



REPUBLIC OF KENYA



**Wanjiru Alias Iso v Republic (Miscellaneous Criminal Application
E091 of 2024) [2025] KEHC 9475 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E091 OF 2024**

FN MUCHEMI, J

JULY 3, 2025

BETWEEN

ISAACK NJAU WANJIRU ALIAS ISO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 21st November 2024 seeks for review of sentence by imposing an alternative sentence and order to take post-conviction evidence for the court to be informed of the review sought.
2. The applicant states that was convicted by Thika Chief Magistrate, in Criminal Case No. 1864 of 2010 with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and was sentenced to death. The applicant states that he filed an appeal to High Court in Kiambu Criminal Appeal No. 106 of 2016 and the appeal was dismissed on 9th September 2017 for lack of merit.
3. The applicant relies on the decision in Petition No. 618 of 2010 *Joseph Kaberia & 11 Others v Republic* and argues that the mandatory death sentence is unconstitutional and asks the court to review the sentence and substitute it with a definite jail term. The applicant further prays that the court consider the time he has spent in prison for 14 years and give him an opportunity to re-integrate back to the society. The applicant further states that he is remorseful for the offence committed.
4. The respondent filed grounds of opposition and submissions dated 26th May 2025 and argues that the instant court became functus officio and has no jurisdiction to resentence since a court of concurrent or similar jurisdiction, that is, the Kiambu High Court vide Appeal No. 106 of 2016 upheld the sentence of the trial court. The respondent states that the death sentence was commuted to life sentence by the then President Uhuru Kenyatta. The respondent further argues that asking the current court to



resentence is equivalent to asking the court to sit as an appellate court against its own judgment and determine whether the appeal has chances of success.

5. The respondent states that the issue of sentence has been dealt with conclusively to the effect that the appeal on conviction and sentence had no merit in the High Court. The respondent further states that the applicant is just testing the waters and trying his lack thus forum shopping which actions should be discouraged to deter other potential applicants with similar applications.
6. Parties put in written submissions.

The Applicant's Submissions.

7. The applicant refers to Section 333(2) of the Criminal Procedure Code and the case of Abamad Abolfathi Mohamed & Another v Republic [2018] eKLR and urges the court to consider the period he spent in custody. The applicant further refers to the cases of Muruatetu I & II and submits that the mandatory death sentence is unconstitutional as declared by the Supreme Court and the cases of robbery with violence should be of no exception.

The Respondent's Submissions.

8. The respondent reiterates what she has deponed in her affidavit and submits that the instant application is an abuse of the court process and ought to be dismissed.

The Law

9. 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.

10. In the case of Samuel Kamau Macharia v 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.”

11. It is noted from the proceedings of the court below as well as in the High Court judgment that the applicant was a co-accused to one Isaac Njau Wanjiru. Both were convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and with a second count of rape contrary to Section 10 of the Sexual Offences Act in Thika CM Criminal Case No. 1864 of 2010 and sentenced to death. Both convicts filed an appeal in Kiambu High Court in Criminal Appeal No. 106 of 2016. The said appeal was dismissed for lack of merit on 9th October 2017. The honourable judge L. Mutende upheld the convictions and sentence for both appellants. The 1st appellant is not a party to this application.

12. It is imperative to look at the relevant law in regard to this application. Article 50(2)(q) of the Constitution is of relevance which 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. Article 50(2)(q) of the *Constitution* gives a convicted person two options and only one is available to them. The convicted person can choose to appeal against the judgment or apply for a review in a higher court. The applicant herein having filed an appeal has no legal basis of approaching this court for a review under Article 50(2)(q).
14. The applicant has relied on the Supreme Court petition of *Francis Karioko Muruatetu & Another* (2017) KLR arguing that the Supreme Court declared death sentence unconstitutional. This is not the correct position. The Supreme Court judgment is very clear that death sentence is still legal for capital offences, being under section 203 and 204 of the *Penal Code* and murder robbery with violence under Section 296(2) of the *Penal Code*. The Supreme Court declared unconstitutional the mandatory nature of the death sentences worded in the under Section 296(2) and Section 204 of the *Penal Code*. The court declared that courts have the discretion to impose any other sentence under the law for the offence of murder.

This was emphasized in Supreme Court *Muruatetu II*. The applicant is therefore, misguided on the law ad evolving jurisprudence and his petition must fail.
15. It is therefore, evident that this court has no power to review the judgment of the High Court Kiambu which upheld the conviction and sentence in the applicant's case.
16. This application is, therefore, misconceived, improperly before the court and an abuse of the court process.
17. The application is hereby struck out.
18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF JULY 2025.

F. MUCHEMI

JUDGE

