



**Robe & another v Republic (Criminal Revision E231 of 2024 & Miscellaneous Criminal Application E093 of 2024 (Consolidated)) [2025] KEHC 9611 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9611 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E231 OF 2024 & MISCELLANEOUS  
CRIMINAL APPLICATION E093 OF 2024 (CONSOLIDATED)**

**FN MUCHEMI, J**

**JULY 3, 2025**

**BETWEEN**

**STEPHEN KIMANI ROBE ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH MUIGAI KIMANI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The applications for determination are dated 24<sup>th</sup> October 2024 and 13<sup>th</sup> November 2024 in which the applicants seek to have their sentence reviewed under Section 35 of the [Penal Code](#) to the effect that the entire duration the applicants have served in prison be deemed as sufficient punishment.
2. The applicants state that they were convicted by Thika Chief Magistrate, in Criminal Case No. 3685 of 2010 with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#) and were sentenced to death. The 1<sup>st</sup> applicant appealed to the High Court in Nairobi in Criminal Appeal No. 232 of 2012 and the appeal was dismissed. The 1<sup>st</sup> applicant further states that he appealed to the Court of Appeal but later withdrew the appeal and filed for resentencing at Thika Magistrates Court whereby his death sentence was reduced to ten 10 years imprisonment on 25<sup>th</sup> July 2019 without considering the time of 2 years and 16 days he spent in custody. Thus, the 1<sup>st</sup> applicant invokes Section 333(2) of the [Criminal Procedure Code](#) and seeks to have the time he spent in custody to be taken into consideration.
3. The 2<sup>nd</sup> applicant states that he appealed to the High Court in Nairobi in Criminal Appeal No. 239 of 2012 which was dismissed on 25<sup>th</sup> May 2017. He then applied for resentencing at the Thika



Magistrates Court whereby the death sentence was set aside and his sentence reduced to ten (10) years imprisonment. The 2<sup>nd</sup> applicant states that he has been in prison for 15 years and seeks to be discharged for having served sufficient time.

4. The 2<sup>nd</sup> applicant states that he is 54 years old and he has undertaken rehabilitation programs which have transformed him.
5. The respondent filed grounds of opposition dated 26<sup>th</sup> May 2025 and argues that a resentence hearing was done at Thika Chief Magistrate Court and the life sentence reduced to 10 years considering the time the applicants spent in custody. Thus all the pertinent issues of sentence have been fully canvassed through the resentencing hearing. It is further argued that the sentence imposed by the trial court was proper and legal for the court considered the aggravating and mitigating circumstances.
6. The respondent further states that the applicants are just testing the waters and trying their luck thus forum shopping which actions should be discouraged to deter other potential applicants with similar applications.
7. Parties put in written submissions.

### **The Applicants Submissions.**

8. The applicants rely on Section 35 of the [Penal Code](#) and the cases of Martin Bahati Makoha & Another vs Republic (2018) eKLR and Paul Eyanai Nakwanga vs Republic (2019) eKLR and submit that they have been incarcerated for 15 years and they applied for resentencing in the Thika Magistrates court after being in custody for 8 years. They thus urge the court to appreciate the entire time they have already served as sufficient and award them total discharge.
9. The applicants further rely on the case of Sebastian Okwero Mrefu vs Republic Petition No. 151 of 2012 Kakamega and submit that they are first offenders and are currently rehabilitated and are remorseful. Thus they seek the leniency of the court.

### **The Respondent's Submissions**

10. The respondent reiterates the contents of her affidavits and submits that the instant applications are an abuse of the court process and ought to be dismissed.

### **The Law**

11. This court is empowered by Article 165(6) of the [Constitution](#) of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

12. The applicant has come to this Honourable court by way of review provided for under Article 50 of the [Constitution](#). It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.



13. In the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011, it was stated:-

“ A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law.

It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

14. The applicants herein were convicted for the offence of robbery with violence by the trial court in Thika CM Criminal Case No. 3685 of 2010 and sentenced to death. The applicants appealed the decision in the High Court in Nairobi in Criminal Appeal No. 236 of 2012 whereas the appeal was dismissed on 29<sup>th</sup> November 2013 and the conviction and sentence upheld. The applicants then filed an application for resentencing in the magistrate’s court in Thika after being in custody for eight (8) years and the trial magistrate granted them to serve a further ten (10) years in prison on 25<sup>th</sup> July 2019.

15. Article 50(2)(q) of the Constitution is of relevance as discussed above. It provides: -

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

16. The constitutional provision is clear that review can only be done by a court of higher jurisdiction. That notwithstanding, the provision prohibits review where a convict has gone through the appeal process like the appellants have done. Additionally, the applicants have already gone through resentencing in the lower court and their sentences were reduced to ten years.

17. The applicants relied on Section 35 of the Penal Code which provides for discharge by the trial court of a convicted person either conditionally or unconditionally. This Section is applicable to a convicted person who is yet to be sentenced. The provision is not applicable after a person has been convicted. In the case of the applicants, their sentences have been reviewed in resentencing applications before the Magistrates courts. The death sentences were set aside and substituted with terms of imprisonment for ten (10) years. As such, Section 35 of the Penal Code is not applicable in the circumstances.

18. The applicants in my view are out to have a 3<sup>rd</sup> bite of their cherry before this court which is not supported by the law. This is a waste of precious judicial time which is unacceptable and should not be entertained. Consequently, I find these applications are misconceived, incompetent and an abuse of the court process.

19. Consequently, these applicants are hereby struck out.

20. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3<sup>RD</sup> DAY OF JULY 2025.**

**F. MUCHEMI**

**JUDGE**

