



**Thuku v Director of Public Prosecution (Miscellaneous Application
78 of 2019) [2024] KEHC 9697 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 78 OF 2019**

HM NYAGA, J

JULY 25, 2024

BETWEEN

FRANCIS KARIUKI THUKU APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Through an undated application lodged on 4th June, 2019, the Applicant, Francis Karikui Thuku, moved this Court for sentence rehearing.
2. The facts as contained in the supporting affidavit indicate that the Applicant was charged, convicted and sentenced to suffer death which was later commuted to life sentence for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. He avers that thereafter, he lodged an appeal but the same was dismissed.
3. The Applicant relying on the case of Francis Karioko Muruatetu & another vs Republic [2017] eKLR seeks for appropriate sentence on ground that mandatory death penalty is unconstitutional.
4. The Application was canvassed through written submissions.
5. 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.
6. 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.



7. 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.
8. 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. He submitted that he has been in remand custody for 22 years and prayed that this court finds that he has already atoned for his sins and further incarceration is not appropriate in the circumstances.
9. He also prayed that the court while reviewing its sentence should take into account the period served in remand custody.
10. In buttressing his submissions, he placed reliance on the cases of Francis Karioko Muruatetu & another vs Republic (supra), Omukanga vs Republic Criminal Appeal No. 260 of 2019, Julius Kitsao *Manyeso vs Republic Malindi Criminal Appeal No 12 of 2021*, *Boniface Keya vs Republic* Misc. Criminal Application No. E007 of 2023, *James Kariuki Wagana vs Republic* [2018] eKLR, *Simon Kimani Maina vs Republic* [2019] eKLR, *Joseph Kaberia Kabiga vs Republic* [2019]eKLR & *Martin Bahati Makoha & Another vs Republic* [2018] eKLR & *Ahamad Abolfathi Mohammed & Another vs Republic* (2018) eKLR.
11. Respondent submitted that the Applicant is properly before this court and this being a sentence rehearing this court is called upon to issue an appropriate and proportionate sentence after considering the circumstances of the case in striving to achieve the objective of punishment.
12. The Respondent urged this court to consider the following as aggravating factors;
 - i. The nature of the offence the Applicant is facing and the fact that he was in company of others and armed with dangerous weapons.
 - ii. The facts that the Applicant used actual threats on the victim and forcefully robbed him and was found with the victim's property shortly after the incident.
13. The Respondent urged this court to exercise its discretion and order that the sentence of life imprisonment do translate to 30 years' imprisonment.

Analysis & Determination

14. 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

15. 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.
16. The Applicant seeks review of his sentence on ground that mandatory death penalty is unconstitutional.
17. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others vs 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.”

18. 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*.”

19. 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.
20. For instance, the court in *William Okungu Kittiny vs 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 20th 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.”

21. Guided by Muruatetu 1 and 2 & the decision in *William Okungu Kittiny’s* case (supra), many High Court decisions have reviewed the death sentences meted against applicants charged with robbery with violence and substituted them with a determinate sentence.
22. However, the application of Muruatetu case to other cases other than those of murder was brought to a skidding halt by the recent decision of the Supreme Court in Petition No. E018 of 2023 *Republic Vs Joshua Gichuki Mwangi* (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia), delivered on 12th July, 2024.
23. On the said issue the Supreme Court 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]

24. In light of the above, it is clear that *Muruatetu*’s case is now inapplicable to the offence herein.

25. The applicant may be left baffled that some applicants have previously benefitted from *Muruatetu* and now he cannot do so. My short answer is that the highest court in the land has now spoken. The above decision is binding on this court.

26. From the foregoing, I hold that this court is bereft of the necessary jurisdiction to determine this matter and the same is hereby dismissed.

27. Orders accordingly.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer/Miruya

State counsel Nancy

Accused present (Manyani Maximum prison)

