

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. E054 OF

2023

BETWEEN

JUSTUS OTIENO

NYAKWAKA:.....APPLICANT

AND

**REPUBLIC:.....RESPO
NDENT**

RULING

1. On the 15th October 2003, the Applicant **Justus Otieno Nyakwaka** and another were convicted by the Senior Resident Magistrate at Kericho for two concurrent offences of robbery with violence, Contrary to Section 296[2] of the Penal Code and sentenced to suffer death on both counts.
2. Being dissatisfied with the conviction and sentence the Applicant and his co-accused filed an appeal at the High Court in Nakuru. The appeal succeeded in favour of the Applicant's Co-Accused but not the Applicant. His

conviction was upheld and so was the sentence save for the sentence on count two being suspended for the main reason that a death sentence cannot be executed twice,

3. The Applicant's fate was therefore sealed barring any further appeal to the Court of Appeal. At that time the death sentence was mandatory upon conviction for the offence of robbery with violence, **Contrary to Section 296 [2] of the Penal Code.**

4. However, with the advent of the **New Constitution of Kenya** in the **year 2010**, the New Supreme Court of Kenya in the case of **Muruatetu and Another Vs. Republic eKLR**, ruled that the mandatory death sentence was unconstitutional thereby allowing courts to impose alternative sentences consideration being given to the gravity or seriousness of the offence and the circumstances under which it was committed.

Significantly, the Supreme Court did not outlaw the death sentence itself but the mandatory nature of the sentence.

5. Such alternatives sentences would include those prescribed under **Section 24[b] [i] of the Penal Code. Sub Section [I] of the Provision** alludes to any other punishment provided by any other **Act**. The **Probation of Offenders Act [Cap 64 Laws of Kenya]** would be such other **Act** and

provides under **Section 4** the power of the court to place a convicted person on probation for a specific period of time.

6. Under **Section 4[1]** of the **Act** where a person is charged with an offence triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may make a probation order.
7. In context, the application dated 27th July 2023 seeks to have a review of the sentence currently being served by the Applicant in favour of a non-custodial sentence by way of a probation order notwithstanding that he was charged and convicted for the offence of robbery with violence **Contrary to Section 296[2]** of the **Penal Code** and handed a death sentence which was later substituted for a sentence of imprisonment for a period of forty [40] years following the decision of the Supreme court in the **Muruatetu** case.
8. The Applicant rides on the provision of **Article 50[2][P]** of the Constitution in making the application. It provides that:
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“[2] Every Accused Person has the right to a fair trial, which includes the right: -

(a)

(b)

(c)

(P) to the benefit of the least severe of the prescribed punishments for an offence if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

9. However, the history of this case as revealed by the available record shows that the Applicant benefited from the aforementioned provision of the Constitution when the death sentence was reviewed to forty [40] years imprisonment. It would appear that this application is an attempt to take a *“Second or third bite at the Cherry”*.

10. Although it is possible for a court to use its discretion in sentencing to impose an alternative sentence such as an order of probation in favour of a convicted person, for an offence of robbery with violence, probation might not be a likely option given that the offence is a serious one and the

circumstances under which it was committed may have led to the injury of the victim.

- 11.** In that regard, this court fully agrees with the Respondent's submissions to the effect that: -

“Robbery with violence, as defined under Section 296[2] of the Penal Code, is one of the most sever offences. It involves the unlawful taking of property with the use of force, violence, or the threat of violence often resulting in significant harm or even death to victims. The gravity of this offense is reflected in the mandatory sentence of life imprisonment, as prescribed by the Penal code. Robbery with Violence, by its very nature, endangers public safety, threatens the lives of individuals and causes immense psychological and physical harm to victims.”

- 12.** This court is also in agreement with the State/ Respondent when it submits that: -

“The Petitioner has already benefited from the constitutional changes in sentencing law following the Muruatetu decision. The Petitioner was initially sentenced to death, but this sentence was commuted to a 40

year custodial sentence following his re-sentencing. The Petitioner’s mitigation was duly considered in the resentencing process as is evidenced by the fact that his life sentence was reduced. This shows that the Petitioner has already received the benefit of a more lenient sentence under the changed legal framework in line with the Muruatetu ruling.”

13. In sum, this application is devoid of merit and smacks of an abuse of the Criminal Justice process. The Applicant seemingly withdrew his intended appeal to the Court of Appeal, but may now consider re-instating it if only to try his luck in his quest for liberty on account of his fading health. He may also consider exploring other legal channels to find respite due to ill-health.

Otherwise, the application is hereby dismissed.

Ordered accordingly.

Delivered and Dated this 30th day of October, 2025

**HON. J. R. KARANJAH,
JUDGE**