



**Muiruri & another v Republic (Criminal Petition E002 of 2023)
[2025] KEHC 10425 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL PETITION E002 OF 2023
TW OUYA, J
JULY 16, 2025**

BETWEEN

SAMUEL MWAURA MUIRURI 1ST PETITIONER

STEPHEN NYAMU KIOI 2ND PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. This ruling is in respect to the applicants' undated Notice of Motion filed before this court on 9th August, 2023. Prayer I of the motion is now spent, and what is pending this court's determination are the following prayers, which I hereunder replicate as follows:
 - i. That this court be pleased to invoke the provisions of Section 329 of the Criminal Procedure Code to take the post-conviction evidence to review and determine the appropriate sentence in this matter, while exercising its jurisdiction under Article 65 (3) (a) of the Constitution as read with section 364 (1) (b) of the Criminal Procedure Code to alter the sentence imposed to enable the petitioner be of value after serving his sentence considering he has been in custody from the date of arrest;
 - ii. That this court be pleased to exercise its inherent unlimited jurisdiction to order the taking of post-conviction evidence by dint of section 329 of the Criminal Procedure Code to satisfy itself in Cr. Case no. 1053 of 1995 at Murang'a law court which is harsh and excessive considering the time already served from the date of arrest;
 - iii. That this court be pleased to order the taking of post-conviction evidence for the petitioner to be considered for alternative sentence in cr. Case 1053 of 1995 at Murang'a law court for equal benefit and protection of law with the objective of restorative justice to all parties, considering



the time already served under the orders of the court could be sufficient for retribution, restoration and rehabilitation if practically considered against time.

2. In the grounds premising the Motion and, in the depositions made in the supporting affidavit sworn by Samuel Mwaura Muiruri and Stephen Nyamu Kioi, the 1st and 2nd applicants respectively, the applicants alleged that they were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal code and on 6th of June, 2000, they were sentenced to death.
3. They contended that the purpose of sentencing is retribution, rehabilitation and restoration, as such, this court should, by dint of section 329 of the Criminal Procedure Code (CPC), order taking of evidence so as to satisfy itself on the appropriate sentence to impose on them in this case, considering also the time they have already served and their age amongst other mitigating factors.
4. The applicants further contended that they have been in custody from the date of arrest which was on 27th December 1994 to date, as such, this court should review the indefinite life sentence imposed on them and substitute it instead with a lenient alternative sentence.
5. The application was opposed by the respondent vide a replying affidavit sworn on 20th September, 2023, by Ms. Ann Penny Gakumu, Senior Principal Prosecution counsel. In the Affidavit, Ms. Gakumu raised a preliminary objection that this court lacks the jurisdiction to hear and determine the instant application and petition as this court already pronounced itself on the matter and became functus officio.
6. Ms. Gakumu contended that should this court determine that it has the jurisdiction to hear and determine the suit, then the court should consider the aggravating circumstances of the case before making a determination on re-sentence.
7. The respondent further contended that the sentence imposed on the applicants for the offence of robbery with violence and rape, need no interference; and that the learned trial magistrate and judges of the high court and court of appeal did not act on wrong principles, and neither did they overlook any material factors during the appeal processes to warrant further review or alteration by this court.
8. The respondent averred that the law and the court precedents have not outlawed the mandatory sentences or declared them unconstitutional, as such, this court should dismiss the instant application.
9. The application was canvassed by way of written submission following the directions issued by this court on 20th September, 2023. The applicants' written submissions were filed on the 27th of October, 2023, while that of the respondent dated 7th May, 2025 was filed by Mr. Pithon Mwangi Gachanja Principal Prosecution Counsel.
10. On my part, I have duly considered the application, the rival written submissions made by the parties in support of and opposition of the application; and I find that the main issue for determination is whether the instant application is merited.
11. Before delving into the above issue isolated for determination, I would first like to determine whether the preliminary objection raised by the respondent that this court lacks the jurisdiction to hear and determine this suit, is sustainable, as the respondent's preliminary objection seeks to oust the entire suit filed by the applicants.
12. What constitutes a Preliminary Objection, was addressed in the celebrated court of appeal case of Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd (1969); as follows: "A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.



Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. In this case, the respondent’s Preliminary Objection is anchored on the grounds that this court lacks the jurisdiction to entertain the present application, as this court, differently constituted, already discharged its mandate as regards the sentence imposed on the applicants and it therefore became *functus officio*.
14. Being that the respondent in his preliminary objection is challenging the jurisdiction of this court, I am satisfied that it raises a pure point of law capable of disposing of the suit.
15. As to whether the preliminary objection is merited; it is evident from the records of the court, that applicants were convicted by the Principal Magistrate court in Murang’a in count I, with the offence of Robbery contrary to section 296 (1) of the *Penal Code* and in count II, with the offence of rape, and thereafter sentenced to serve a term of eight (8) years imprisonment for the said offence.
16. The applicants were aggrieved by the said conviction and sentence and appealed to the high court at Nyeri, where on appeal they were convicted of a greater offence of robbery with violence contrary to section 296 (2) of the *Penal Code*, and their conviction for the offence of rape upheld. The high court then enhanced their sentence to death. The applicants thereafter, being dissatisfied with the high court’s decision, filed a second appeal to the Court of Appeal, and the said court upheld their sentence. The applicants have now come to this court seeking resentencing after exhausting all their channels of appeal.
17. In my considered view, this court does not have the jurisdiction to entertain or handle the present application on its merits; I say so because, given that the applicants have exhausted their channels of appeal, considering the application on its merit, will be tantamount to disregarding the hierarchy of the courts and would be seen as supervising a superior court, which jurisdiction this court does not have.
18. Furthermore, this court, differently constituted, having addressed itself on appeal, on the sentence meted out on the applicants, became *functus officio* and therefore lacks the jurisdiction to handle the said application.
19. It is trite that jurisdiction is everything, and where the court lacks jurisdiction, it has no power to make one more step on the matter and must instead down its tools.
20. This principle was established in the Court of Appeal case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989] eKLR; where the Court expressed itself as follows: “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.”
21. Given the foregoing, I am of the considered view that the respondent’s preliminary objection has merit and is hereby allowed. The applicants’ application and petition are hereby dismissed.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH JULY 2025.

HON. T. W. OUYA

JUDGE

For 1st Petitioner.....No Appearance

For 2nd Petitioner.....Rutto

For Respondent.....P.Mwangi

Court Assistant.....Brian

