Mwanika v State/Odpp (Criminal Miscellaneous Application E109 of 2024)
[2025] KEHC 15633 (KLR) (Crim) (21 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL MISCELLANEOUS APPLICATION E109 OF 2024

MW MUIGAI, J

OCTOBER 21, 2025

BETWEEN

JOHN NDUNDA MWANIKA ..... APPLICANT

AND

STATE /ODPP ..... RESPONDENT

RULING

Application

1. On 5th February, 2025 Ms Celyne Odembo; Advocate of the High Court of Kenya on behalf of the Applicant filed an application seeking the following orders:

    1. That the Hon Court declares that the High Court has jurisdiction to hear cases and determine applications on re-sentencing especially on death sentence.

    2. That the Court makes a declaration that the High Court has Jurisdiction to hear cases on re-sentencing as the accused is on life imprisonment after the Court abolished death penalty and found it unconstitutional.

    3. That the Application be allowed as the High Court has

        mandate over remission pursuant to Sec.333(2) of the Criminal Procedure Code.

    4. That Applicant has attached various authorities to persuade learned Judge.

Supporting Affidavit By Celyne Odembo Advocate For The Applicant Dated 5/2/2025

2. On 5th February, 2025 the Applicant filed a Supporting affidavit and stated as follows

1. That the Applicant faced murder charge, was committed to death, went to Court of Appeal, lost appeal, and returned to Court for resentencing.

2. That in his homemade application, Justice Nzioka dismissed his application that she lacked Jurisdiction.

3. That we have attached the following cases which may persuade the Court that High Court has jurisdiction to resentence according to Supreme Court on Sentencing Policy Guidelines of 2015.

3. List Of The Cases Cited That May Persuade The Court

1. Petition No 16/2019 High Court of Kenya Machakos - Justice Odunga.

2. Petition 15/2020 High Court Machakos - Justice Odunga

3. Misc Criminal Appl. No. 37/2018 Rolex Odhiambo Akeyo - Justice Ngenye Macharia.

4. Misc. Criminal App. No. 337/2013 Rajesh Chotallah Shah versus Hon. Justice Lesiit.

5. Petition 15 & 16/2015 (Consolidated Francis Karioko Muruatetu & Wilson Thirimbu Mwangi.

6. Kisumu Criminal Appeal No.56/2013 William Okungu Kitiny versus Republic.

7. Kiambu High Court Case No. 31/2016 Republic versus John Makueni

8. High Court Criminal 3/2018 Stephen Kimanthi Mutunga.

   That *the Constitution* of 2010 has empowered the High Court to deal with the cases of resentencing.

9. That the Court makes a declaration that the High Court has inherent Jurisdiction empowered by *the Constitution* and High Court to handle the resentencing in High Court.

4. Applicant's Submissions On Jurisdiction Of High Court

1. The Applicant seeks orders that his application on re-sentencing be heard on merit and not be dismissed on technicality. The Applicant had appeared in person before Justice Nzioka who dismissed his Application citing lack of jurisdiction.

2. The Applicant has been in custody since 2005 after being convicted of murder and sentenced to through High Court Criminal Case No. HCCR 111/2005 and sentenced to death

3. The Applicant proceeded to Court of Appeal vide CRA 365/2007 which Appeal was dismissed.

4. The Applicant then returned to High Court for re-sentencing which application 588/2018 was dismissed by Lady Justice Nzioka in 2022 citing lack of jurisdiction.

5. The Applicant reiterate that the High Court has jurisdiction to hear re-sentencing according to Re-Sentencing Guidelines Policy and according to Francis Muruatetu and Another in which the Supreme Court ruled that death sentence was unconstitutional, the Applicant moved to the High Court as like his colleagues who moved to High Court and benefited and their life sentence and death sentence were converted into years served in remand.

6. The Applicant has been in custody since August 2005 and Justice Nzioka went on transfer and the application on review could not be placed before her. Justice Nzioka's ruling dismissing the application on re-sentencing be set aside.

Respondent's Submissions

Summary Of Facts

5. On 26th May, 2025 the Respondent filed submissions and stated as follows:

    1. The Applicant was charged vide High Court Criminal Case Number Case number 111 of 2005 with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code.

    2. After full trial, he was convicted and sentenced to suffer death. The Applicant being aggrieved by both the conviction and sentence preferred an Appeal to the Court of Appeal vide Court of Appeal Criminal Appeal No.365 of 2007 whereby the Court dismissed his appeal and upheld the conviction and sentence.

    3. Following the Muruatetu decision, the Applicant came back to this Court for resentencing vide Misc. Application No. 588 of 2018 whereby Lady Justice Grace Nzioka dismissed the application for lack of jurisdiction since the matter had already been handled by the Court of Appeal.

    4. The Applicant being dissatisfied, further filed another application before this Court vide Misc Application No. E109 of 2024 which was dismissed by Justice M. Muteti on 23rd October 2024 citing lack of jurisdiction. We emphasis that the said application is the same one before you for determination.

6. Issues For Determination

    1. Whether this Hon Court has jurisdiction to entertain the Application

        The Applicant cites case-law on the basis that this Court has jurisdiction on re -sentencing proceedings whilst the Respondent submitted that this Court lacks jurisdiction to hear and determine the instant Application as it is functus officio.

    2. As the record clearly reflects, the Applicant has already had his day in this Court when he appeared before Hon. Lady Justice Grace Nzioka and Hon. Justice Muteti who ably dealt with the matter. For this court to hear and determine the Application would amount to the Court sitting on appeal over its judgment.

7. This court is functus officio, in Jeremiah Mwita Range vs. Republic [2020] eKLR the Court in striking out the Application before it cited the Court of Appeal decision in Telkom Kenya Limited v John Ochanda [20141CKLR where the court held that:

    > " functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon"

8. Placing reliance on that authority, the Hon. Lady Justice Lesiit stated:

    > " ...The Applicant is challenging the order in sentence by Hon. Kimaru, J. made on the13th March, 2019. The learned judge is of parallel jurisdiction as this court. That means that the

decision by Hon. Kimaru J. is by this court, meaning that this court has already rendered a final determination on the matter before me. That being the case, this court cannot entertain the instant application. Similarly, it was not open for the Applicant to return to this court to challenge the decision made by this court. In the result, the application is incompetent and is accordingly struck out."

9. In the celebrated case of Owners of the Motor vessel

> " Lillian S" versus Caltex Oil(Kenya) Limited (1989) Eklr, the Court of Appeal held:-
>
> "Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

We therefore urge you to down your tools as this court lacks jurisdiction.

Whether The Application Is Merited

10. We invite the Court to look at Section 364 of the Criminal Procedure Code. Section 364 (1) provides as follows:

> " In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may (b) in the case of any order other than an order of acquittal, alter or reverse the order."

Analysis & Determination

11. The Court considered case-law cited by the Applicant in aid of establishing the High Court's jurisdiction in conducting re-sentencing proceedings and the Respondent's position that this Court lacks requisite jurisdiction as the Applicant already exhausted the re-sentencing Application through 2 Courts of similar, equal and competent jurisdiction.

12. This Court gleaned through the Judgment by Court of Appeal Criminal Appeal No 365 of 2007 of 21st March 2014 and the Bench (Karanja, GBM Kariuki & Kiage JJA) as 1st Appellate Court evaluated the evidence of the Trial Court (Apondi J) and judgment delivered on 31/1/2007 and upheld both conviction & sentence. It is noted that the original Trial Court file was not availed for perusal.

13. With this background, the Appellant filed application before Hon LJ G.Nzioka which by Ruling of 30/5/2022 vide Misc. Application No. 588 of 2018 declined to grant the application for lack of jurisdiction. The Applicant filed Misc Application No. E109 of 2024 which was dismissed by Justice M. Muteti on 23rd October 2024 citing lack of jurisdiction.

14. Presently, substantially, the same or similar application for re-sentencing has been revived in the instant Application. This Court has gleaned through Case-law provided and, in a nutshell, found the cases contained the following;

15. Petition No 16/2019 High Court of Kenya Machakos - Justice Odunga (as he then was) Sammy Musembi Nicholas Mukila Ndetei Sammy Kitonga Mukusya John Muoki Mbatha & Paul Mumo Muia vs AG & KPS.

    The Petitioners were charged with robbery with violence, tried convicted and sentenced o imprisonment ranging from 15 years – 40 years. The gist of the Petitioner's claim was that the Section

46 Prison Act was discriminatory in provision of remission to only inmates with determinate and/or definite period of imprisonment. The Court found the discriminatory nature of application of Section 46 of Prisons was contrary to Art 27 of Constitution and therefore remission subject to stated objections was/is available to ALL Prisoners.

16. Petition 15/2020 High Court Machakos - Justice Odunga (as he then was) Vincent Sila Jona & 87 Others vs KPS, ODPP & AG. The Petitioners sought declaration that Section 333(2) Criminal Procedure Code & 'admission' in Section 46 (2) of *Prisons Act* was from the 1st admission to Prisons not the date from resentencing. The review of sentences to be considered was on a case to case basis.

17. Misc Criminal Appl. No. 37/2018 Rolex Odhiambo Akeyo - Justice Ngenye Macharia (as she then was) The Applicant killed his wife and was sentenced to death. The sentence was upheld by Court of Appeal. Following Muruatetu 1 case the Applicant mitigated in the High Court, and was found to be 1st Offender, remorseful and had been pardoned by victim's parents as he had children of the marriage to look after. The death sentence was replaced by 15 years imprisonment.

18. Misc. Criminal App. No. 337/2013 Rajesh Chotallah Shah versus Republic Hon. Justice Lesiit (as she then was) The Applicant murdered his father & stepmother and was sentenced to death. The Applicant attended re-sentencing proceedings following Muruatetu 1, the President had commuted death penalty to life imprisonment. In Re-sentencing the term was reduced to 20 years imprisonment. The Applicant sought re-sentencing again that the remaining sentence to be served on CSO non-custodial sentence. The Court observed that there was no guidance to the effect that the same Court could consider review/revision after re-sentencing nor guidance of filing an appeal to the orders arising from re-sentencing proceedings. The Application filed was not based on any law, he benefitted from re-sentencing twice; death penalty -life imprisonment and then 20 years imprisonment. This was 3rd Application at re-sentencing and was therefore struck out.

19. Petition 15 & 16/2015 (Consolidated Francis Karioko Muruatetu & Wilson Thirimbu Mwangi.) The Supreme Court in the landmark case on imposition of mandatory sentence of death penalty in murder cases was/is declared unconstitutional. The Apex Court held that mitigation was an important congruent element of Fair trial under Art 50 (2) of *the Constitution*. Section 204 of the Penal Code deprived the [Trial] Court of the use of judicial discretion in a matter of life and death. The mandatory nature derives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. The mandatory nature of death penalty was declared unconstitutional.

20. Kisumu Criminal Appeal No.56/2013 KSM CoA William Okungu Kitiny versus Republic. 7 Applicants a filed a joint Petition on re-sentencing as some were charged with robbery with violence others with murder and each of them was sentenced to death. Thereafter death penalty was commuted to life imprisonment. Each of the Appellants appealed to the High Court and the appeal was dismissed. A 2nd Appeal to the Court of Appeal was also dismissed. The Applicants challenged the constitutionality of Section 204, 296(2) & 297(2) of the Penal Code and sought their cases remitted to the Trial Court for Re-sentencing. The Court found; The Supreme Court opened the door for review of death sentences even in finalized cases and resentencing was granted.

21. Kiambu High Court Case No. 31/2016 Republic versus John Nganga Gacheru & Joseph Kamau Wanyoike both charged with offence of murder, upon trial, conviction and sentence, they were sentenced to serve mandatory death sentence. Upon Muruatetu 1 decision by Supreme Court mandatory death penalty was found unconstitutional. Hon. J.Ngugi J (as he then was) conducted re-sentencing proceedings and mitigation and the death penalty was commuted to life imprisonment was pegged at 15 years imprisonment.

22. High Court Petition 3 of 2018 Stephen Kimanthi Mutunga vs Republic Hon. C. Kariuki J considered the Petition, the Petitioner was arrested in 2003 and been in custody since then charged with offence of robbery c/s 296(2) of Penal Code, during sentencing he was not granted the opportunity to mitigate. He appealed in Machakos High Court & Court of Appeal both dismissed conviction and sentence upheld. The Court found it had jurisdiction to conduct re-sentencing and the court found that the sentence was up to the period served and Petitioner set free.

23. Michael Kathewa Laichena & Martin Mugambi Karindi vs Republic Petition 19 of 2017 Meru High Court Majanja J. The Petitioners were charged tried convicted and sentenced to death penalty under robbery with violence and each had served 16 years imprisonment.

24. Following Muruatetu 1, the Supreme Court, having declared the mandatory death sentence unconstitutional, directed that the petitioners' case be remitted back to the High Court for re-sentencing in accordance with directions of the court.

25. In the meantime, and as regards petitioners in other similar cases in Muruatetu 2 (directions by the Supreme Court) the Court stated that;

> (111) ... [They] ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.
>
> I take judicial notice of the fact that pursuant to the direction of the Supreme Court, the Attorney General did appoint a Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the *Penal Code Act* vide Gazette Notice No. 2160 dated 15th March 2018.
>
> In the case of William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR, the Court of Appeal applied Muruatetu Case (Supra) mutatis mutandis to the provisions of section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya) which imposes the mandatory death penalty for the offence of robbery with violence.

26. The High Court, Hon. D.Majanja J considered aggravating & mitigating circumstances and the Pre-Trial Period served in custody by the Appellants and re-sentenced the Applicants to 15 years imprisonment.

27. The import ofPetition 15 & 16/2015 (Consolidated Francis Karioko Muruatetu & Wilson Thirimbu Mwangi vs Republic[2017] eKLR referred to as Muruatetu 1 stated as follows;

> 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 articles 25 of *the Constitution*; an absolute right.
>
> 49. With regard to murder convicts, mitigation is an important facet of fair trial.....
>
> 111. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.

28. This finding by the Supreme Court was/is emerging jurisprudence and binding precedent to ALL Courts. Thereafter, Courts in the hierarchy of Court System employed the Supreme Court finding in Re-sentencing processes by Trial Court where mitigation was not considered and all circumstances of the specific case to arrive at the sentence of death penalty only in deserved cases but not as mandatory sentence.

29. The cases cited above by the Applicant are from the case-law following rendition of Muruatetu1 in 2017-2021 and applied by courts up to 2021. In the 2021Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), (Muruatetu 2) the Supreme Court noted the following;

> In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the *Sexual Offences Act*, presumably assuming that the decision by this court in this particular matterwas equally applicable to other statutes prescribing mandatory or minimum sentences.
>
> We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision.
>
> 8. While it is regrettable that the report was not filed timeously and these directions not issued immediately, there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. Appellants whose sentences were confirmed by the High Court and the Court of Appeal have returned to the Magistrate's courts, where, without reference to the decisions of the two superior courts, have had those sentences revised. The Magistrate's courts have also, in some instances entertained applications for re-sentencing in murder cases, clearly without jurisdiction. Likewise, some appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that are pending hearing and determination, either in the High Court or the Court of Appeal, have also had their sentences revised by the Magistrate's courts without disclosing the fact that pending appeals exist in superior courts.

30. The Supreme Court clarified as follows;

> 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.

31. Therefore, with is background the 2 pertinent questions are;

a) Is this Court clothed with requisite jurisdiction to consider on merit the instant application?

b) If so; what remedy orders are amenable to be granted with regard to the Application?

Jurisdiction

32. The jurisdiction of the High Court emanates from Article 165 of Constitution of Kenya 2010 specifically Article 165 3 (a) –(e) 6 & 7 and other written laws pertaining to the Criminal Justice System.

33. The Applicant invokes jurisdiction of this Court also vide Section 362-364 of Criminal Procedure Code; Section 362 provides as follows;

Power of High Court to call for records

> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

34. In Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Machakos High Court, the Court held

> " Taking cue from the decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

35. In Criminal Appeal No. E009 OF 2022; Ramadhan Hamisi &haji Masingu Swaleh Bakari Versus Republic (Machakos High Court) This Court in an appeal against conviction and sentence on the judgment of Trial Court against 2 Appellants to the charge of robbery with violence, the Court found conviction sound on law and evidence on Trial record. However, with regard to sentence, the new jurisprudence from Muruatetu 1 (2017) & Muruatetu (2021) applied as to sentence and death penalty set aside to 20 years imprisonment including pre-sentence period in custody already served under Section 333 (2) CPC.

36. In Julius Manyeso Kitsao vs Republic Malindi Criminal Appeal 12 of 2021;(Hon JJA P Nyamweya, J Lesiit & GV Odunga) in the case of defilement the court found the indeterminate sentence of life imprisonment was found discriminatory inhumane and a violation of the right to human dignity. C.A. partly allowed the appeal and life imprisonment was reduced to 40 years imprisonment. The Court held in part as follows;

37. Evans Wanjala Wanyonyi vs Rep [2019] eKLR and Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. Nevertheless, the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applied 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 were allowed to be heard in mitigation. That was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*.

38. Julius Manyeso Kitsao vs Republic supra was cited in Herman Mwero Mwavughanga vs Republic Criminal Appeal 111 of 2022 C.A.Mombasa (Hon JJA SG Kairu, J Lesiit & GV Odunga) that considered the issue of indeterminate sentences -life imprisonment and found comparative jurisprudence compelling and held;

> We are equally guided by the holding of the Supreme court of Kenya and in the instant appeal, we are of the view that having found the sentence of life imprisonment unconstitutional, we have discretion to interfere with the sentence. [reduced to 35 years imprisonment]

39. In light of the above consideration of case-law in sentencing; mandatory death penalty and mandatory life sentence have been declared unconstitutional where the Trial Court's hands are tied without consideration of the specific circumstances of the case and /or taking into account the elaborate and comprehensive Judiciary Sentencing Policy Guidelines in determining appropriate sentence and mitigation of the Accused persons before meting out the appropriate sentence in the circumstances.

40. Recently, The Supreme Court pronounced itself on sentencing in Republic v [Joshua Gichuki] Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)

41. The precedents set by the Supreme Court were binding on all other Courts in the land. It was imperative for all courts bound by decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without that steadfast and uniform commitment, the legal system risked ambiguity, eroding public trust, and causing disorder in the administration of justice.....

42. Mandatory sentences left the trial court with absolutely no discretion such that upon conviction, the singular sentence was already prescribed by law. Minimum sentences however set the floor rather than the ceiling with regard to sentences. What was prescribed was the least severe sentence a court could issue, leaving it open to the discretion of the courts to impose a harsher sentence. Using the words mandatory and minimum together convoluted the express different definitions given to each of the two words.

43. Chege v Republic (Criminal Appeal 98 of 2019) [2025] KECA 1207 (KLR) (4 July 2025) (Judgment) (Hon. Mativo Gachoka & Odunga JJA) Court of Appeal Nakuru, observed where a 2nd Appeal was filed on sentence in robbery with violence case;

44. 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.

45. The outline of all these cases amongst others indicate disparity on conduct of an appeal, review/revision and/or re-sentencing on sentence regarding offences that carry mandatory, minimum- maximum sentences in various Courts. Muruatetu 1 that confirmed mitigation as part of Trial Court proceedings culminating to appropriate sentence upon considering all circumstances of the case and granted Trial Court jurisdiction to consider appropriate sentence in the specific circumstances of each case, and Muruatetu 2 that explained the parameters of the decision of Muruatetu 1 has seen floodgate of appeals, reviews and resentencing processes by all Courts bound by judicial precedent. It is now almost 9-10 years later of implementing Muruatetu 1 & 2 it is time to on another matter presented before the Superior Courts to conflate what constitutes re-sentencing; what law is applicable; in which Court(s) should re-sentencing be undertaken and how many times may one pursue re-sentencing in the same matter and what commends successful re-sentencing. Food for thought. See; Misc Criminal App No 337 of 2013 Rajesh Chotallah Shah vs Republic supra.

46. In the instant case, from the long line of case-law that informs re-sentencing process, the Court must have jurisdiction. Secondly, the Court if clothed with jurisdiction should conduct re-sentencing not rehearing of the case unless an appeal is presented and not review unless from a Lower Trial Court in line with Section 362 of the Criminal Procedure Code.

47. The Re-sentencing ought to be conducted with regard to adjustment of a criminal sentence due to a problem or error of judgment. Also, to consider mitigation (if not given/considered during trial) Re-sentencing may take into account possibility of reform and social re-adaptation of the offender in re-evaluating sentence meted out and circumstances of the case and offenders conduct and activity since then.

48. The uncontroverted procedural facts of this case are that, the Applicant was convicted of murder and sentenced to death by Hon.Muga Apondi J on 31/1/2007. On appeal in Court of Appeal Criminal Appeal 365 of 2007 on 21/3/2014 found the Trial Court's conviction safe and sentence proper and upheld death penalty. Later, death penalty was commuted to life imprisonment.

49. The Applicant applied for re-sentencing before High Court Hon. G. Nzioka LJ who on 30/1/2022 dismissed application for want of jurisdiction. Another Application was filed before the High Court Hon.A Muteti J who vide Ruling of 23/10/2024 dismissed the Application.

50. The present Application is on the same grounds in the High Court before this Court. Pursuant to decisions emanating from the 3 Courts of the High Court these are decisions of Courts of equal, similar, concurrent and competent, jurisdiction to this Court. This Court cannot sit on appeal of decisions by similar Courts on the same matter.

51. Superior Courts cannot sit in review/appeal of decisions of peers of equal and competent jurisdiction, much less those Courts higher than themselves. The current sentence was already affirmed by Court of Appeal, a Court of higher status in CA Criminal Appeal 365 of 2007. This Court took the trouble to explain why with requisite jurisdiction as per case-law cited and recent developments, in the particular scenario, it is illegal and irregular to pursue re-sentencing in the High Court.

52. This Court confirms jurisdiction to hear and determine appeals from Trial Magistrate's Courts, Review/Revision and re-Sentencing. However, in the instant case, the appeal has been considered by Court of Appeal. This Court on equal jurisdiction cannot set aside the Ruling by 2 other High Courts and more so the Court of Appeal.

Disposition

53. The upshot is that this Court is functus officio and hence bereft of jurisdiction to review sentence.

54. The Application is dismissed, Applicant to pursue redress from Court of Appeal and/or Supreme Court.

RULING DELIVERED DATED & SIGNED IN OPEN COURT CRIMINAL DIVISION OF THE HIGH COURT-MILIMANI ON 21/10/2025

M.W.MUIGAI

JUDGE