



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutunga v Republic (Criminal Revision E254 of 2025)
[2025] KEHC 16336 (KLR) (12 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E254 OF 2025
RM MWONGO, J
NOVEMBER 12, 2025**

BETWEEN

MICHAEL MUTHINI MUTUNGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The applicant was charged with murder contrary to section 203 as read with section 204 of the Penal Code in Embu HCCRC 22 of 2019. He pleaded guilty and was convicted on his own guilty plea. The court heard and considered his mitigation before sentencing him to 30 years imprisonment.
2. In the sentencing ruling delivered on 11th November 2021, the trial court noted that even though the applicant alleged that he was sodomised by the deceased, he did not have to take the law into his own hands by killing him. That there were legal avenues available to him but he failed to take them. The court stated that time spent in custody had been considered in the 30 years imprisonment sentence.

The Application

3. By this undated application filed on 28th April 2025, the applicant seeks the following orders:
 1. That the Honourable court allows the application;
 2. That the Honourable court be pleased to review and revise the sentence of 30 years imprisonment imposed on the applicant and consider a lesser custodial sentence that foresees his reintegration into the society within a reasonable time frame.
4. The applicant stated that he was a 26-year-old student and he regrets the tragic death of the deceased. He has demonstrated willingness to reform and reintegrate into society. He stated that he was not



adequately guided in the case given the fact that he was sexually abused by the deceased, a fact that was not considered by the trial court during mitigation and sentencing. He stated that the sentence of 30 years imprisonment was harsh and excessive.

5. He stated that the sentence is just as long as a life imprisonment sentence and that the court should consider the circumstances of the case as was held in the case of *William Okungu Kittiny v Republic* [2018] KECA 851 (KLR). That the sentence is disproportionate and it goes against the tenets of Articles 29 and 50(2)(p) of *the Constitution*.
6. It was his averment that during his incarceration, he has learned skills that will positively contribute to the society when he reintegrates. These skills are in the form of a paralegal course and carpentry. He produced recommendation letters and certificates for the certifications attained while in prison. He invoked the revisionary power of the court and also sought consideration of time spent in custody in terms of section 333(2) of the Criminal Procedure Code.

Grounds of Opposition

7. The respondent filed grounds of opposition stating that the application lacks merit and it ought to be dismissed because the court lacks jurisdiction to determine it.

Parties' Submissions

8. In his submissions, the applicant relied on sections 362 to 366 of the Criminal Procedure Code and the case of *Stephen Mugendi Ndwiga v Republic* [2021] KEHC 7153 (KLR) and stated that the court is able to exercise its revisionary powers to review his sentence. That event though this court was the trial court, it can still exercise revisionary powers given the findings of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR) (*Muruatetu 1*).
9. He drew the court's attention to his mitigation where he informed the court that commission of the offence was compelled by the fact of the deceased continuously sexually abusing him. He stated that at the time of the offence, the deceased had infected him with HIV and this could have been the motivation for committing the offence. He relied on the cases of *Willy Kipchirchir v Republic* [2015] KEHC 375 (KLR) and *R v Duffy* [1949] CA.
10. With respect to his plea on section 333(2) of the Criminal Procedure Code, he relied on the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] KECA 743 (KLR). He argued that the court should have clarified when the sentence ought to start whilst considering the days spent in custody. He also relied on Articles 10 and 29 of *the Constitution*.
11. The respondent submitted that the High Court's revisionary powers under Section 362-366 of the Criminal Procedure Code do not apply to matters in the High Court. That the parameters for review as set by the Supreme Court in *Muruatetu 1* have not been met in this case to compel sentence review. The respondent did not oppose application of section 333(2) of the Criminal Procedure Code as prayed.

Issues for determination

12. The issues for determination are:
 1. Whether the court has jurisdiction to entertain the application; and
 2. Whether the court should grant the orders sought.



Analysis and Determination

13. The revisionary power of the High Court is drawn from Article 167(6)&(7) of *the Constitution* which provide:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

14. Section 362 of the Criminal Procedure Code provides as follows on the High Court’s supervisory jurisdiction:

“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.”

15. In a murder trial, the High Court sits as a court of original jurisdiction, and in this case, it passed the impugned sentence. There is provision for re-sentencing hearings following the decision of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR) (*Muruatetu 1*). The Supreme Court, through jurisprudence in this case, donated jurisdiction to the High Court to rehear sentences in murder cases even though it had heard the cases in the first instance. Following *Muruatetu 1*, Paragraph 4.8.18 of the Judiciary Sentencing Policy Guidelines 2023 emerged and it provides:

“Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”

16. In *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) (*Muruatetu 2*), the Supreme Court gave directions on re-sentencing as follows:

“9. To obviate further delay and to avoid confusion, the court issued the following guidelines: -

- a. The decision of *Muruatetu* and the guidelines herein were applicable to sentences of murder under sections 203 and 204 of the Penal Code only.
- b. The Judiciary Sentencing Policy Guidelines were to be revised in tandem with the new jurisprudence enunciated in *Muruatetu*.
- c. All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.



- d. Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
 - e. In the re-sentencing hearing, the court had to 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 a suitable sentence.
 - f. An application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which had jurisdiction to do so and not the subordinate court... [Emphasis added]
17. From the Supreme Court guidelines, it is clear that the High Court's revisionary powers expand to its own findings on sentence where it was exercising its original jurisdiction in murder trials. Therefore, this court bears the relevant jurisdiction to entertain the applications.
18. The second issue is whether the sentences should be reviewed. In *Muruatetu 2*, the Supreme Court gave guidelines on what to consider before reviewing a sentence, as follows:
- “In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court: -
1. Age of the offender;
 2. Being a first offender;
 3. Whether the offender pleaded guilty;
 4. Character and record of the offender;
 5. Commission of the offence in response to gender-based violence;
 6. The manner in which the offence was committed on the victim;
 7. The physical and psychological effect of the offence on the victim's family;
 8. Remorsefulness of the offender;
 9. The possibility of reform and social re-adaptation of the offender; and,
 10. Any other factor that the court considered relevant.”

Conclusions and Disposition

19. In this case, the applicant pleaded guilty to the offence and he was convicted on his own guilty plea. He has claimed that his mitigation was not properly considered having told the court that the deceased was sexually abusing him and this could have motivated the commission of the offence. This mitigation was noted by the trial court, as against the manner in which the offence was executed. From the trial file, the facts of the case showed how the deceased met his death in a gruesome manner and in the hands of the applicant and his accomplices. The applicant and his accomplices concealed the deceased's body by burying it in a shallow grave in a dry riverbed after stuffing it into a polythene lined gunny bag.



20. The applicant stated that he is remorseful and wishes that the court reconsiders his sentence. He has demonstrated that he is making the best out of his time in custody and has acquired some skills which make him a better person. The 30 years imprisonment sentence was a departure from the statutory prescribed death sentence upon conviction for the offence of murder.
21. It is noted that the offender is a young person with a long life ahead of him. His efforts to become a better person even while incarcerated have been noted. He is a first offender who pleaded guilty to the offence and is remorseful.
22. The sentencing ruling was unclear as to the inclusion of the days spent in custody as envisioned by section 333(2) of the Criminal Procedure Code. The prosecution has conceded that the applicant's rights under that provision should be duly exercised.
23. In light of the foregoing discussion, it is my view that the application succeeds and I order as follows:
 1. All factors considered, the sentence of 30 years imprisonment meted out against the applicant is hereby set aside and substituted with a sentence of 22 years imprisonment; and
 2. In light of section 333(2) of the Criminal Procedure Code, the applicant's sentence is deemed to begin on 22nd February 2021. That is, the sentence now meted includes the 262 days (37 weeks and 3 days) the applicant spent in custody pending hearing.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 12TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Applicant present in Court

Mzari for the Applicant

Ms. Nyika for the Respondent

Francis Munyao - Court Assistant

