



**Musonye v Republic (Criminal Revision E040 of 2024)
[2025] KEHC 13212 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E040 OF 2024
RN NYAKUNDI, J
SEPTEMBER 25, 2025**

BETWEEN

MICHAEL SHIVEKA MUSONYE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is pending before this Court for determination is a Notice of Motion Application dated 13th February 2024 where the Applicant is seeking the following orders: -
 - a. Spent
 - b. The applicant is seeking for sentence review in accordance with section 329, 333(2) of the Criminal Procedure Code.
 - c. That the Applicant relies in fundamental Bill of Rights under Article 27(1)(2)(4), 28, 29, 50(2) p, q of *the Constitution* of Kenya 2010.
2. The Application is made on the following facts on the face of it among others:
 - a. That the Applicant was charged and convicted of an offence of Robbery with violence contrary to section 295 as read with 296(2) of the Penal Code Cap 63 Laws of Kenya in Criminal Case No. 1008 of 2012 at Kapsabet SRM's Court and sentenced to death.
 - b. That the Applicant's first appeal in the high Court HCCRA No. 187 of 2013 at Eldoret was dismissed for lack of merit.
 - c. That they appealed to the Court of Appeal on 27th December 2018 and the Co-accused withdrew to pursue with the petition on re-hearing whereby he was given 20 years' imprisonment.



- d. The Applicant prays that this Court be Pleased to award him the same sentence as the one given to the co-accused as they were in the same file under Article 50(2)(p)(q) of *the Constitution* of Kenya.
 - e. That the Honourable Court be pleased to the provisions of sections 329 and 333(2) of the Criminal Procedure Code to include the period spent while in remand custody and be factored in the sentence to be provided.
 - f. That the applicant is remorseful, reformed and skilled after undergoing prison rehabilitative programs for the last 12 years.
3. The Application is supported by the annexed affidavit dated 13th February 2024 sworn by the Applicant who deponed as follows: -
- a. That I was charged jointly and convicted for the offence of Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code in Criminal Case No. 1008 of 2012 at Kapsabet SRM's Court and was sentenced to Death.
 - b. That I appealed to the High Court whereby the same appeal was dismissed for lack of merit vide HCCRA No. 187 of 2013 at Eldoret.
 - c. That this Hon. Court has powers to hear and determine this matter under Article 165(3) of *the Constitution* of Kenya 2010.
 - d. That I am a convict hence a pauper who cannot afford any costs for preparation of this application, thus the fee be waived and urgently certified.

Analysis and Determination

4. I have read and considered the Notice of Motion Application and the Affidavit in support. There is one issue manifest for determination;

Whether the Application for sentence review is merited?

5. Before I delve into the merits of this application, I take cognizant note that in meting out the death sentence on 30/9/2013, the trial court stated that much as it empathized with the Applicant herein and his co-accused who had indicated that they had families, they were a threat to the society and did not deserve to be released to the society until they reform. The trial court stated that its hands were tied by the mandatory provision of the law on the penalty, a sentence of death was thus pronounced for the offence of robbery whilst for the defilement, the sentence was held in abeyance.
6. The Applicant appealed against the conviction and sentence in High Court Criminal Appeal No 187 of 2013 Francis Inyanje Ingosi & Michael Shivela Musonye Vs R. The appellate court in rejecting the appeal was satisfied that the conviction was proper. However, the court did not comment on the issue of sentence. In particular, the appellate court had this to say, "Having regard to the findings and observations that I have made in this judgement, I find that the instant appeal is not merited and I hereby dismiss it." This thus necessitated the filing of the instant application for the review of the sentence imposed by the trial court.
7. In sentence review, the court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. A glimpse of the application herein clearly calls



for a re-hearing of the sentence imposed. Thus is in consonant with the provisions of *the Constitution* specifically, Article 50 (2) (p) which provides as follows:

Every accused person has the right to a fair trial, which includes the right-

- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

8. The High Courts' revisionary jurisdiction is governed by section 364 of the Criminal Procedure Code which states as follows;

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

9. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court's decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner's offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.

10. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

“The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”

11. Additionally, in the *Muruatetu Case*, the Supreme Court proffered the following guidelines for consideration in respect of a sentence re-hearing:

- a. Age of the offender
- b. being a first offender
- c. whether the offender pleaded guilty
- d. character and record of the offender
- e. commission of the offence in response to gender-based violence
- f. remorsefulness of the offender
- g. the possibility of reform and social re-adaptation of the offender



- h. any other factor that the court considers relevant.
12. From the foregoing authorities, it is evident that mandatory sentences are unlawful. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.
13. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. Section 333(2) of the Criminal Procedure Code provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:
- “Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
14. I have considered the application and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the sentence of death imposed at the trial court and substitute it with a more definite sentence of 20 years’ imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the Criminal Procedure Code the sentence shall run from the date date of arrest being 11th May 2012.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH SEPTEMBER 2025

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R. NYAKUNDI
JUDGE

