



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gold v Republic (Constitutional Petition E002 of 2025)  
[2025] KEHC 7538 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7538 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKADARA  
CONSTITUTIONAL PETITION E002 OF 2025**

**J WAKIAGA, J**

**JUNE 4, 2025**

**BETWEEN**

**GACHECHE PATIENCE GOLD ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner herein is currently serving a custodial sentence following her conviction and sentence for the offence of trafficking in narcotic drugs and in the petition herein she alleges that she has since demonstrated significant rehabilitation and reformation and therefore her continued incarceration violates her constitutional rights and that the sentence should be reviewed and commuted.
2. It was contended that her rights under Articles 27, 28 and 50 of *the constitution* had been violated and that the court ought to exercise its revisionary powers to review and mitigate the sentence imposed considering the manifest interest of justice.
3. The petitioner sought the following prayers:
  - A. A declaration that the continued incarceration of the petitioner under the current sentence is unconstitutional and violates the rights under Articles 27,28, 29 and 50 of *the constitution*
  - B. An order commuting the petitioner’s sentence to a term that reflects the rehabilitative strides made by the petitioner
  - C. Any other order that the court may deem fit to grant
4. This petition was initially filed at the High Court Registry at Kibera before being transferred to this registry upon its establishment and the court gave directions that the same be heard by way of written submissions .



## Submissions

5. The petitioner filed written submission which were highlighted by Ms Kamau while the respondent made oral submissions through Ms Kariuki
6. On behalf of the Petitioner, it was submitted that this court has jurisdiction under Article 165(3) (b) of *the Constitution* as read with the right to fair hearing under Article 50 thereof. It was contended that where a lesser punishment has changed between the time of sentencing and appeal, a convict can appeal against the sentence or seek resentence hearing in line with the decision of the Supreme Court in Francis Karioko Muratetu & another v Republic [2017] e KLR and that this being a case of trafficking then principles set out in the Muratetu case are applicable.
7. In support of this contention reference was made to the case of Gichobi v Republic [2023] KEHC 25107(KLR) in which the court held that IT had jurisdiction to review sentence under the Muratetu case principles. It was contended that the mandatory minimum sentences under narcotic drugs and psychotropic substances Control Act was unconstitutional since it does not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by the circumstances of the case.
8. It was contended further that sentence was a matter within the discretion of the trial court as was stated in S v Mchunu & another {AR24/11}2012 ZAKZPHC 6 where the court held that the issue of sentencing is one which vest a discretion in the trial court which should consider what fair and appropriate sentence should be.
9. Reference was made to the South African Case of S v Mofokeng 1999(1) SACR 502 where the court stated that for the legislature to have imposed minimum sentences severely curtailing the discretion of the court, offends against the fundamental constitutional principles of separation of power and tends to undermine the independence of the judiciary .
10. Further reference was made to Maingi & 5 others v DPP [2022] KEHC 13118(KLR) where the court applied the Muratetu principles to mandatory minimum sentence and the Court of Appeal in Daniel Kipkosgei Letting v Republic [2021] eKLR where the court considered the appellant mitigation on record and substituted the sentence.
11. It was submitted that the petitioner was convicted and sentenced to pay a fine of Kshs 15,000,000 in default one-year imprisonment in line with section 28 (2) of the *Penal Code* and in addition to serve 15 years in jail. It was submitted that the sentence did not take cognizance of the petitioner sworn testimony of innocence and her mitigation. It was contended that her sentence was torturous discriminatory and denied her chance to reform contrary to the purpose of sentence of imprisonment.
12. It was contended that sentencing was at the discretion of the court and that in Carolyne Auma Majabu v Republic [2014] eKLR the Court of Appeal stated that the use of the word liable in section 4(a) of the Narcotic Drugs and Psychotropic Act merely gives the likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentences with maximum limit being indicated and that provisions which provides for mandatory sentences compromise the court discretion and are the exception rather than the rule.
13. The court was urged to review the sentence
14. On behalf of the respondent Mr Kariuki submitted that the petitioner had filed an appeal to this court being Criminal Appeal No E196 of 2019 which was dismissed and that this court now lacks jurisdiction. It was contended that under Article 165 (3) (b) of *the constitution* the court can interpret



constitutional issues but that though framed as a constitutional petition there were no constitutional issues raised and that a party raising constitutional issues ought to specifically state the act or omission constituting violation as was stated in the Anarita Karimi Njeru case.

15. It was contended that the sentence was proper and that the same was an exercise of the trial court which may only be if the same was exercised in error as was stated in the case of Shadrack Kipchoge Kogo v R Criminal Appeal no 252 of 2022.

### **Determination**

16. From the petition and submissions herein, the following issues have been identified for determination :
  - a. Whether the petition qualify as a constitutional petition
  - b. Whether this court has jurisdiction to hear the same
  - c. Whether the petitioner has proved violation .
17. I will begin with the issue of jurisdiction as it is trite law the jurisdiction is everything and where the court finds that it lacks jurisdiction the same ought as a matter of right and good order to fold its wings .
18. In this matter the petitioner was convicted and sentenced in Criminal case no 136 of 2017 JKIA and being dissatisfied by the said conviction and sentence she lodges an appeal to this court at the High Court criminal registry at Milimani being criminal appeal no E 0196 of 2019 where ibn the appellant had opportunity to raise the issuers which she has now brought before the same court but clothed as a constitutional petition and which appeal was dismissed on merit.
19. The only avenue available to the petitioner herein was to file an appeal to the Court of Appeal. I take the view that to hear this matter will be akin to sitting on appeal from this courts decision or reviewing the same through backdoor.
20. A reading of the petition herein confirms that the petitioner is only seeking sentence review but through back door. Resentencing as a principle was introduced by the Supreme Court in the Muratetu case and the same has now caused untold confusion in the criminal justice system in Kenya, with parties filing the same as either application for revision, review and or constitutional petition as in this case.
21. I therefore find and hold that this court has no jurisdiction to entertain the petition herein, the petition having approached this court on appeal and any constitutional issues, though the Supreme Court has warned against this approach, would have been raised therein, so as not to fall into the trap of resjudicata , which I know find this petition is.
22. On the issue of whether the same is a constitutional petition in strict sense, as submitted by the respondent, the petitioner has not made out any alleged violation save for the fact that the same believe honestly but mistaken that the Supreme Court had declared all mandatory sentence unconstitutional which they have since clarified in Muratetu two and as such the petition herein cannot stand.
23. *The constitution* of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules 2013 (Mutunga Rules) provides for clarity of pleadings and the content of the petition which includes the provision of *the constitution* violated, the nature of the injury caused or likely to be caused and the relief sought. This position was reinstated by the Supreme Court in the Communication commission of Kenya & 5 others v Royal Media services Limited & 5 others [2014] e KLR where it stated that a party invoking Article 22 has to show the right said to be infringed as well as the basis of his or her grievances .



24. What constitute a constitutional issue was stated in the South African case of Fredrick & others vs MEC for Education and Training, Eastern Cape & others (2002) 23 ILJ 81(CC) must include disputes as to whether any law or conduct is inconsistent with *the constitution*, as well as issues concerning the status powers and functions of the organ of state, the interpretation , application and upholding of *the constitution* , the question of the interpretation of any legislation among others.
25. A look at the prayers sought in the petition herein clearly shows that the same fall short of ticking any of the boxes herein above stated and that her best recourse now that she is serving a lawful sentence of the court as confirmed by this court on appeal is to appeal to the Executive through the Power of Mercy Committee , a jurisdiction which this court is not willing to exercise, in as much as some courts have not resisted the temptation to so do.
26. I therefore find no merit on the petition herein which I hereby dismiss with no order as cost

**DATED SIGNED AND DELIVERED AT MAKADARA THIS 4<sup>th</sup> DAY OF JUNE 2025**

**J.WAKIAGA**

**JUDGE**

In the presence of

