

**IN THE COURT OF
APPEAL AT NYERI**

**(CORAM: KANTAI, LESIIT & ALI-ARONI,
JJ.A.) CRIMINAL APPEAL NO. 184 OF 2017**

BETWEEN

JAMES LEBITE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Nanyuki
(M. Kasango, J.) delivered on 8th November, 2017*

in

H.C. CRA No. 31 of 2017.)

JUDGMENT OF THE COURT

The appellant, **James Lebite** was charged with another with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. That other was acquired at the trial. The appellant was convicted by the Principal Magistrate's Court at Maralal and sentenced to death. He appealed to the High Court at Nanyuki but his appeal was dismissed by **Kasango, J.** in a judgment delivered on 8th November, 2017.

Although there are 5 grounds of appeal in the homemade "Memorandum Grounds of Appeal" when the appeal came up for hearing before us on 30th April, 2025 where the appellant was represented by learned counsel **Mrs. Ndiangui** while the respondent was represented by learned counsel **Mr. Naulikha** counsel for the

appellant abandoned the appeal on conviction and urged only 1 ground of appeal which was attack on the sentence. Counsel submitted that the mandatory nature of the death sentence imposed denied the trial court's discretion; that it contradicted Articles 27 and 28 of the Constitution of Kenya, 2010; that the mandatory nature of a death sentence denies an accused person an opportunity to mitigate. These issues had not been raised before the High Court on first appeal.

Although the issues raised by counsel for the appellant appear attractive, the issues are easy to deal with because they were the subject of a matter before the Supreme Court of Kenya in **Petition No. 15 and 16 (Consolidated) of 2015. Francis Karioko Muruatetu & Another vs. Republic & Others [2015] eKLR [2021] KESC 31 (KLR) (6 July 2021) (Directions)** commonly referred as **Muruatetu 2** where that Court gave directions, *inter alia*, to the effect:

4. By our judgment rendered on December 14, 2017, this court (though differently constituted), readily accepted that the last two questions (b) and (c) above, not having been canvassed before the two courts below, were not available for the court's determination. On the first question, however, the court made the following declarations and orders:

"a) The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence

**as contemplated under article 26(3) of
the Constitution.”**

The Supreme Court therefore declared mandatory death sentence in murder cases to be unconstitutional. It ordered the Attorney General to develop a framework for dealing with other offences where a mandatory sentence was provided. We are not aware whether that office has carried out that exercise at all.

The appellant here was charged with the offence of robbery with violence and was convicted. Asked to mitigate he said:

“I have nothing to say.”

He was sentenced to death, a sentence that was upheld on first appeal.

As per the threshold of the Supreme Court that was a lawful sentence.

We find the appeal to have no merit and we dismiss it.

Dated and delivered in Nyeri this 24th Day of October, 2025.

S. ole KANTAI

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

ALI-ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed

DEPUTY REGISTRAR