



**Alfan v Republic (Criminal Miscellaneous Application E096 of 2024)
[2025] KEHC 15234 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL MISCELLANEOUS APPLICATION E096 OF 2024
WM KAGENDO., J
OCTOBER 23, 2025**

BETWEEN

SWALEH ALFAN APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. By way of a Notice of Motion dated 12th May, 2024 the applicant moved this court for resentencing. The applicant was convicted and sentenced to life for the offence of robbery with violence contrary to 296(2) of the Penal Code and sentenced to death on 18th November, 2003. He appealed the conviction and sentence in HC.CR. Appeal No. 383 of 2003, but the same was unsuccessful.
2. Nevertheless, his sentence of death was commuted to imprisonment for life by Presidential order and he presently seeks the revision of the same pursuant to the decision of the Court of Appeal in Julius Kisau Manyeso vs Republic (2023)eklr.
3. The application was proffered on grounds that the applicant's mitigation circumstances were not considered during sentencing owing to the wording of Sec 296(2) of the Penal Code, even though he was relatively young with no priors or criminal record against him.
4. It was thus the applicant's contention that Section 296 (2) of the Penal Code violates the provisions of Article 25(c) and 50 (2) (q) of the C.O.K by limiting his rights.
5. Further, the applicant argued that he retains the right to equal protection before the law despite his incarceration as in Muruatetu1 where the appellants therein were given an opportunity for review of their sentences.



6. The instant application was not opposed by the state, as despite directions to have the same canvassed by way of written submissions, neither of the parties herein complied as at the time of making this determination.

Analysis and Determination

7. Before I proceed, this court observes that the pleadings filed by the Applicant were not properly drafted in so far as their relevant foundational provisions of law are concerned and their grounds thereto. However, the court takes judicial notice that the Applicant is unrepresented and serving sentence without access to facilities to present his case. It is thus sufficient that the court was able to make out that the Applicant wished to have his sentence reviewed.
8. The issue of resentencing to reduce the sentence of death as a mandatory sentence in cases other than murder and the sentence of life to a term of years and to sentences other than the minimum or mandatory sentences has severally been precluded by the Supreme Court in several of cases being the *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) (*Muruatetu II Directions*) of July 2021, *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023)* [2024] KESC 34 (KLR) (12 July 2024) (Judgment) of 12 7 2024, and most recently on 11th April, 2025 *Republic v Manyeso (Petition E013 of 2024)* [2025] KESC 16 (KLR) (11 April 2025) (Judgment); which its Court of Appeal decision the applicant has anchored his application upon.
9. Respectfully, in the said Court of Appeal decision in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) the learned judges took the view that the reasoning in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) SC Petition No 15 & 16 of 2015 (Consolidated)* [2017] KESC 2 (KLR) applied equally to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denied a convict facing life imprisonment the opportunity to be heard in mitigation, when those facing lesser sentences are allowed such mitigation. This, the Court of Appeal held, was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *akn ke act 2010 constitution the Constitution*, and thereby un-constitutionalized the
10. However, as earlier highlighted the Supreme Court has since overturned the above decision in *Republic v Manyeso (Petition E013 of 2024)* [2025] KESC 16 (KLR) (11 April 2025) (Judgment) where the learned judges outlawed the application of the *Muruatetu I* decision, which related to murder, to offences in other statutes with minimum and mandatory sentences, and held as follows:

“64. Paragraph 11 to 14 of the *Muruatetu* directions are very clear that the decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, *akn ke act 2006 3 Sexual Offences Act* or any other statute. Further, that the *Muruatetu* case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with *akn ke act 2010 constitution the Constitution*. Paragraphs 93 to 97 of the *Muruatetu* decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:



- “94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.
95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.
96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.
65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.
66. We therefore find that the Court of Appeal violated the principle of stare decisis by misapplying the decision in Muruatetu and in finding the life sentences of imprisonment to be unconstitutional.”
1. It is worth mentioning that in the above decision, the Supreme Court further impugned the Court of Appeal’s decision on grounds that it acted ultra vires and without jurisdiction by assuming original jurisdiction on a constitutional issue that was not raised at the High Court. They held as follows:
55. Therefore, we agree with the submissions made by the appellant that the Court of Appeal acted ultra vires when it determined in the first instance whether the life sentence imposed upon the respondent was constitutional. In the same vein, this court cannot delve into the question of the constitutionality of the sentence of life imprisonment, as it has not been raised and determined by the High Court and cascaded through the proper channels
1. It would thus follow that the applicant’s reliance on the reviewed Court of Appeal decision cannot form the basis of his success, if any in the instant application. By virtue of Article 163(7) the



Supreme Court's decisions bind all courts subordinate to it, and this Court is, respectfully, guided by these decisions.

2. It is not lost to me, that the Supreme Court in its *Muruatetu II* case, distinguished other capital offences from the offence of murder which had been the subject of *Francis Karioko Muruafetu & another v Republic* [2017] eKLR (*Muruatetu I*) and gave directions that the ratio of *Muruatetu I* that the sentence of death as a mandatory sentence for the offence of murder did not apply to capital sentences on other offences attracting a mandatory death sentence such as robbery with violence as follows:

“ 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 *akn ke act 2010 constitution 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.

1. 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 filled, 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.”

2. The above Supreme Court decisions therefore present two (2) limbs to be appreciated by this court in so far as minimum and mandatory sentences on offences other than murder are concerned:
3. The mandatory sentence of death for offences other than murder contrary to section 203 as read with 204 of the Penal Code, remain constitutionally valid unless successfully challenged by a suitable petition for declaration of constitutional invalidity before the High Court as the Constitutional Court wielding the said original jurisdiction and escalated, if need be, to the Court of Appeal and the Supreme Court.
4. Unless and or until the above is successfully undertaken and declarations made on the constitutional invalidity of the said provisos, the mandatory and minimum sentences for various offences such as robbery with violence contrary to sec 296 (2) of the Penal Code remain constitutionally valid, and this court has no discretion by dint of the doctrine of stare decisis to reduce or substitute the said sentence.



5. Consequently, it is this court's view that the applicant in this application must in the first instance, institute a suitable petition for the declaration of constitutional invalidity of the sentence of death for the offence of robbery with violence contrary to Sec 296 (2) of the Penal Code, imposed on him by the trial court and subsequently reduced by executive act of the Presidential clemency.
6. If and or when successful, the court may refer the matter to the trial court for mitigation and resentencing in its discretion. Unfortunately, this court's hands are tied as it stands.
7. Accordingly, the application for resentencing is declined but the applicant is at liberty to institute a petition for declaration of constitutional invalidity of the death sentence for the offence of Robbery with violence cases as recommended by the Supreme Court in Muruatetu II Directions (2021)eKLR, and reiterated herein.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI Virtually this...23RD... day of.....OCTOBER. 2025.

W.K. MICHENI JUDGE

In The Presence Of:



For The Applicant(s).....

For The Respondent.....mr Ngiri.....

Court Assistant.....bebora.....

Signed By For:

Hon. Lady Justice Wendy Micheni

The Judiciary Of Kenya.

