



**Mwangi v Republic (Criminal Application E021 of 2024)  
[2025] KEHC 14066 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPLICATION E021 OF 2024  
DKN MAGARE, J  
OCTOBER 8, 2025**

**BETWEEN**

**MOSES GITAHI MWANGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over an application filed on 12.4.2024 seeking rehearing of the sentence of life imprisonment imposed upon the Applicant. The Applicant was convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was sentenced as it was then mandatory to death.
2. The particulars were that on the 15th day of January 2005 at around 1.00 am with others not before the court while armed with dangerous weapons namely pangas and axes, robbed Moses Wanjohi Kamotho's shop of goods, utensils, pangas, power saw, thermos, plates, wrist watch, and cash Ksh. 5,000/- all valued at Ksh. 150,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Moses Wanjohi Kamotho.
3. Subsequently he filed a re-sentencing application in the Chief Magistrate's Court vide case number 1224 of 2008. This resulted in HCCRA 18 of 2012. Subsequently he filed High Court petition number 14 of 2019. He posited that he was tried and convicted and sentenced to death. The fourth president of the Republic of Kenya commuted his sentence in 2016 to life sentence. The court was supposed to hear him and it did not and as a result his rights under Section 50(2)(q) of *the Constitution* were breached. He then sought that he be heard.
4. The court, Ngah J directed on 3.3.2020 that the petition for re-sentencing be filed in the Magistrate's Court. There does not appear to have been an appeal from the order. Nor was the petition transferred



- to the lower court for resentencing as directed by the court. There is also no application to disturb that decision. It is not before this court but was found out of due diligence.
5. Prior thereto, the applicant had filed HCCRA 256 of 2010. The appeal was dismissed by the High Court [Wakiaga, Ngaah J]. It is one of the judges who heard the appeal that directed the petition to be heard before the lower court. The appeal was subsequently filed in the Court of Appeal by the applicant and the accused in HCCRA 259 of 2010. The appeal in the Court of Appeal was Nyeri CACRA 110 of 2014.
  6. On 03.05.2021, the said appeal was withdrawn and the Court of Appeal deemed the appeal as dismissed under Rule 68 of the Court of Appeal Rules, which was later repealed on 2022.07.08 by the Court of Appeal Rules, 2022. The said rule then provided as follows:
    1. An appeal may be withdrawn at any time before hearing by notice in writing to the Registrar signed by the appellant, and upon such notice being given the appeal shall be deemed to have been dismissed.
    2. When any appeal is withdrawn, the Registrar shall forthwith notify the respondent and the registrar of the superior court.
    3. An appeal which has been withdrawn may be restored by leave of the Court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice require that the appeal be heard.
    4. An appeal may be withdrawn by an informal application in court at any time before the hearing is concluded.
  7. The decision of the High Court is reported as James Mwangi Maina & 2 others v Republic [2014] KEHC 2889 (KLR). The original file has not been traced. Therefore, the court shall rely on the record on the electronic reporting systems. According to the judgment of the court, the Applicant and James Mwangi Maina, David Mwaura Njaramba were all charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of which were that on 15th day of January 2005 at around 1.00 am with others not before the court while armed with dangerous weapons namely pangas and axes robbed Moses Wanjohi Kamotho's shop of goods, utensils, pangas, power saw, thermos, plates, wrist watch, and cash Ksh. 5,000/- all valued at Ksh. 150,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Moses Wanjohi Kamotho.
  8. The appellants were initially charged in criminal case No. 4634 of 2005. They were tried, convicted and sentenced to death to which they filed Nyeri High Court Criminal Appeal No. 28 of 2008 - Moses Gitahi Mwangi, and on 29th day of October 2008 Mary Kasango J and M.S.A. Makhandia J as he then was ordered a retrial.
  9. After a retrial, the court convicted the Applicant who appealed to the High Court. Thereafter the High Court confirmed the applicant's conviction on 19.11.2014. He was, however, acquitted of the lesser charge. From that case, it is evident that the Appellants were armed with pangas and a crowbar.
  10. This resulted in the filing of the application herein which is supported by the Applicant's affidavit and buttressed by submissions. The Applicant seeks this court to uphold *the constitution* to do substantial and fair justice by reducing the death sentence to a determinate term.
  11. There is no other ground set out in the application to enable the court to make a decision, whether or not to reduce the sentence by way of re-sentencing. To compound the issues, there is an order of this court in petition 14 of 2019 regarding resentencing in the court that heard the matter. It is not clear



whether or not that was overtaken by the directions of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR), where the court guided as follows:

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:

- i. The decision of *Muruatetu* and these guidelines apply only in respect to sentences of murder under sections 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 victims 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 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.
  - viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
  - ix. 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*
12. The Respondent filed a Replying Affidavit in which it was deposed that the Applicant had appealed his conviction before the High Court at Nyeri vide HCCR Appeal No. 256 of 2010. It was further



deposed that the Applicant subsequently moved to the Court of Appeal vide Criminal Appeal No. 1 of 2014, which he later withdrew. The Respondent contended that the instant application is bad in law and an abuse of the court process, the matter having already been determined by the High Court, and is therefore res judicata. It was urged that the application be dismissed forthwith for lack of merit. The parties did not file written submissions.

13. The court has had a considerable difficulty in dealing with this matter. However, it is noted that petition number 14 of 2019 was not concluded in terms of a final order. It is the proper petition to deal with the question that the petitioner needed dealt with. This is to follow the decision of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [Supra], where the Supreme Court held as follows:

In respect of other capital offences such as treason under section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under section 297(2) of the Penal Code, 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 the decision in question could be reached.

14. The application herein therefore wastes the court's time and drains the applicant's chances of a proper consideration as posited in paragraph 13 above. It is not correct to state that the application herein is res judicata when the Supreme Court has properly guided on both resentencing and the constitutional validity of the mandatory death penalty under section 296(2) of the Penal Code. The said application was made in petition number 14 of 2019. It is in that case that parties must take directions on the status of the case. It cannot proceed in this matter until the process started in 14 of 2019 is concluded.
15. The consequence of the foregoing is that I strike out this application in favour of dealing with petition 14 of 2019, which shall be brought to this court for directions to be given shortly.

#### **Determination**

16. I therefore make the following orders: -
- a. The application dated 12.4.2024 is struck out in view of the pendency of Petition 14 of 2019.
  - b. Directions be given in the earlier petition.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8<sup>TH</sup> DAY OF OCTOBER, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Kimani for the State

Applicant present

Court Assistant – Michael

