Lenana alias Lemayian v Republic (Miscellaneous Criminal Application E034 of 2021) [2025] KEHC 14691 (KLR) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

MISCELLANEOUS CRIMINAL APPLICATION E034 OF 2021

CW MEOLI, J

OCTOBER 16, 2025

IN THE MATTER OF: ARTICLES 50(2)(P)(Q), 159(2), 160(1) AND 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CLAUSE 7(1) OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

AND IN THE MATTER OF IN THE COURT OF APPEAL IN MANYESO -VS- REPUBLIC (CRIMINAL APPEAL 12 OF 2021){2023} KECA 827 (KLR)(7 JULY 2023)(JUDGEMENT)

AND

IN THE MATTER OF IN THE COURT OF APPEAL AT ELDORET OPRODI PETER OMUKANGA -VS- REPUBLIC CRIMINAL APPEAL NO 260 OF 2019(UR) DELIVERED ON 14TH APRIL, 2023

AND

IN THE MATTER OF SECTIONS 216, 329 AND 333(2) OF THE CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA.

BETWEEN

SAITOTI LENANA ALIAS LEMAYIAN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By the undated chamber summons filed on 16/2/2021, Saitoti Lenana, alias Lemayian, hereafter the Applicant, seeks re-sentencing pursuant to the directive of the Supreme Court Petition No. 15 of 2015 which I presume to be reference to the now famous case of Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (hereafter Muruatetu I).

2. The prayers are subsumed in the grounds in support of the summons, which are to the following effect:

    a. That this court ought to review the life sentence imposed against him pursuant to order (f) in the decision of the Constitutional Division of the High Court in Petition No. 97 of 2021, Edwin Wachira & 9 others -vs Republic and determine the duration of his sentence, if possible, to the time already served.

    b. That the court be pleased to declare that the Applicant serve the remaining part of his sentence under probation orders.

    c. Further, that the period as from the date of arrest to the date of conviction be computed into the eventual sentence as per the provisions of Section 333(2) of the Criminal Procedure Code and also pursuant to the decision in Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR and Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR).

    d. He cited Mombasa Petition No 5 of 2022 as consolidated with Petition No. 6 of 2022 Shaban Salim Ramadhan & Others vs Republic (sic) where it was declared that the mandatory death sentence for the offence of robbery with violence contrary to Section 296(2) and attempted robbery with violence contrary to Section 297(2) of the Penal Code was unconstitutional.

    e. That as a first offender he was remorseful, and been in prison since 2008 and this court ought to comply with the Constitutional Court's decision in Kakamega Petition Number 151 of 2012 Shaban Okwaro Mrefu -vs- Republic; Petition number 006 of 2016. Philip Nzamuli Kisavo -vs- Republic.

3. The summons was supported by the Applicant's affidavit sworn on 8/10/2019. He stated that he was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal code and sentenced to death on 18/11/2008. That the death sentence was commuted to life imprisonment by the President in 2009 and that he is pursuing an appeal before the Court of Appeal, in Machakos Appeal No. 432 of 2008, thus has not exhausted the appeal process.

4. He stated that pursuant to the Muruatetu I decision by the Supreme Court, he seeks resentencing upon mitigation. Further that this court has jurisdiction to determine and impose an appropriate sentence.

5. The State did not file any response, while opposing the application by its written submissions.

Submissions

6. The Applicant submitted that this court has jurisdiction to deal with this matter by virtue of Article 165(3), while Section 354(3) of the Criminal Procedure Code empowers the High Court to entertain applications for revision of sentence. Further citing Article 50(1)(2)(p) he stated that that an accused person should have the benefit of the least possible sentence. Here relying on Petition No 97 of 2021 Edwin Wachira & 9 others -vs- Republic where the court declared that mandatory minimum sentences

are discriminatory in nature because they allow the preferential treatment of offenders convicted of offences which do not carry mandatory sentences. Thus, mandatory minimum sentences violate an accused person's rights under Article 27 of *the Constitution*.

7. Arguing further that clause 4:8.14 of the Sentencing Policy Guidelines 2023 provides that all offenders including those convicted for the offence of robbery with violence can apply for resentencing pursuant to the decision in Mombasa Petition No 5 of 2022 as consolidated with Petition No 6 of 2022 Shaban Salim Ramadhan & others -vs- Republic and Petition No 97 of 2021 Edwin Wachira & 9 others -vs- Republic .

8. He asserted that the court is constitutionally mandated under Article 23(1) of *the Constitution* of Kenya to hear and determine applications for redress of a denial, violation or threat to a right or fundamental freedom in accordance with Article 165 of *the Constitution*. And argued that his right to a fair trial under Article 50(2) was violated as he was not given the least possible sentence possible.

9. He reiterated that he is remorseful for the offence for which he was convicted as a first offender, and that the duration of sentence served has served its purpose by giving him an opportunity to transform his life. Further stating that during sentencing he did not tender any mitigation because as the mandatory sentence provided did not allow any discretion on the part of the court. He asserted that his continued incarceration affects his economic and social growth. He cited the case of Yawa Nyale -vs- Republic [2018] eKLR in that regard. He argued further that this court has the jurisdiction to look into the constitutionality of his sentence and substitute it with a less severe sentence. He relied on the case of Ahmad Abolfathi Mohammed & another -vs- Republic [2018] eKLR

10. On its part, the State submissions dated 6.10.2025 identified the sole issue arising to be whether the sentence imposed on the Applicant was unlawful in light of the Muruatetu I decision. Affirming that the death sentence for the offence of robbery with violence contrary to Section 296(2) of the Penal Code was both constitutional and lawful, the State relied on the Court of Appeal decision in Daniel Njenga Chege v Republic Criminal Appeal No. 98 of 2019, full citation Chege v Republic [2025] KECA 1207 (KLR).

11. In that case, the Court of Appeal, citing directions issued by the Supreme Court in Francis Karioko Muruatetu & Another vs Republic & Others (2021) eKLR (Muruatetu II) to the effect that Muruatetu I only applied to sentences in murder cases, rejected an invitation to interfere with a sentence meted in a robbery with violence case. It was therefore the position of the State that Applicant's invocation of Muruatetu I was misconceived and the mere fact that his sentence was subsequently commuted to life imprisonment did not affect the legality of his initial sentence. The State therefore contended that this court has no jurisdiction to resentence persons convicted and sentenced for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

Analysis and Determination

12. The Court has considered the application, the supporting affidavit, and the submissions of the parties. The outcome of the Applicant's summons is predicated on two related questions, firstly, the legality of the sentence meted on him pursuant to the decision in Muruatetu I, and secondly the jurisdiction of this court to review his sentence by way of resentencing. There is no dispute that the Applicant was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The sentence was subsequently commuted to life imprisonment by the President.

13. It appears that the Applicant has already exhausted his right of appeal to this court and is currently pursuing an appeal before the Court of Appeal. It is important to state at the outset that although the

Applicant has made allegations of constitutional violations while questioning the constitutionality of the death or life sentence, the matter before the Court is not a constitutional petition.

14. In Chege v Republic (supra) the Appellant had been convicted for the offence of robbery with violence and sentenced to death. His appeal to the High Court was dismissed. He subsequently filed an appeal to the Court of Appeal challenging the conviction and sentence but abandoning the appeal on conviction submitted that since the victim was not injured during the incident, he ought to have benefited from a term of imprisonment, rather than the death penalty. He cited the provisions of Article 50 (2) (p) of *the Constitution* and the decisions in Jackson Wanyoike Njuguna & another vs. Republic [2019] eKLR and Swaley Muhaya Lubanga vs. Republic [2021] eKLR.

15. In its judgment delivered on 4th July 2025, the Court of Appeal expressed itself as follows:

> " As already stated, the appellant abandoned his appeal on conviction and therefore, there is no dispute that the ingredients of the offence were established beyond reasonable doubt. This appeal is on sentence only. We must, however, point out that even if the appeal on conviction was pursued, the facts of this case are straightforward as there was overwhelming evidence leading to his conviction.
>
> 18. The appellant was sentenced to death after the trial court considered his mitigation. This sentence was upheld by the High Court. Section 296 (2) of the Penal Code provides that a person convicted of the offence of robbery with violence shall be sentenced to death. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6th July 2021 in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR reiterated that mandatory or minimum sentences imposed in the statutes have not been invalidated. The Apex Court further clarified that the exercise of discretion in meting out a sentence was only applicable to murder cases where it is not expressly provided in statute.
>
> 19. In view of the foregoing, it is clear that our hands are tied, and we cannot interfere with the sentence. We must reiterate with a heavy heart that the apparent discriminatory sentencing regime ought to be reviewed and reconsidered as soon as possible. It is puzzling why a murderer can, for example, be sentenced to just one day in prison based on the court's discretion, while other crimes still receive mandatory death or life sentences without such flexibility, yet murder is, going by the forum at which it is tried, deemed to be more serious than some of the offences for which death sentence is mandatorily imposed. This is repugnant to justice and the case before us is a good example. The undisputed facts of the case are that the appellant threatened PW1 with an axe and did not inflict injuries upon him. While it is not gainsaid that he stole the bicycle, why should he be condemned to the sentence of death, the only one available on conviction of this offence? The circumstances of the case certainly called for a determinate jail sentence, and we hope this kind of scenario will prick the conscience of the lawmakers to address this obvious injustice.
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> 20. Having said that, we have no option but to sadly inform the appellant that, as things stand at the moment, his sentence must remain as we are unable to

interfere with the sentence meted out. Accordingly, the appellant's appeal lacks merit and it is hereby dismissed." (Emphasis added)

16. In its recent decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) the Supreme Court held in relation to the mandatory and minimum sentences as follows: -

> " 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:
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> > "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 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."……
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> 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]."

17. Based on the above decisions, it is self-evident that the sentence imposed on the Applicant is lawful and that this court lacks the jurisdiction to revisit the sentence, his appeal to this court having earlier been dismissed. The undated chamber summons filed on 16.02.2021 must fail and is hereby dismissed.

DELIVERED AND SIGNED AT KAJIADO ON THIS 16TH DAY OF OCTOBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kihumba h/b for Mr. Kilunda

Applicant: Present

C/A: Lepatei