meted out to him at the trial court.

The background

2. The applicant, with two others, was charged with two counts in criminal case No. 615 of 2007. Count I was the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. In count II, the applicant was charged with the offence of being in possession of Narcotic drugs contrary to section 3(l) of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 1994* as read with section 2(a) of the same Act.

3. The particulars for count I are that on the 3rd day of June, 2004, at Ntulele area in Narok District of the Rift Valley province, jointly robbed Francis Wagate Gichuki of a motor vehicle Registration No. KAR 206N make Toyota SE saloon, a Nokia 3310 mobile cellphone, a driving licence, one national identity card, one handkerchief, and cash Kshs 2500/: all valued at Kshs 620,000/= and at or immediately before or after the time of such robbery, used actual violence to the said Francis Wagate Gichuki.

4. In count II, the particulars were that on the 3rd day of June, 2004, at about 9.00 pm at Mahi Mahiu police roadblock in Nakuru district of the Rift valley province, was found in possession of a narcotic drug, namely cannabis sativa (Bhang) to wit one roll valued at kshs 20 in contravention of the same Act.

5. In respect to count I, the appellants were sentenced to death by the trial court

6. The applicant herein, being aggrieved by the decision of the trial court, lodged an appeal at Nakuru high Court and Court of Appeal against both conviction and sentence vide criminal appeals No 65 of 2007 and 100 of 2009 respectively. The appeals lodged in both courts were dismissed and the findings of the lower court was upheld by both the high court and the court of appeal.

7. Consequently, the applicant herein filed an application for review of sentence vide miscellaneous application number 143/2018 at Nakuru High Court, which application was later on transferred to Narok Law Courts and was given a new file number, which is miscellaneous number 101/2018.

Directions of the court

8. The application was canvassed by way of a written submission.

The applicant's submissions.

9. The applicant submitted that this court has jurisdiction to adjudicate upon this sentence rehearing. The applicant relied on article 165(3)(a) of *the Constitution*, and Gechu V Republic.

10. The applicant submitted that the sentence passed against the applicant was of a mandatory nature, which is in clear violation of *the constitution*. The applicant relied on Manyeso v Republic, Oprodi Peter Omukanga v Republic, Gechu v Republic, Jin Michael Kathewa Laichena & another v Republic [2018] eKLR, and Michael Kalwa v Republic.

11. The applicant urged this court to take into consideration that he is remorseful and he has undergone rehabilitation in the prison facilities. The applicant relied on State v Warren Vorster

The Respondent's submissions.

12. The respondent submitted that the death sentence imposed on the applicant was lawful and not unconstitutional. The respondent contends that the trial magistrate took into consideration the appellant's mitigation, nature, and circumstances of the offence prior to passing the death sentence, which was within the law. Further, the Supreme Court has clarified the applicability of its decision to offences other than murder. The death sentence remains in the penal code as the same has not been

repealed. Also, article 26 of *the constitution* is clear that the death sentence, when it is prescribed by law, is not unconstitutional. The respondent relied on section 296(2) of the *Penal Code*, Francis Karioko Muruatetu & another v Republic [20171 eKLR, Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR.

13. The respondent submitted that the applicant herein does not meet any of the aforementioned requirements to be considered before allowing the application for resentencing. The applicant is not remorseful of the offense he committed, no report has been furnished to this honourable court from the prison department indicating that the applicant has reformed, and that he is ready to be reintegrated into society. The applicant also did not plead guilty to the charges, among other reasons. The respondent relied on Francis Karioko Muruatctu & Another vs. Republic, Petition No. l5 of 2015

14. The respondent submitted that though the High Court has unlimited original jurisdiction in Criminal and Civil matters under Article 165(3)(a) of *the Constitution*, holding it that it encompasses revisiting issues dealt with by the same Court and a step higher by the Court of Appeal, is equivalent to according the High Court cosmic jurisdiction of which it doesn't have. Litigation, just like everything else, bad or good, has an end.

Analysis And Determination

15. This court has considered the application, its supporting affidavit, and the respective parties' submissions.

16. Two issues arise for determination.

    i. Whether this court has jurisdiction to determine this matter.

    ii. Whether the Applicant's plea for resentencing is merited.

17. It is not in dispute that the Applicant was charged, convicted, and sentenced to suffer death for the offence of Robbery with violence contrary to Section 296(2) of the *Penal Code*. His sentence was later commuted to a life sentence.

18. The Applicant seeks review of his sentence on the ground that the mandatory death penalty is unconstitutional.

19. The issue of mandatory sentences was addressed in Francis Karioko Muruatetu & others v Republic (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the *Penal Code* was unconstitutional. The Court took the view that:

> " Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of *the Constitution*; an absolute right."

20. In clarifying the import case of its earlier decision, in Muruatetu 2, the Supreme Court gave the following guidelines:

> "18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
>
> i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the *Penal Code*.
>
> ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
>
> iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
>
> iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
>
> v. In re-sentencing hearing, the court must record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code* as well as those of the victim before deciding on the suitable sentence.
>
> vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
>
> vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
>
> a. Age of the offender
>
> b. Being a first offender
>
> c. Whether the offender pleaded guilty.
>
> d. Character and record of the offender
>
> e. Commission of the offence in respect of gender based violence.
>
> f. The manner in which the offence was committed on the victim.
>
> g. The physical and psychological effect of the offence on the victim's family.
>
> h. Remorsefulness of the offender.
>
> i. Possibility of reform and social adaptation of the offender.
>
> j. Any other factor the court considers relevant.

k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in Muruatetu."

21. The Supreme Court recently in the Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curiae) delivered on 12th July,2024 with regard to the mandatory death sentence in offences other than murder held as follows: -

"(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows:

"10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

"(48 Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be SC Petition No. E018 of 2023 26 regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right". Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* , and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases

11. The ratio decidendi in the decision was summarized as follows:

"69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment". We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum

sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.

.....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

15. 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."

22. In light of the above, it is clear that Muruatetu's is inapplicable to the offence herein.

23. The above decision is binding on this court and as such, I hold that this court is bereft of the necessary jurisdiction to determine this matter, and the court makes the orders;

    i. The matter is hereby dismissed.

    ii. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 20TH DAY OF MAY, 2025.

.....

CHARLES KARIUKI

JUDGE