



REPUBLIC OF KENYA



**Kimotho v Republic (Criminal Revision E164 of 2024)
[2025] KEHC 12881 (KLR) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL REVISION E164 OF 2024
AK NDUNG’U, J
SEPTEMBER 19, 2025**

BETWEEN

JOSEPH NJOGU KIMOTHO PETITIONER

AND

REPUBLIC RESPONDENT

(Being a petition for mitigation in regards to re-sentencing following the declaration of the unconstitutionality of death sentence. arising from High Court Criminal Petition No. 5 of 2022 consolidated with Petition No. 6 of 2022 at Mombasa High Court)

RULING

1. The Petitioner, Joseph Njogu Kimotho moved this court pursuant to the High Court’s Judgment in *Shaban Salim Ramathan & Others v Republic* Petition No. 5 of 2022 as consolidated with Petition No. 6 of 2022 at Mombasa High Court, eKLR (6th February 2024) (judgment) (sic) seeking for sentence hearing only in this matter.
2. The factual background is that the Petitioner was tried and convicted for Robbery with violence and sentenced to death in Nanyuki Criminal case no 527 Of 2004. The sentence was commuted to life imprisonment as per the presidential decree in 2009.
3. The Petitioner’s appeals both at the High Court and at the Court of Appeal were dismissed.
4. The Petitioner relies on the decision in in *Shaban Salim Ramathan & Others v Republic* Petition No. 5 of 2022 as consolidated with Petition No. 6 of 2022 at Mombasa High Court, where the court declared the application of the mandatory nature of death sentence as being unconstitutional and directed that those affected may be presented before the respective sentencing courts for sentence re-hearing.



5. The petition elicited a preliminary objection from the Respondent premised on grounds that the court lacks jurisdiction to entertain, hear and/or determine the application and that the application is an abuse of the court process and should accordingly be dismissed.
6. The Preliminary objection was canvassed by way of written submissions.
7. I have had occasion to consider the Petition, the po, the submissions made and case law cited. It is not contested that the petitioner was tried and convicted for the offence of robbery with violence and sentenced to death which sentence has since been commuted to life imprisonment.
8. That he appealed to this court sitting at Nyeri which appeal was dismissed. A second appeal at the Court of Appeal was equally dismissed.
9. It is contended that the High Court’s judgement in *Shaban Salim Ramadhan & Others v Republic*, Petition No. 5 of 2022 as consolidated with Petition No. 6 of 2022 declared the application of the mandatory death sentence as unconstitutional and granted orders that those sentenced to death may be presented before the respective sentencing courts for sentence re-hearing.
10. The pertinent question for determination off the blocks is whether this court has jurisdiction to entertain, hear and determine this petition.
11. Jurisdiction is at the core of exercise of power by a court. The Court of Appeal put it plainly in the oft quoted case of *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] eKLR, thus:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
12. This position was expounded in the more recent case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Supreme Court succinctly 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
13. There has been a serious misapprehension of the law following the decision of the Supreme Court in *Muruatetu 1* which indeed prompted the Supreme Court to provide clarity in *Muruatetu 2* and, lately, in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) where the court has affirmed the legality of the mandatory sentences in the Sexual offences and which sentiments are applicable in my view to other offences where the legislature has prescribed the applicable sentences. The court stated;

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A



judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....

Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence”.

14. This finding applies mutatis mutandis to the sentence imposed on the Petitioner herein where the charge was one of robbery with violence.
15. Moreover, the Petitioner seeks to have this court review the orders of the Court of Appeal which was the last court that gave the orders obtaining in the matter. The law abhors the practice of a Judge sitting to review a Judgment or decision of another Judge of concurrent jurisdiction. This is because the rule of the thumb is that courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts of higher Jurisdiction than theirs. In the instant case, am invited to interfere with a sentence imposed by the court of appeal.
16. I associate myself with the holding of Ngugi J (as he then was) in *John Kagunda Kariuki v Republic* [2019] eKLR, where he stated:

“In the present case, the Applicant’s appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.

At the helm of the Court system in Kenya is the Supreme Court followed by the Court of Appeal. This Court falls below the Court of Appeal. After the Applicant’s appeal in this Court was dismissed, he appealed to the Court of Appeal and the same was dismissed. That decision of the Court of Appeal is binding on this Court. In light of this, to entertain this matter in respect of which the Court of Appeal has pronounced itself, no matter how compelling the arguments placed before it, would be to violate the constitutional judicial hierarchical norm. In this regard, I am guided by the holding in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* [2020] eKLR, where the Court of Appeal stated:As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice...Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the *Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of the *Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant



sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere".

17. In light of the above, this court lacks jurisdiction to entertain the Petition. The preliminary objection succeeds and the petition is consequently dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF SEPTEMBER 2025.

A.K. NDUNG'U

JUDGE

