Robert v Republic (Petition E610 of 2024) [2025] KEHC 16122 (KLR) (Constitutional and Human Rights) (6 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E610 OF 2024

LN MUGAMBI, J

NOVEMBER 6, 2025

BETWEEN

BRYON ROBERT ..... PETITIONER

AND

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 31st October 2024, is supported by the Petitioner's affidavit in support of even date and a further affidavit dated 19th November 2024.

2. The Petition challenges the constitutionality of his mandatory death sentence. It also seeks to have his case re-heard on sentencing so that the mitigating circumstances can be considered.

3. Accordingly, the Petitioner seeks the following reliefs:

    a. A declaration that the mandatory death sentence imposed on the Petitioner is unconstitutional and violates his rights under Articles 27, 28, 29, and 50 of *the Constitution*.

    b. An order directing that the Petitioner's case be remitted to the High Court for a re-hearing on sentencing only, consistent with the guidelines pronounced in the Muruatetu case, taking into account mitigating factors presented by the Petitioner.

    c. An order commuting the Petitioner's sentence to a term that reflects his rehabilitative strides and the interests of justice.

    d. Any other orders that this Court may deem fit to grant in the interests of justice.

Petitioner's Case

4. The Petitioner states that he was charged in Criminal Case No. 12 of 2014 at the High Court in Nairobi with the offence of murder, which resulted in the mandatory death sentence. He states that this conviction and sentence was upheld by the Court of Appeal in Criminal Appeal No. 90 of 2017.

5. The Petitioner states that the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR declared mandatory death sentences unconstitutional for denying Courts an opportunity to consider the mitigating factors before sentencing to take into account different options including giving a chance to rehabilitative opportunities for the accused.

6. The Petitioner depones that he has demonstrated impeccable conduct during his time in custody and has further undergone attitude and psychological rehabilitation. Moreover, he states that he has shown genuine remorse, indicative of his readiness for reintegration into the society.

7. The Petitioner stresses that although his application in Misc. Criminal Application No. 82 of 2019 was dismissed, this does not bar this Court from revisiting the matter in light of Article 27, 28, 29 and 50 of *the Constitution*.It is on this basis, that he files the instant suit.

Respondent's Case

8. In response, to the Petition the Respondent filed a Replying Affidavit by Senior Prosecution Counsel, Edna Ntabo sworn on 11th November 2024.

9. She depones that the High Court at Nairobi in Criminal Case No.12 of 2014 delivered its Judgment in the Petitioner's case and thus at that juncture the High Court became functus officio.

10. It is stated that the Petitioner filed an appeal in Court of Appeal in Civil Appeal No.90 of 2017 which was subsequently dismissed on 7th February 2020. Considering this, Counsel avers that the Petition before this Court is sub judice.

11. In addition, by virtue of Article 165(6) of *the Constitution*, Counsel argues that this Court lacks jurisdiction to entertain this Petition as the matter has already been determined by the Court of Appeal. Further that, this Court cannot supervise a Court of concurrent jurisdiction.

12. She depones that the High Court in Misc. Criminal Application No.82 of 2019 considered the question of resentencing and dismissed the Petitioner's application on 29th September 2024.

13. In sum, she emphasizes that by dint of Section 24 and 25 of the Penal Code, the punishment of death meted out on the Petitioner is lawful and that the Petitioner has not demonstrated whether the Respondent violated *the Constitution*. On this basis, she argues that the Petition is an abuse of the Court process.

Petitioner's Submissions

14. Swaka Advocates for the Petitioner filed submissions dated 3rd March 2024 and highlighted the issues for argument as: whether this Court has jurisdiction to hear this Petition, whether the mandatory death sentence imposed on the Petitioner is unconstitutional by virtue of Article 27, 28, 29, and 50 of *the Constitution*, whether the Petitioner's right to a fair hearing under Article 50 was violated by the trial Court's failure to consider mitigating factors before imposing the death sentence and whether the Petitioner is entitled to a review/re-hearing of his case on sentencing considering the Supreme Court's decision in Francis Karioko Muruatetu(supra).

15. On the first issue, Counsel submitted that this Court has jurisdiction to entertain this matter owing to Article 165(3) (b) and (d) of *the Constitution*. Equally, Counsel noted that this Court has jurisdiction to entertain matters for resentencing as conferred upon through recent jurisprudence. In this regard, reliance was placed in Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR) where it was held that:

> " We are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*".

16. On the second issue, Counsel submitted the mandatory death sentence deprives the Petitioner of the right to an individualized sentence thereby treating all offenders convicted of murder equally regardless of the circumstances, in contravention of Article 27 of *the Constitution* and his right to dignity under Article 28 of *the Constitution*. As such, Counsel urged the Court to exercise its discretion in reviewing the imposed sentence, while considering the mitigating factors.

17. Reliance was placed in Godfrey Ngotho Mutiso v Republic [2010] KECA 487 (KLR) where it was held:

> " We may stop there as we have said enough to persuade ourselves that this appeal is meritorious, and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while *the Constitution* itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of *the constitution*, which as we have said, makes no such mandatory provision."

18. Like dependence was placed in Nelson Mwiti Gikunda & 2 Others v Republic [2018] eKLR, Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR) and S v. Makwanyane and Another [1995] ZACC 3.

19. Furthermore, Counsel submitted that Article 48 of *the Constitution* guarantees the right of access to justice, while Article 50 provides for the right to a fair trial which in his opinion includes the right to a downward review of a sentence. Counsel relied in Muruatetu (supra) where it was held that:

> " 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 article 25 of *the constitution*; an absolute right.... We therefore reiterate that, this court's decision in Muruatetu, did not

invalidate mandatory sentences or minimum sentences in the Penal Code, the *sexual offences act* or any other statute"

20. Like dependence was placed in Attorney General v. Susan Kigula and 417 Others, No. 03 of 2006.

21. To this end, Counsel submitted that this Court should adopt a similar approach as stated in the cited cases and review the imposed sentence. Counsel urged the Court to also in its determination factor in the time that the Petitioner has been incarcerated so that it aligns with the principles of justice, fairness, and proportionality as articulated by the superior courts.

Respondent's Submissions

22. Principal Prosecution Counsel, Edna Ntabo filed submissions dated 16th June 2025.

23. Counsel reiterating the averments in the Respondent's Replying Affidavit noted that the Petitioner's criminal suit, appeal and subsequent Miscellaneous Application for re-sentencing, were heard and determined, therefore this Court became functus officio. Furthermore, Counsel argued that this suit is sub judice.

24. Counsel as well submitted that the Petitioner had not demonstrated how the Respondent had violated *the Constitution*. Counsel noted that he was charged, tried and convicted of the offence of murder and pursuant to Section 24 and 25 of the Penal Code and that punishment by death is lawful. Counsel stressed that by virtue of the application for resentencing being dismissed, the Petitioner ought to have demonstrated how his rights were violated as per *the Constitution* however failed to do so.

25. In this regard, Counsel submitted that the Supreme Court in Muruatetu (supra) issued the following guidelines:

> "i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code;
>
> ii. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu;
>
> iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
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> iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
>
> v. In re-sentencing hearing, the court must record the prosecutions and the appellant's submissions under Section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.
>
> vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
>
> vii. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court.
>
> a. Age of the offender;
>
> b. Being a first offender;

c. Whether the offender pleaded guilty;

d. Character and record of the offender;

e. Commission of the offence in response to gender-based violence;

f. The manner in which the offence was committed on the victim;

g. The physical and psychological effect of the offence on the victim's family;

h. Remorsefulness of the offender;

i. The possibility of reform and social re-adaptation of the offender;

j. Any other factor that the Court considers relevant.

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu."

26. According to Counsel these guidelines were correctly applied and followed by the High Court in re-sentencing the Petitioner. Counsel pointed out that the Petitioner did not demonstrate any injustice faced in the re-sentencing. Likewise, Counsel submitted that the constitutionality of life imprisonment was recently discussed by the Supreme Court in Supreme Court Petition no. E018 of 2023 R vs Joshua Gichuki Mwangi as follows:

> " Before Kenyan Courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed,presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences other than for the offence of murder. This was the approach and direction in Muruatetu which must remain binding to all courts below".

27. On this premise Counsel submitted that this decision supports the Respondent's challenge to this Court's jurisdiction as the Petitioner seeks to have this Court constitutionally interrogate the decision made in High Court Misc Criminal Application No. 82 of 2019. Considering this, Counsel submitted that this Court lacks jurisdiction to entertain this matter.

Analysis and Determination

28. It is my considered opinion that the issues that arise for determination are as follows:

i. Whether this Court has jurisdiction to entertain this matter.

ii. Whether the Petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain this matter.

29. Jurisdiction refers to the legal authority or power of the Court to hear and determine a dispute and this is usually delineated by law. In Macharia & another v Kenya Commercial Bank limited & 2 others [2012] KESC 8 (KLR) this principle was underscored by the Supreme Court by stating thus:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

30. Echoing a similar position, the Court of Appeal in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR) held:

> "Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...
>
> In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
>
> "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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

31. The Petitioner is seeking re-sentencing hearing following his conviction and sentence in Criminal Case No.12 of 2014 so that consideration can be given to his mitigating factors. In fact, it emerged from the Respondent that the Petitioner lodged an appeal Civil Appeal No. 90 of 2017 and further filed a re-sentencing application before the High Court namely: Misc. Criminal Application No.82 of 2019 which was dealt with. However, the Petitioner asserts there is no legal bar that prevents this Court from considering his claim for violation of his Constitutional rights under Articles 27, 28, 29 and 50 of *the Constitution*.

32. It will be necessary to give context to this matter by referring to the resentencing Ruling dated 29th September 2020 that was delivered by Justice L. Kimaru who stated as follows:

> "This court has carefully considered the rival submission made by the parties to this application. It was clear to the court that the issue as to whether this court has jurisdiction to entertain this application is a pertinent one. The Supreme Court in Francis Karioko Muruatetu vs. Republic [2017] eKLR having declared mandatory death sentence to be unconstitutional, inter alia, on the basis that it denied a person who has been convicted to

mitigate his sentence, directed those who had been adversely affected to make appropriate applications before the High Court for remedy. The Court of Appeal in Jeff Mutunga Muliva vs. Republic [2019] eKLR re-emphasized the critical role that the sentencing process plays in determination the sentence to be meted on an accused. The court held as follows:

"The centrality of properly-conducted sentencing hearing assumes greater significance when considered in light of the Supreme Court's decision in Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR where mandatory death sentences were declared unconstitutional. Thus, it not the case that a murder conviction must necessarily lead to the imposition of the sentence of death. The court's hand are no longer tied. Sentencing being a trial function, the proper order to make in this dismissed appeal is that the case be and is hereby remitted to the High Court for re-hearing in sentencing only consistent with the guidelines pronounce by the Supreme Court in the Muruatetu case (Supra). To that end, the case shall be mentioned before the Judge hearing Criminal cases at the High Court at Makueni..."

This decision is however not entirely reflective of how the Court of Appeal deals with the issue of resentencing or sentencing when considering an appeal in light of the Muruatetu decision (Supra). In some cases, the Court of Appeal has resentenced Appellants, after specifically citing the Supreme Court decision in the Muruatetu case. An example of these cases are Jared Koiti Injiri vs. Republic [2018] eKLR and Christopher Ochieng vs. R [2018] eKLR. It is important to point out that all these decisions were rendered by the Court of Appeal while considering appeals from decisions that were rendered by the High Court before the Supreme Court rendered itself in the Muruatetu decision. The appeals were considered by the Court of Appeal after the Muruatetu decision had been pronounced by the Supreme Court.

In the present application, it was clear to this court that Ms. Chege, the Learned prosecutor has a point when she submits that the Applicant SHOULD have raise the issue of his sentence when he presented the appeal before the Court of Appeal. It was evident that the Applicant DID NOT raise the issue of the suitability of his sentence in light of the Supreme Court's decision in the Muruatetu case. That being the case, this court agrees with Ms. Chege that this court lacks jurisdiction to relook into the issue of the sentence of the Applicant when the Court of Appeal has pronounced itself of the issue. The Court of Appeal, being a court superior to the High Court, cannot have its decision subjected to review by an inferior court.

In the premises therefore, this court holds that the Applicant's application lacks merit since it has been filed before a court that lacks the requisite jurisdiction to consider his plea to be resentenced. This court advises the Applicant to file an appeal before the Court of Appeal, so that the issue as to whether the High Court has jurisdiction to consider an application whose Appeal on both conviction and sentence has already been considered by the Court of Appeal. This is more so in the circumstance where the Applicant was aware that he could invoke the Muruatetu case before the Court of Appeal with a view to have his sentence re-looked.

In the premise therefore, the Application herein cannot be allowed. It is hereby dismissed. It is so ordered."

33. It is pertinent to note that the High Court declined to deal with the resentencing application on the basis that it could not do so as the Petitioner had already been to the Court of Appeal which had dealt with the matter including the sentence hence it could not disturb it as doing so would have been to

interfere with the decision of the Court of Appeal which is a court superior to the High Court and thus advised the Petitioner to go back to the Court of Appeal on that issue.

34. The fact that a resentencing application was heard and determined by this Court is thus not in dispute which means it cannot be revisited under the principle of functus officio. This cannot be remedied by even by filing a new case in form of *the Constitution* Petition as basically, this is the same Court, that is the High Court, only that it is differently constituted. As noted in the Ruling on resentencing, the Petitioner's remedy lies in pursuing an appeal.

35. The doctrine of functus officio was explained by the Supreme Court Odinga v Independent Electoral & Boundaries Commission & 3 others [2013] KESC 8 (KLR) where the Court observed that it marked the end of adjudicative authority of the Court in a matter as follows:

> "
>
> "(18) We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:
>
> "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
>
> (19) This principle has been aptly summarized further in Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550:
>
> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available"

36. Moreover, the argument by the Petitioner that this Court can reopen the case because it concerns violation of his Constitutional rights cannot succeed. The resentencing ruling delivered by the High Court cannot be countermanded or reversed by orders of another High Court by dint of Article 165 (6) of *the Constitution* which provides as follows:

> " The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function, but not over a superior court."

37. In view of the foregoing, this Court does not find merit in this Petition which is hereby dismissed in its entirety.

38. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2025.

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L N MUGAMBI

JUDGE