



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kirwa v Republic (Miscellaneous Application 184 of 2021)  
[2023] KEHC 23668 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23668 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION 184 OF 2021  
RN NYAKUNDI, J  
OCTOBER 17, 2023**

**BETWEEN**

**JOSEPHAT KIPKOECH KIRWA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By an application dated 28/7/2019, the Applicant seeks for a rehearing on the sentence imposed against him. The application is further supported by the Affidavit sworn by the Applicant on 27/7/2019.
2. The Applicant's case is that he was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and sentenced to death.
3. According to the applicant this Court is clothed with the requisite jurisdiction under Article 165 (3) (b) of the Constitution to hear applications of this nature. The Applicant maintains that he has not exhausted all appeals and alleges that he was never accorded fair sentence.
4. The Applicant maintains that death penalty was declared unconstitutional as per the case of Francis Karioko Muratetu and Another.
5. The only issue for determination is whether this Court has the requisite jurisdiction to resentence the Applicant herein. The Applicant is subject to the mandatory death penalty and desires to be heard on sentence and should be entitled to resentencing hearing.
6. In the present application, the Applicant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and was sentenced to suffer death.
7. The Supreme Court in 2015 in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] eKLR determined the legal question whether or not mandatory death penalty sentence was /is constitutional or not. The Supreme Court found that the nature of death



sentence as provided for under Section 204 of the [Penal Code](#) is/was hereby declared unconstitutional. Thereafter, *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR the Supreme Court dealt with the lack of harmony in revised sentences by the Courts, where it gave the following directions

8. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows: The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the [Penal Code](#);
  - i. the Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;
  - ii. 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.
  - iii. 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.
  - iv. 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 victims before deciding on the suitable sentence.
  - v. 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.
  - vi. 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 response to 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. The possibility of reform and social re-adaptation of the offender;
    - j. Any other factor that the Court considers relevant
  - vii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.



- viii. 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.
9. These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines (2023) lists the objectives of sentencing at paragraph 1,3 as follows:
- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
  - iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
  - v. Community protection: To protect the community by incapacitating the offender.
  - vi. Denunciation: To communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society.
10. The Court of Appeal in *Daniel Kipkosgei Letting vs. Republic* [2021] eKLR where, the Court while citing with approval its decision in *Jared Koita Injiri v Republic* [2019] eKLR and guided by the sentiments of the Supreme Court in Muruatetu 1 observed that:

“the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.”



11. The Court of Appeal *Thomas Mwambu Wenyi vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing: -

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

12. In the present case, the Applicant was charged and convicted with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal code* in Eldoret High Court Criminal Case No. 42 of 2007 and was sentenced by Honourable Justice G.K Kimondo to suffer death
13. Article 50 (2) (p) of *the Constitution* of Kenya, provides that every accused person has the right – to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.
14. Article 50 (6) (a) (b) of *the Constitution* of Kenya, provides that a person who is convicted of a criminal offence may petition the High Court for a new trial if –
- a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and
  - b. new and compelling evidence has become available.
15. In light of the *Muratetu 1 & 2* cases, the mandatory death penalty was/is declared unconstitutional and an aggrieved party is entitled to Resentencing hearing. Both the Applicant’s appeal at the High and the Court of Appeal were dismissed and thus this Court is the only avenue for an Applicant who was sentenced to death to seek resentencing.
16. Having said so, I recognized that there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. I also take judicial notice of the severity of the offence vice vis the number of years already spent in custody by the Applicant and hereby set aside the death sentence and substitute it with (35) years’ imprisonment to run from 12/9/2007 when the Court imposed the sentence.

It is ordered so.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> OCTOBER 2023**

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**R. NYAKUNDI**  
**JUDGE**

