



**Khaemba v Director of Public Prosecution (Criminal Miscellaneous  
Application E079 of 2021) [2024] KEHC 9297 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9297 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL MISCELLANEOUS APPLICATION E079 OF 2021**

**HM NYAGA, J  
JULY 25, 2024**

**BETWEEN**

**ROBERT SIMIYU KHAEMBA ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The Applicant, Robert Simiyu Khaemba through application dated 3<sup>rd</sup> June, 2024 moved this Court for sentence rehearing.
2. In his supporting affidavit, the Applicant avers that he was charged with the offence of robbery with violence in the year 1999 and he was convicted and sentenced to death. He states that his sentence was later commuted to life imprisonment.
3. He asserts that since the year 1999 he has been in custody and he prays that the years spent in custody be treated as enough punishment.
4. The Respondent did not file any response to the Application.
5. The Application was argued through written submissions.

**Applicant's Submissions**

6. The Applicant submitted that his rights to fair trial as enshrined under Articles 25(c) and 50(2) (p) of the *constitution* was breached as the mandatory death sentence imposed by the trial court fettered its discretion to impose appropriate sentence and the same was arrived at after the court failed to take into consideration his mitigation.
7. The Applicant posited that pursuant to Article 50(2)(p) of the *Constitution* he was entitled to benefit from the least severe of the prescribed punishment for the offence.



8. The Applicant argued that this court under Articles 22(1) and 23(1) has jurisdiction to hear and determine whether his rights and fundamental freedoms which cannot be limited as provided under Article 25(a) and (c) were violated.
9. In light of the above, the Applicant urged this court to intervene and receive his mitigation herein or release him by ordering that the period served in prison is sufficient sentence.
10. The Applicant submitted that he has been in lawful custody for 24 years and urged this court to grant him appropriate lenient definite sentence taking note that life expectancy of a human being is Seventy (70) years.
11. The Applicant posited that he deserves a lenient sentence because he was a first time offender; there was no life lost during the commission of the offence; he has been in prison for 24 years; he has undergone sufficient rehabilitation; he cannot be rehabilitated for life and there has to be an end to rehabilitation; and he ought to be integrated into the society so that he can rebuild his life.
12. To demonstrate his reformation, he attached a certificate of trade test grades III, II and II as a spray painter & Trade test certificate for Grade III, II and I in sheet metal from the National Industrial Training Authority he acquired in prison.
13. In buttressing his submissions in regard to unconstitutionality of the mandatory sentences, he placed reliance on the cases of;
  - a. [\*Francis Karioko Muruatetu & another v Republic\*](#) [2017] eKLR
  - b. [\*Omukanga v Republic\*](#) Criminal Appeal No. 260 of 2019;
  - c. [\*Julius Kitsao Manyeso v. Republic\*](#) Malindi CACRA No. 12 of 2021.
  - d. [\*Boniface Keya v Republic\*](#) Misc. Criminal Application No. E007 of 2023
14. The Applicant also urged this court in resentencing him to adopt the criteria established in [\*James Kariuki Wagana v Republic\*](#) [2018] eKLR; [\*Simon Kimani Maina v Republic\*](#) [2019] eKLR; [\*Joseph Kaberia Kainga v Republic\*](#) [2019] eKLR; & [\*Martin Babati Makoha & Another v Republic\*](#) [2018] eKLR.
15. The Applicant citing Section 333(2) of the [\*Criminal Procedure Code\*](#), urged this court to consider the period he has spent in remand custody. To support this position, he relied on the case of [\*Abamad Abolfathi Mohammed & another v Republic\*](#) [2018] eKLR.
16. He prayed that he be sentenced to serve three years' probation.

### **Respondent's Submissions**

17. The Respondent submitted that sentences are about keeping the offender's away from the society which acts as a lesson to the accused and the public so that such offences are not committed.
18. The respondents prayed that this court exercises its discretion in sentencing the Applicant.

### **Analysis & Determination**

19. There are two issues that arise for determination.
  1. Whether this court has jurisdiction to determine this matter.



2. If answer to the above is in the affirmative, whether the Applicant’s plea for resentencing is merited.

### Issue No.1

20. It is not in dispute that the Applicant was charged, convicted and sentenced to suffer death for the offence of Robbery with violence contrary to Section 296(2) of the [Penal Code](#). His sentence was later commuted to life sentence.
21. The Applicant seeks review of his sentence on ground that mandatory death penalty is unconstitutional.
22. The issue of mandatory sentences was addressed in [Francis Karioko Muruatetu & others v Republic](#) (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the [Penal Code](#) was unconstitutional. The Court took the view that:

“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 that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the [Constitution](#); an absolute right.”

23. In clarifying the import case of its earlier decision, in [Muruatetu 2](#) the Supreme Court gave the following guidelines:

18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
  - i. The decision of [Muruatetu](#) and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the [Penal Code](#).
  - ii. The [Judiciary Sentencing Policy Guidelines](#) to be revised in tandem with the new jurisprudence enunciated in [Muruatetu](#).
  - iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
  - iv. Where an appeal is pending before the court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
  - v. In re-sentencing hearing, the court must record the prosecution’s and the appellant’s submissions under section 329 of the [Criminal Procedure Code](#) as well as those of the victim before deciding on the suitable sentence.



- vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
  - 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 respect of gender based violence.
  - f. The manner in which the offence was committed on the victim.
  - g. The physical and psychological effect of the offence on the victim’s family.
  - h. Remorsefulness of the offender.
  - i. Possibility of reform and social adaptation of the offender.
  - j. Any other factor the court considers relevant.
  - k. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
  - l. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in *Muruatetu*.”

24. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

25. For instance, the court in *William Okungu Kittiny v Republic*, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR applied the reasoning in the *Muruatetu 1* case to the offence of robbery with violence. The Court held that at paras 8 and 9 that:

“(8) Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender: -

“... shall be sentenced to death.”



The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

.....

- (9) From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.
- (11) Although the appellants' appeal was dismissed by the Court of Appeal on 20<sup>th</sup> June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.(emphasis mine)

The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases.

- (12) From the foregoing, the learned judge having partly found in favour of the appellant erred in law in not remitting the case for sentence re-hearing and the appeal is allowed to that extent. Now that the Supreme Court has opened the door for sentence re-hearing, the matter is remitted to the Chief Magistrate's Court, Kisumu, for sentence re-hearing and sentencing only. The Registrar of this Court to return the record of the Chief Magistrates Court at Kisumu-Criminal Case No. 181 of 2004 as soon as reasonably practicable for sentence re-hearing and sentencing by the Chief Magistrate.”

26. Guided by Muruatetu 1 and 2 & the decision in William Okungu Kittiny's case (supra), many High courts have reviewed the death sentences meted against applicants charged with robbery with violence and substituted them with a determinate sentence.
27. However, the Supreme court recently in the Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia) delivered on 12<sup>th</sup> July, 2024 with regard to the mandatory death sentence in offences other than murder held as follows: -

- “(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the



application of its decision in the *Muruatetu Case* to other statutes prescribing mandatory or minimum sentences as follows:

“ 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment 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. In that paragraph, we stated categorically that:

“(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 SC *Petition No. E018 of 2023 26* 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”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases



11. The ratio decidendi in the decision was summarized as follows:

“  
“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.
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.” [Emphasis ours].....”



28. In light of the above, it is clear that Muruatetu's is inapplicable to the offence herein.
29. The above decision is binding on this court and as such I hold that this court is bereft of the necessary jurisdiction to determine this matter and the same is hereby dismissed.
30. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jeniffer

Nancy for state

Accused present

