REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. CRIMINAL APPLICATION E027 OF 2021

IN THE MATTER OF: ARTICLES 20(1)(2), 22(1), 25(a)(c), 27(1)(2)(4), 28, 29(f), 48,50(1)(6), AND ARTICLES 159, 165(3)(b) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 216, 329 and 333(2) OF THE CRIMINAL PROCEDURE CODE, SECTION 26(2) OF THE PENAL CODE CAP 63 AND SENTENCING POLICY GUIDLINE 2018.

AND

IN THE MATTER OF JOSEPH KABERIA KAHINGA AND OTHERS PETITION NO 618 OF 2010; ORDER NO 5 which stated thus, "if the above orders are not complied with within stipulated period, the petitioners shall be at liberty to apply.

BETWEEN

MILTON MUTHOKA MUASYA……APPLICANT

VERSUS

REPUBLIC……RESPONDENT

RULING

1. On 16.2.2021 **Milton Muthoka Muasya** (hereafter the Applicant) filed his initial undated chamber summons and petition seeking resentencing, both which were subsequently amended via the undated chamber summons and application filed on 26.01.2023. The latter essentially sought resentencing the Applicant citing inter alia

Articles 22, 25, 50 and 165 of the Constitution and sections 216, 329 and 333(2) of Criminal Procedure Code (CPC) .

2. The application was supported by the Applicant's affidavit. The gist thereof being that the Applicant was convicted for the offence of Robbery with violence under Section 296(2) of the Penal Code and sentenced to death in **Kajiado Criminal Case No. 972 of 2014** and his subsequent appeals to the High Court **(HCCRA No. 7 of 2016)** and to the Court of Appeal (**Nairobi Criminal Appeal No. 2 of 2018)** were dismissed.
3. His initial resentencing application herein having been based on the decision **Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (**hereafter **Muruatetu I)** whose dicta was clarified in **Muruatetu & Anor.; Katiba Institute & 4 Others (Amicus Curiae) (2021) KESC 31 KLR (**hereafter **Muruatetu II**) to apply only to murder cases, he now bases his application on the persuasive decision of the High Court in **Joseph Kaberia Kahinga & Others, Petition No. 618 of 2010**.

4. He seeks that the time served since arrest on 1.6.2014 be considered sufficient for rehabilitation and proposes that the remaining sentence be served under probation.

Submissions

5. The application was canvassed by way of written submissions. The Applicant's submissions are dated 8.4.2025. Reiterating the affidavit material above, the Applicant states that his death sentence was commuted to life imprisonment by the President, and citing **Muruatetu I** asserted that mandatory sentences were declared unconstitutional and courts were directed to deal with affected concluded matters by allowing mitigation and resentencing.
6. He also relied on **William Okungu Kittiny v Republic [2018] KECA 851 (KLR)** and **Shaban Salim Ramadhan & Others v Attorney General & DPP, Constitutional Petition Nos. 5 & 6 of 2022**, for the proposition that the dicta in **Muruatetu I** applied equally to all offences that attracted a mandatory sentence. Further relying on the case of **Julius Kitsao Manyeso -vs- Republic [2023] KECA 827 (KLR)**, which declared life imprisonment unconstitutional, and **Evans Nyamari**

Ayako -vs- Republic, [2017] KEHC 5570 (KLR) where life sentences were translated to 30 years imprisonment.

7. In mitigation, the Applicant emphasized his remorse, rehabilitation, and transformation over 11 years in custody following correctional programs, including vocational training in upholstery, biblical studies, counseling, and spiritual growth. He cited his tender age of 35 years at arrest and the hardship endured by his wife and six children during his incarceration, and invoked **Wilson Kipchirchir Koskei v Republic [2019] eKLR**, in that regard. He also pointed to his clean criminal record, lack of prior conviction, and low risk of reoffending.
8. Invoking Section 333(2) of the Criminal Procedure Code, he sought that his sentence be computed from the date of his arrest. Here relying on **Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR**.
9. In conclusion, he prays for a declaration that the time served since 2014 is sufficient, or alternatively, a non-custodial sentence that reflects his rehabilitation and readiness for reintegration. He appeals

to the court's discretion to grant reprieve in the interest of justice, rehabilitation, and family restoration.

10. The Respondent's submissions are dated 31.5.2022 in opposition to the application. According to the prosecution, the sole issue for determination was whether the sentence imposed is harsh or excessive in the circumstances. Starting by asserting that resentencing is not a rehearing or appeal but a review of the sentence's legality and appropriateness as stated in **Kamulak Shuma v Republic [2021] eKLR**, the Respondent emphasizes that sentencing discretion must respond to the facts and circumstances of the case, as held in **Thomas Mwambu Wenyi v Republic [2017] eKLR**, citing the **Supreme Court of India in Alister Anthony Pereira v State of Maharashtra.**

11. The prosecution further arguing that the Applicant has not demonstrated that the original sentence was unconstitutional or that the trial court acted on wrong principles. Here citing the case of **Evans Kyalo v Republic [2020] eKLR**, in asserting the focus of resentencing to be the circumstances at the time of the offence, not post-conviction rehabilitation. Moreover, contending that the

Applicant has not provided evidence of rehabilitation, such as life-changing skills or prison reports, and therefore fails to meet the threshold for resentencing. In conclusion, the prosecution invites the court to dismiss the application and to uphold the sentence previously affirmed by the trial and appellate courts.

Analysis and Determination

12. The court has considered the prayers sought by the application and the material canvassed in that respect**.** In the court's considered view, the sole issue for determination is whether this court is possessed of the jurisdiction to do what the Applicant seeks of it.

13. The history of this matter is not in dispute. The Applicant was convicted for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to death by the lower court. His subsequent appeals to this court and the Court of Appeal were dismissed. However, the death sentence has now been commuted to life imprisonment. That is the sentence the Applicant wishes this court to review by resentencing him to a lesser or different sentence.

14. The offence of Robbery with violence contrary to Section 296(2) of the Penal Code attracts a death sentence. It is therefore

clear that the prescribed mandatory sentence for the offence is the death sentence; and its commutation to a life sentence is an exercise of the prerogative of the President under the Power of Mercy Act, and therefore separate from the lawful sentence of the court .

15. In **Chege v Republic [2025] KECA 1207 (KLR),** the Appellant had been convicted for the offence of robbery with violence and sentenced to death. His appeal to the High Court was dismissed. He subsequently filed an appeal to the Court of Appeal challenging the conviction and sentence, but abandoning the appeal on conviction submitted that since the victim was not injured during the incident, he ought to have benefited from a term of imprisonment, rather than the death penalty. He cited the provisions of Article 50 (2) (p) of the Constitution and the decisions in **Jackson Wanyoike Njuguna & another vs. Republic [2019] eKLR** and **Swaley Muhaya Lubanga vs. Republic [2021] eKLR.**

16. In its judgment delivered on 4th July 2025, the Court of Appeal expressed itself as follows:

> **"As already stated, the appellant abandoned his appeal on conviction and therefore, there is no dispute that the**

ingredients of the offence were established beyond reasonable doubt. This appeal is on sentence only. We must, however, point out that even if the appeal on conviction was pursued, the facts of this case are straightforward as there was overwhelming evidence leading to his conviction.

18. The appellant was sentenced to death after the trial court considered his mitigation. This sentence was upheld by the High Court. Section 296 (2) of the Penal Code provides that a person convicted of the offence of robbery with violence shall be sentenced to death. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6th July 2021 in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (AmicusCuriae) [2021] eKLR reiterated that mandatory or minimum sentences imposed in the statutes have not been invalidated. The Apex Court further clarified that the exercise of discretion in meting out a sentence was only applicable to murder cases where it is not expressly provided in statute.

19. 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.

20. <u>Having said that, we have no option but to sadly inform the appellant that, as things stand at the moment, his sentence must remain as we are unable to interfere with the sentence meted out.</u> Accordingly, the appellant's appeal lacks merit and it is hereby dismissed." (Emphasis added)

17. In its recent decision in **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)** the Supreme Court held in relation to the mandatory and minimum sentences as follows: -

> **"In light of the structural and supervisory interdicts issued, the court issued the *Muruatetu Directions*, wherein it, inter alia, pronounced itself on the application of its decision in the *Muruatetu Case* to other statutes prescribing mandatory or minimum sentences as follows:**
>
> > ***"10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of***

murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

[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 article 25 of the Constitution; an absolute right".

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that Section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases

11.The *ratio decidendi* in the decision was summarized as follows:

"69.Consequently, we find that Section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

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.”…….

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

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." [Emphasis ours]."

18. A similar position was adopted in **Republic Versus Evans Nyamari Ayako Petition No: E002 of 2024,** being an appeal from the Court of Appeal where the Supreme Court in its judgment delivered on 11th April 2024 stated that:

> "**(51) In the instant case, the Court of Appeal in its judgment, referred to the case of Manyeso Vs. Republic case where a different bench of the Court of Appeal cited the Muruatetu I case in stating that the rationale therein applied mutatis mutandis to the issue of mandatory indeterminate life sentence.**
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> **52. In Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale**

could be applied as is to other offences with a mandatory or minimum sentence."

19. Further in the case of **Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment)** the Supreme Court held that:

> **"67. Article 94 of *the* Constitution provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 (3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened.**
>
> **The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue**

equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.

68. Courts cannot therefore extend their determination to rectify or amend their determination to rectify or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption.

70. Our findings hereinabove effectively lead us to the conclusion that the Judgment of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The

Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the first appellate court. Consequently, the life imprisonment sentence remains lawful ……"

20. Similarly in this case, this court has no jurisdiction to interfere with the lawful, now commuted, death sentence, that was imposed by the trial court and confirmed on the first and second appeals. It is of no moment for the Applicant to cite the High Court's decision in **Kaberia Kahinga's c**ase (supra); the Supreme Court decisions bind all superior courts. At best, his recourse ought to lie with the Power of Mercy Committee appointed under the Power of Mercy Act. In the result the application filed on 16.02.2023 must fail in its entirety and is hereby dismissed.**DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 20TH DAY OF NOVEMBER 2025.**

C.MEOLI
JUDGE

In the presence of:

Applicant: Present

For the Respondent: Mr. Kilunda

C/A: Lepatei