



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Matia v Republic (Criminal Petition E007 of 2021)  
[2023] KEHC 20262 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20262 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL PETITION E007 OF 2021  
WM MUSYOKA, J  
JULY 17, 2023**

**BETWEEN**

**MICHAEL OUMA MATIA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. I am determining this matter without having the benefit of the original records from the trial and appellate courts. Efforts to locate these files from the Bungoma court registry, where the appeal was heard and determined, have proved futile. I only have an incomplete record of the typed proceedings and judgment of the trial court in Busia CMCCRC No. 702 of 2003, and a photocopy of the judgment in Busia HCCRA No. 89 of 2003.
2. The application, dated 4<sup>th</sup> September 2020, seeks re-sentencing. The petitioner had been convicted in Busia CMCCRC No. 702 of 2003, on 1 count of robbery with violence, and was given the mandatory death penalty. From the incomplete record before me, I cannot tell when he was convicted and sentenced. His appeal, in Busia HCCRA No. 89 of 2003 was not successful. The petitioner avers that he filed an appeal at the Court of Appeal. He has not attached any court documents on that appeal. He avers that the records at the Court of Appeal were lost, and he chose to withdraw the appeal, so that he can pursue these review proceedings. He has attached a letter to that effect, addressed to the Deputy Registrar of the Court of Appeal, Kisumu, dated 15<sup>th</sup> March 2022, which was forwarded to that court by the Kenya Prison Service. The appeal is cited as Kisumu CACRA No. 109 of 2008. As the appeal at the Court of Appeal appears to have been withdrawn, I will proceed to consider the review application.
3. The application, no doubt, rides on the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle that all mandatory sentences were unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been



imposed, with a view to revising or reviewing them. The Supreme Court has since re-visited the issue in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was of application only in murder cases, and not any other.

4. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of the Constitution of Kenya of 2010. The offence, that the petitioner was convicted in respect of, attracts a mandatory sentence.
5. As the death sentence has been pronounced unconstitutional, at all levels of superior courts, it then stands that the sentence imposed on the petitioner herein is no longer tenable. I hereby set it aside.
6. Subsequent to setting aside that sentence, I have to consider the alternative sentence that I should impose. The offence of robbery with violence is a felony, so grave that the Republic assigned to it the ultimate penalty, death. The consequences of violent robbery are grave. It can lead to deaths or maiming of victims. It strikes terror to communities, and the Republic has a responsibility to ensure that all are safe and secure within the borders. For anyone convicted of robbery with violence, imprisonment ought to be the alternative to death.
7. I note, from the trial record, that the petitioner and his accomplices did not use physical violence on their victim, although they were armed with crude weapons, and threatened to harm her. No one was assaulted, and no one got injured. No violence was visited on the victim, although the petitioner and his accomplices struck terror in the hearts of the local community. Simple robbery attracts a maximum sentence of 14 years, according to section 296(1) of the *Penal Code*, Cap 63, Laws of Kenya. The sentence to be imposed for robbery with violence should logically be more than 14 years. Consequently, I shall, and do hereby, impose an imprisonment sentence on the petitioner of 25 years. I doubt whether it would be possible to reckon the time he spent in custody, because the record is incomplete. Plea was taken on 28<sup>th</sup> April 2003. The date of conviction is not discernible from the incomplete record before me, but it would appear to have been sometime in 2003, for that is when the appeal in Busia HCCRA No. 89 of 2003, was filed. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 17<sup>TH</sup> DAY OF JULY 2023**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

**Appearances**

Michael Ouma Matia, the petitioner, in person.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the respondent.

