



REPUBLIC OF KENYA



**Swati v Republic (Criminal Petition E010 of 2023)
[2025] KEHC 11451 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL PETITION E010 OF 2023**

**AC BETT, J
JULY 29, 2025**

BETWEEN

JOHN AMARERE SWATI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner John Amarere Swati was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal code in Kakamega CMC Criminal Case No. 1161 of 2004 and as a consequence thereof, sentenced to death as stipulated by the law.
2. Aggrieved by the conviction and sentence, the Petitioner lodged an appeal vide Kakamega HCCR. Appeal No. 19 of 2005. In a judgement delivered by a two-Judge Bench on 18th July 2014, the Petitioner's appeal was dismissed in its entirety. See *John Amarere Swati v. R* [2012] eKLR.
3. Meanwhile, the Petitioner had filed an application dated 3rd October 2012 vide Kakamega HCCR. Miscellaneous Application No. 141 of 2012 seeking a retrial under Article 50 (6) and 165 of *the Constitution* on the grounds that Section 200 of the *Criminal Procedure Code* had not been complied with during his trial in the Magistrate's court therefore resulting in a miscarriage of justice. In a brief ruling delivered on 31st January 2013, Chitembwe, J. dismissed the application for want of merit. See *John Amarere Swati v. Republic* [2013] KEHC 5212 (KLR).
4. The Petitioner was dissatisfied with the decisions of the High Court and lodged an appeal before the Court of Appeal in which he challenged the conviction. The Court of Appeal considered the appeal and dismissed it. See *John Amarere Swati v. Republic* [2014] KECA 19 (KLR).
5. Not being one to give up, the Petitioner lodged Criminal Petition No. 49 of 2019 on 20th August 2021. The Petition was predicated on the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR and in it, the Petitioner was seeking review of the death sentence



imposed upon him by the trial court. In a succinct ruling delivered by Musyoka, J. on 15th November 2021, the Petition was struck out for being incompetent. See [John Amarere Swati v. Republic](#) [2021] KEHC 2213 (KLR).

6. Undeterred, the Petitioner filed the present petition in which he prayed for review of the death sentence imposed upon him by the trial court and affirmed by the High Court and the Court of Appeal to a definite sentence pursuant to Article 50 (2) (e) and (g) of [the Constitution](#). The Petitioner also prayed that should the eventual computation result in a balance of three (3) years or less, the High Court do grant him probation for the remainder of the sentence.
7. In his submissions, the Petitioner relied on the case of [Omukanga v. Republic](#) [2023] KECA 430 (KLR). He further relied on the case of [Manyeso v. Republic](#) [2023] KECA 827 (KLR) and the case of [Boniface Keya v. Republic](#), Misc. Criminal Application No. E007 of 2023. According to the Petitioner, this court should be bound by the decision of the Court of Appeal in [Manyeso v. Republic](#) (*supra*) under the principles of stare decisis.
8. On its part, the Republic submitted that this being a Constitutional Petition, the court is seized with jurisdiction to hear and determine the same. Relying on the case of [James Kariuki Wangana v. Republic](#) [2018] eKLR, the Republic urged the court to consider the circumstances under which the offence was committed and to review the sentence and substitute it with a term of forty five (45) years.
9. It cannot be gainsaid that the death penalty is still prescribed in law. However, the mandatory nature of the death sentence in respect to certain offences including robbery with violence contrary to Section 296 (2) of the [Penal Code](#) has been the subject to vigorous challenges after the Supreme Court delivered its directions in [Muruatetu & Another v. Republic, Katiba Institute & 4 others](#) (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) on 6th July 2021 in which it stated:-

“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.”

10. In [William Okungu Kittiny v. Republic](#) [2018] eKLR, the Court of Appeal held that the principles set out in the Muruatetu case should apply to Section 296 (2) of the [Penal Code](#) and rendered itself thus:-

“9. From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the [Penal Code](#). Thus, the sentence of death under Section 296 (2) and 297 (2) of the [Penal Code](#) is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the [Penal Code](#) provides for mandatory death sentence the Sections are inconsistent with Constitution. The judgment of Chemitei, J., appealed from is four years earlier than the decision of the Supreme Court. That decision is in conformity with the decision of the Supreme Court. Thus, the finding of Chemitei, J., that death penalty per-se under Section 204 of the [Penal Code](#) is not inconsistent with [the Constitution](#) has been affirmed by the Supreme Court. By parity of reasoning the death penalty under Sections 296 (2) and 297 (2) is not inconsistent with



the Constitution as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296 (2) and 297 (2) of the Penal Code on the death penalty fails.

10. By paragraph 111 of the judgment, the Supreme Court allowed sentence re-hearing only for the two petitioners in the matter before it and said:

“In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidance for the disposal of the same. The Attorney General is directed to urgently set up a frame work to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence which is similar to that of the petitioners in this case.”

11. Although the appellants’ appeal was dismissed by the Court of Appeal on 20th June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.”

11. The position of the court in regard to Section 296 (2) of the Penal Code and the death sentence was further elucidated by the Court of Appeal in Omukanga v. Republic (*supra*) held that:-

“ 31. Even though in its 2021 directions in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the Supreme Court limited the applicability of its decision in Francis Karioko Muruatetu & another (*supra*) to the death sentence under section 204 of the Penal Code; we have no doubt that the deficits identified by the Court in the above excerpt applies to all mandatory death sentences. For instance, the rights to fair trial and dignity as discussed by the Supreme Court above are inherent and applicable to all accused persons. In appreciating and ensuring the rights of all accused persons are preserved, a court within our jurisdiction would, of necessity, refer to the decision of the Supreme Court in a bid to protect and preserve these rights. Similarly, we adopt the opinion of the Supreme Court expressed above in dealing with the death sentence passed by the trial court and confirmed by the first appellate court in this matter, even though it was in respect of a robbery with violence case.

32. The trial court, going by the provisions of Section 296(2) of the Criminal Procedure Code, proceeded on the basis that it lacked discretion to render a different sentence other than the death sentence. It is on this basis that we accept the invitation by the appellant to intervene on the sentence. The provision to Section 333(2) of the Criminal Procedure Code requires the



court when passing sentence to take into account the period already spent in custody by the accused. The *Sentencing Policy Guidelines* issued by the Kenyan Judiciary in 2016 at paragraph 23.9 provides for how to conduct a balancing act between the aggravating and mitigating circumstances during sentencing. The appellant disclosed that his sentence has been commuted to life imprisonment. Paragraph 23.10 of the guidelines provide that even in instances calling for life sentence, courts should still endeavor to impose a sentence in keeping with the spirit of these guidelines, which includes the promotion of consistency and certainty in the sentencing process hence enhancing delivery of justice and promoting confidence in the judicial process.”

12. This court is bound by the doctrine of stare decisis as submitted by the Petitioner. Furthermore, Article 27 of *the Constitution* guarantees every person equality before the law and more specifically, equal protection and equal benefit of the law. In the premises, the Petitioner is entitled to have his mitigation heard and considered before an appropriate sentence can be imposed upon him.
13. From the trial court records, the Petitioner did not demonstrate remorse. He said that he had people who rely on him and asked for the court’s assistance.
14. This court called for a Probation Officer’s Report which was filed on 7th April 2025. I have considered the import of the report which indicates that both the victim and the community are in favour of a reduced term. Notwithstanding the positive report, the Petitioner continues to deny involvement in the offence, maintaining that he is innocent but demonstrating a willingness to comply with prison regulations.
15. From the evidence adduced during the trial, the Petitioner was armed and applied excessive force during the offence. PW3, PW5 and PW7 were badly injured. The Petitioner was acting with accomplices and attacked the responders who reacted to the complainant’s calls of distress hence the injuries. There is no doubt in my mind that the attack was vicious. After the offence, the Petitioner went into hiding and was arrested a year later.
16. In *Paul Njoroge Ndungu v. Republic* [2021] eKLR, the Appellant had his appeal against a conviction for the offence of robbery contrary to Section 296 (2) of the *Penal Code* dismissed but the sentence was reduced from the death penalty to thirty-five (35) years.
17. L. Njuguna J. allowed a Petition for review of a life sentence in the case of *Laban Nyaga Njue v. Republic* [2024] KEHC 2519 (KLR) and substituted it with a thirty (30) years sentence.
18. Having taken into account the mitigating and aggravating circumstances of the case, I allow the Petition, set aside the death sentence, and substitute the same with a term of thirty-five (35) years with effect from the date the Petitioner was first placed in custody as provided by Section 333 of the *Criminal Procedure Code*.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF JULY 2025.

A. C. BETT

JUDGE

In the presence of:

The Petitioner in person

Ms. Chala for the Respondent



Court Assistant: Polycap

