Mwangi v Attorney General & another (Petition E230 of 2025) [2025] KEHC 12564 (KLR) (Constitutional and Human Rights) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12564 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E230 OF 2025

AB MWAMUYE, J

SEPTEMBER 10, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2,10,50 (1), 51 (3) AND 25 (A) & (C) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 24, 27, 258, AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 23, AND 165 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JACKSON IRUNGU MWANGI ..... PETITIONER

AND

THE HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

JUDGMENT

1. The petitioner was charged with the offence of Robbery with Violence contrary to Section 296[2] of the Penal Code. Upon trial, he was convicted and sentenced to suffer death on 12th August 2002.

2. He appealed to the High Court at Nairobi vide Criminal Appeal No. 930 of 2002 on both conviction and sentence and the same was dismissed on 9th August 2005. The petitioner then filed an application for resentencing based on Muruatetu 1, which was not heard and determined based on the decision on Muruatetu 2.

3. The Petitioner has moved this court by way of Petition seeking:

   i. A declaration that the death sentence imposed by the trial courts, confirmed by the Court of Appeal and later commuted to life imprisonment by the President, is inconsistent with Articles 50[2] [h] [p] and 25[a] & [c] of *the Constitution* of Kenya, 2010;

   ii. A declaration that the constitutional rights of the Petitioner have been violated;

   iii. An order remitting the Petitioner's case to the trial court for mitigation and determination of appropriate sentence in line with Article 50 [2] [p] of *the Constitution* of Kenya, 2010;

   iv. An order, in the alternative, for a review of the Petitioner's case in the interest of justice;

   v. Or that such other order[s] as this Honourable Court shall deem just.

4. In response to the Petition, the 1st Respondent filed their Grounds of Opposition dated 23rd July, 2025 contending, inter alia, that the Petitioner has failed to demonstrate how the 1st Respondent violated his constitutional rights. It is argued that the Petition does not meet the threshold of a constitutional petition as enunciated in Anarita Karimi Njeru v Republic [1976-1980] KLR 1272 and reiterated in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. They further contend that the doctrine of constitutional avoidance and the exhaustion of remedies preclude this Court from entertaining the matter since the Petitioner could have pursued his grievances in the Court of Appeal. Moreover, it is asserted that the sentencing under Section 296[2] of the Penal Code was lawful, constitutional, and enjoys the presumption of validity unless expressly declared unconstitutional and the Petitioner's request to have this court revise his sentence is baseless since it is not supported by any grounds for revision acceptable in law.

5. The 2nd Respondent, through a Replying Affidavit sworn by Njoki Kihara on 18th June, 2025 emphasized that the Petitioner was duly tried, convicted, and sentenced to death under Section 296 [2] of the Penal Code. The Petitioner subsequently lodged Nairobi High Court Criminal Appeal No. 930 of 2002, which was dismissed on 9th August 2005. It is contended that the Petition is therefore res judicata, and this Court lacks jurisdiction by virtue of Article 165[6] of *the Constitution*, given that a court of concurrent jurisdiction has already rendered a decision.

6. It was argued that the Petition does not meet the threshold set out in Anarita Karimi Njeru [supra] and reaffirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [supra] as it does not disclose how it has violated *the Constitution* and his rights since the Petitioner was charged, tried and convicted and awarded a convenient sentence in accordance with the provisions of the law.

7. The 2nd Respondent also asserted that Section 24 and 25 of the Penal Code make the death penalty lawful, and that the Petition amounts to an abuse of the court process. Further, it was argued that this court cannot entertain any prayer for mitigation and determination of appropriate sentence or any revision as the same was dealt with by a court of concurrent jurisdiction with competent jurisdiction and urged this Honourable Court to dismiss the Petition with costs.

8. The Petition was canvassed by way of written submissions and all parties complied by filing their respective submissions.

Petitioner's Submissions;

9. The Petitioner submitted that Article 22[1] of *the Constitution* gives every person the right to institute proceedings claiming violation or threatened violation of fundamental rights. He urged the Court to

find that Article 23, read with Article 165, donates jurisdiction to the High Court to enforce the Bill of Rights, regardless of whether a conviction was upheld on appeal.

10. He argued that the violation occurred at sentencing when his mitigation was disregarded owing to the mandatory nature of Section 296[2]. He relied heavily on the Muruatetu jurisprudence, where the Supreme Court held that the mandatory nature of the death penalty under Section 204 of the Penal Code was unconstitutional. He submitted that the same reasoning ought to extend to robbery with violence cases.

11. The Petitioner further contended that his continued detention under a mandatory sentence is degrading and violates Articles 25[a], 28, and 29 of *the Constitution*. He noted that he is now 61 years old, has undertaken rehabilitation programs, and has no previous criminal record. He emphasized that sentencing should serve the objectives of reformation and rehabilitation and urged this court to resentence him or issue an order for him to be given a re-sentence hearing at the trial court.

12. In reply to the Respondents, the Petitioner submitted that this Court is not sitting on appeal but in its constitutional jurisdiction to reconcile penal laws with constitutional rights. He further argued that the doctrine of functus officio does not apply since this is his first constitutional petition and not a criminal appeal.

13. The Petitioner urged the Court to be guided by comparative jurisprudence such as Reyes v The Queen [2002] 2 AC 335, which emphasized that courts must declare unconstitutional any law inconsistent with fundamental rights. He prayed for a declaration that Section 296[2] of the Penal Code is unconstitutional to the extent that it imposes a mandatory death sentence and that his case be remitted for resentencing.

1st Respondent's Submissions;

14. The 1st Respondent submitted that the Petition is fatally defective for want of specificity as required in Anarita Karimi Njeru [supra] and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others[supra]. They argued that the Petitioner has merely cited constitutional provisions without demonstrating with precision how they were infringed.

15. They further submitted that rights are not absolute and may be limited by operation of the law where the limitation is reasonable and justifiable. Given the gravity of robbery with violence, Parliament deemed it necessary to impose capital punishment. To buttress this, reliance was placed on the Supreme Court decision on Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [2024] KESC 34 [KLR].

16. It was submitted that the Petitioner is attempting to re-litigate issues already determined and that the Petition should be dismissed as an abuse of process.

2nd Respondent's Submissions;

17. The 2nd Respondent submitted that this Court is functus officio, having already determined Criminal Appeal No. 930 of 2002. It was argued that constitutional jurisdiction cannot be invoked to re-open concluded criminal matters.

18. Counsel further submitted that the Petitioner has not demonstrated how the respondent has violated *the Constitution* and argued that the Petitioner was charged, tried and convicted of the offence of Robbery with Violence and sentenced to suffer death which is lawful under section 24 and 25 of the Penal Code.

19. It was also submitted that this court is barred from entertaining any prayer for mitigation and determination of appropriate sentence or any revision as the same was dealt with by a competent court of concurrent jurisdiction which dismissed the Petitioner's Appeal.

20. Counsel also submitted that the Petition fails to meet the precision test under Anarita Karimi Njeru [supra] and reaffirmed in Mumo Matemo v Trusted Society of Human Rights Alliance [supra] as the Petitioner has not indicated the rights which have been breached with clarity and thus urged the Court to dismiss the Petition with costs since it lacks jurisdiction to entertain it as it is an abuse of the court process.

Analysis And Determination;

21. Having carefully considered the pleadings, responses, submissions and authorities relied by the parties, this court identify the major issue for determination herein being whether the petition is competent before this court.

22. Article 23[1] of *the Constitution* provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.

23. Article 165[3][b] and [d] of *the Constitution* of Kenya 2010 entrenches the constitutional jurisdiction of the Court to interpret *the constitution* and enforcement of rights and fundamental freedoms. The Court does have jurisdiction. The question is whether on the material and submissions made before the court, it is possible to make the declarations of constitutionality or invalidity of the death sentence and life sentence.

24. The Petitioner's principal contention is that the mandatory nature of the death penalty prescribed by Section 296[2] of the Penal Code offends Articles 25[c], 26, 27 and 28 of *the Constitution*. He argues that the provision deprives a sentencing court of discretion to consider mitigating factors, thereby undermining the right to a fair trial and the inherent dignity of the individual. He further argued that the violation occurred at sentencing when his mitigation was disregarded owing to the mandatory nature of Section 296[2].

25. The offence or robbery is defined under Section 295 of the Penal Code as follows;

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

26. Section 296[2] of the Penal Code then defines "robbery with violence" and also sets out the sentence to be meted out to the offender as follows:

> [2] If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

27. It is therefore clear that the prescribed mandatory maximum sentence for the offence of "robbery with violence" as per the provisions of Section 296[2] of the Penal Code is therefore the death sentence. The trial court and the court on appeal sentenced the petitioner to death as provided by law in compliance with the mandatory death sentence.

28. The Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR in holding that the mandatory nature of the death sentence in murder cases is unconstitutional held as follows:

> "47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25[c] of *the Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse.
>
> 48. Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of *the Constitution*; an absolute right.
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> 49. With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.
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> 50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the rights to dignity. Failing to allow a judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same [mandatory] sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
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> ...
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> 53. If a judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an

offence or offender may result in the undesirable effect of 'overpunishing' the convict."

29. The Supreme Court later issued directions that their holding in the Francis Karioko Muruatetu case [supra] could not be directly applied to mandatory death sentence in offences such as robbery with violence under section 296 [2] of the Penal Code.

30. As explained in the Supreme Court's recent decision on the applicability of the Muruatetu Case in relation to mandatory and minimum sentences in sexual offences in Republic v Ayako [Petition E002 of 2024] [2025] KESC 20 [KLR], the court underscored that:

> " 52. In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.
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> 53. In the Republic v Mwangi Case, we explained as follows:
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> "[52] We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance."
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> 54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore, to the extent that the Court of Appeal did so, it has offended the principle of stare decisis."

31. Similarly in Republic v Manyeso [Petition E013 of 2024] [2025] KESC 16 [KLR] the Supreme Court said:

> " 62. In the Muruatetu Directions, this Court pronounced itself on the application of the ratio in the Muruatetu case to other statutes prescribing mandatory sentences as follows:
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> "10.It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgement in this matter, or indeed the spirit of the Judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it.
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> 11. The ratio decidendi in the decision was summarized as follows:
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> i. "69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death

penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."...

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court." [Emphasis added]"

32. The Manyeso court was categorical at paragraphs 67 – 69 of the Judgment that:

" 67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 [3][b] grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.

68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption. As a Court we have invoked this remedy in various instances; in Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [Petition 18 [E020] of 2022] [2023] KESC 106 [KLR] we suggested the consideration of reforms over the recourse parties have upon the declaration of trust by the courts and how to actualize the same, especially regarding the aspect of shareholding. In Malcolm Bell v Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak [Application 1 of 2013] [2013] KESC 23 [KLR] Hon. Justice Kaplana Rawal, DCJ in her concurring opinion made recommendations to amend Section 16 of the *Supreme Court Act*. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 [KLR] we urged CAK to set a timeline for the digital migration. In National

Bank of Kenya Limited v Anaj Warehousing Limited [Petition No. 36 of 2014] [2015] KESC 4 [KLR] we suggested appropriate legislative action to be taken to address the gaps and inconsistencies apparent in the *Advocates Act*.

69. We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences."

33. From the above, the direction issued by the supreme court underscores two critical points: first, that Muruatetu I was confined to murder cases under Section 204 of the Penal Code, and second, that challenges to other capital offences must be independently advanced and adjudicated. The Supreme Court thereby declined to extend its ruling automatically to robbery with violence cases. Additionally, subsequent decisions from both the Court of Appeal and the High Court have consistently affirmed that robbery with violence remains outside the ambit of Muruatetu, and trial courts retain full discretion to mete out lawful sentences within the statutory framework. In this case, the petitioner was not only lawfully convicted of robbery with violence, but was also accorded mitigation at the time of sentencing, demonstrating compliance with constitutional safeguards.

34. Further, the Petitioner's attempt to revisit the sentence through a constitutional petition is misplaced because his appeal to the High Court, the first appellate court, was already heard and dismissed. The petitioner cannot use a constitutional petition to circumvent the hierarchy of appellate procedure or to reopen issues that were conclusively adjudicated. If aggrieved by the outcome of the first appeal, the petitioner's recourse is to invoke his statutory right of appeal.

35. Furthermore, the Petitioner must still meet the substantive threshold of constitutional pleadings, as laid down in the celebrated case of Anarita Karimi Njeru v Republic [supra], where the court stated:

> " ... if a person is seeking redress from a High Court or an order which invokes reference to a particular section in *the constitution*, it is important, if only to ensure justice is done in his case that he should set out the reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they were alleged to be infringed ..."

36. The present Petition falls short of that standard. While the Petitioner invokes several constitutional provisions, he has not set out with clarity how the Respondents have violated, infringed, or threatened those rights. The Petition is framed in broad and general terms, largely revisiting dissatisfaction with his sentence, without connecting specific acts or omissions of the Respondents to the alleged violations.

37. Accordingly, I find that the Petitioner has failed to satisfy the threshold of constitutional pleadings as established in Anarita Karimi Njeru v Republic [supra] and reaffirmed in subsequent decisions.

38. This Court notes that the Petitioner has been in custody for 23 years of his death sentence commuted to life imprisonment. The reduction of the death sentence or life sentence to a sentence for a term of years has now been outlawed by the Supreme Court in the Directions in Muruatetu II case as regards offences other than murder contrary to section 203 as read with 204 of the Penal Code.

39. The Supreme Court has determined in Ayako and Manyeso decisions, supra, that the Court has no jurisdiction to define the life sentence as being equal or equivalent to a term of years for 30 or 40 years. Consequently, the prayer for resentencing of the life sentence fails.

40. As regards the death sentence, the Court observes that a successful petition impugning the constitutionality of the mandatory death penalty for the offence of robbery with violence, as in the

present case, may have the effect of warranting the imposition of a determinate term of imprisonment in lieu of the death sentence.

41. However, as counselled in Muruatetu & another v Republic; Katiba Institute & 4 others [Amicus Curiae] [Petition 15 & 16 of 2015] [2021] KESC 31 [KLR] [6 July 2021] [Directions] [Muruatetu II], the applicant is required to petition for a declaration of unconstitutionality of the death sentence in cases of robbery with violence under section 296 [2] of the Penal Code in a petition brough in that behalf in the words of the Supreme Court:

> " 15. 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."

42. The upshot, therefore, is that the instant Petition lacks merit and is dismissed in its entirety with no orders as to costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of: -

The Petitioner – Jackson Irungu present at Kamiti Maximum

Counsel for the 1st Respondent – mr. Mulati h/b Ms. Ntabo

Counsel for the 2nd Respondent – Mr. Weche

Court Assistant – Ms. Lwaambi