



**Tirus v Republic (Constitutional Petition E009 of 2023)  
[2024] KEHC 1335 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1335 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION E009 OF 2023**

**LM NJUGUNA, J**

**FEBRUARY 14, 2024**

**IN THE MATTER OF ARTICLES 22(2)(B), 21(1)(4), 20(1)  
(2) (4(A)) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 25(A)(C), 27(1), 28, 29(A)(D)(F), 48,  
50(1)(2(L)&(P)), 23(1) AND 165 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 216 AND 329 OF THE CRIMINAL  
PROCEDURE CODE AND SECTION 296(2) OF THE PENAL CODE**

**BETWEEN**

**DANIEL NJIRU TIRUS ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petitioner has filed an undated petition seeking the intervention of this court on the sentence imposed. He stated that he was sentenced to death following conviction for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, in Embu Criminal Case Number 407 of 2010. That the decision was upheld on appeal both at the Embu High Court and the Court of Appeal in Nyeri. At the trial, the petitioner was convicted and sentenced to death, which was later commuted to life imprisonment through a Presidential directive. The orders sought through the petition are as follows:



- a. A declaration that the sentence imposed by the trial court and upheld by the High Court and Court of Appeal is inconsistent with Article 50(2)(b)&(p) of the Constitution and Section 329 of the Criminal Procedure Code;
  - b. A declaration that the section 296(2) of the Penal Code is inconsistent with Articles 26(1)(2), 28, 48, 50(1)(2)(p) of the Constitution; and
  - c. A declaration that the Constitutional rights of the petitioner have been violated.
2. The respondent filed grounds of opposition stating that this court lacks the jurisdiction to define a life imprisonment sentence as that is a preserve of the Legislature.
  3. The parties herein filed their written submissions.
  4. The petitioner submitted that even though the death sentence was commuted to life imprisonment, the same is still unconstitutional and should be reviewed. That he has already served 11 years imprisonment and during this time, he had learned several crafts and acquired certified skills which when applied, will make a positive impact to the society. He seeks leniency of the court and review of the sentence to allow the petitioner a chance to re-integrate back into society at some point.
  5. The respondent submitted that section 296(2) of the Penal Code prescribes the mandatory sentence for robbery with violence as was applied in the case of Willaim Okungu Kittiny v. Republic (2018) eKLR in which the Court of Appeal was guided by the Supreme Court in the Muruatetu Case. That the Supreme Court rendered sections 296(2) and 297(2) of the Penal Code inconsistent with the Constitution only to the extent of its mandatory nature.
  6. On the petitioner's argument that the indeterminate nature of the life imprisonment sentence is unconstitutional, reliance was placed on the cases of Jackson Maina Wangui & Another v. Republic (2014) eKLR and Dennis Kiprotich Byegon v. Republic (2022) eKLR and submitted that life imprisonment can only be defined by the legislature. It stated that the Supreme Court in the case of Francis Karioko Muruatetu & Another v. Republic (2017) eKLR cautioned parties aggrieved from the decision to await the relevant legislative guidance.
  7. The issues for determination herein are:
    - a. Whether this court has jurisdiction to grant the orders sought in the petition; and
    - b. Whether the petition has merit.
  8. On the issue of whether this court has jurisdiction to determine the petition, the same is targeted at re-sentencing. The petition is rightly before this court as the High Court bears original jurisdiction to entertain constitutional petitions. Further, this court has jurisdiction to entertain matters of resentencing as donated to it through recent jurisprudence, particularly in the Court of Appeal decision in the case of Julius Kitsao Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023). In this case, it was held thus:

“...we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution”.



9. On the issue of whether the petition has merit, the petitioner seeks review of the life imprisonment sentence. Article 48 of the *Constitution* guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which included the right to downward review of a sentence imposed. The death sentence was imposed by the trial court but the same was commuted to life imprisonment through Presidential directive. In the case of *Francis Karioko Muruatetu & Another v. Republic* (2017) eKLR (*supra*), it was held thus:

“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 article 25 of the *Constitution*; an absolute right.... 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”

10. In the Supreme Court’s decision of *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), the court stated;

“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*”

11. The mandatory death sentence imposed by the trial court was commuted by a Presidential directive to life imprisonment, which is the sentence that the petitioner is currently serving. I am guided by the Superior courts in the above-cited decisions to the extent that mandatory or minimum sentences curtail the trial court’s discretion on sentencing. This argument must, however, not be wielded carelessly as cautioned by the Supreme Court. It is not true that the sentence imposed is unconstitutional but rather, that the sentence can be subjected to the review on the strength of *stare decisis*. Further, the result of commutation of the mandatory sentence was the indeterminate life imprisonment sentence. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (*supra*) rendered the indeterminate nature of life imprisonment discriminatory.

12. In light of this decision, the life imprisonment sentence imposed on the petitioner should be defined. The Superior court also revisited the issue in the case of *Evans Nyamari Ayako v. Republic* Criminal Appeal No. 22 of 2018 the Court of Appeal sitting at Kisumu rendered itself on 08<sup>th</sup> December 2023, as follows:

“This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective *indicia* of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing



socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.”

13. Consequently, and being guided by the Superior Court's decisions, I find that the petition has merit and is hereby allowed. The life imprisonment imposed on the petitioner is hereby set aside and substituted with a sentence of 35 years imprisonment, to run from the date of conviction.

14. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

