

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKADARA
CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO E149 OF 2025

JOHN MAINA MACHARIA

APPLICANT

VERSUS

REPUBLIC

RESPONDENT

RULING

1. The applicant herein was charged with the offence of robbery with violence on 21st march 2003 in criminal case no 6078 of 2003 and was on 23rd July 2004 convicted and sentenced to death.
2. The appellant filed an appeal to this court sitting at Milimani being a Criminal appeal no 378 of 2004 which appeal was dismissed and the conviction and sentence affirmed on 1st February 2007.
3. On the 15th March 2019 the applicant filed an application under certificate of urgency before the Chief Magistrates Court at Makadara for resentencing under the Muruatetu 1 decision being Misc. Criminal application no 178 of 2019 in which he confirmed that he had also filed an appeal to the Court of Appeal being Criminal Appeal No 279 of 2007 which appeal was also dismissed for lack of merit.
4. By an application under certificate of urgency dated 21st May 2024 filed at the Criminal Registry at Milimani

being Misc. criminal application no E183 of 2024 the applicant moved the court for resentencing on the basis that the court of appeal had by then in the case of Evans Nyamari Ayako Criminal Appeal no 22 of 2018 at Kisumu equated life imprisonment to 30 years at the highest and that by dint of the sentencing Policy Guidelines this court has jurisdiction.

5. The application was supported by the affidavit by the applicant in which he deposed that he was convicted and sentenced to death for the offence of robbery with violence and that he has been in custody from the date of his arrest.
6. He deposed further that he had not been heard for resentence by any court of competent jurisdiction and therefore should be given equal benefit thereof.
7. This matter was transferred to this registry upon its establishment and at the hearing hereof the applicant submitted that the sentence should be reviewed since at the time when he was sentenced he was 56 years old and has spent 22 years in prison making his age as at the time of the application to be 78 years. He therefore sought that his life sentence be commuted to term.
8. Ms Kariuki for the prosecution submitted that this court has no jurisdiction to review the sentence the same having been confirmed by a higher court.

DETERMINATION

9. There are two issues identified by the court for determination, that is whether this court has jurisdiction

to hear and determine this matter and what order should the court make.

10. Resentencing was introduced to the criminal justice in Kenya through the provision of Article 50 (6) of the constitution which provided that a person who is convicted of a criminal offence may petition the High Court for a new trial if

(a) The persons appeal if any has been dismissed by the highest court to which the person is entitled to appeal or the person did not appeal within the time allowed for appeal and

(b) New and compelling evidence has become available.

11. This provision to my understanding is only available to a person who has discovered new evidence, it is only then that an accused person is entitled to a new trial so that if that evidence was only limited to sentence, then the High Court on a petition can hear the same.

12. The applicant has not approached the court under this constitutional provision but through the window which was provided for by the Supreme Court in the Muruatetu decision where the court stated that those accused persons charged and convicted of murder as clarified in Muruatetu 2 where entitled to resentencing since they did not benefit from mitigation as the only sentence then available was death, the mandatory nature of which the court found unconstitutional.

13. In Muratetu 2 the court clarified that the decision on Muruatetu was limited to murder only and not to any other offences which had mandatory minimum and maximum sentence.
14. The Supreme Court in petition filed by the DPP in the case of **Republic versus Ayako [2025] KESC 20 (KLR)** which was an appeal against the decision of the court of Appeal in Evans Nyamari Ayako, which formed the foundation of the applicant's application herein dismissed the applicant's contention that his life sentence should be substituted with 30years and specifically stated that the Court acted arbitrarily without involving parliament.
15. The court went further and found that in applying the Muruatetu decision beyond Muruatetu 2 the Court of Appeal violated the doctrine of stare decisis.
16. It therefore follows that this court has no jurisdiction to hear this matter on the account that the same is not covered under the resentencing provision availed under Muruatetu and secondly on the basis of stare decisis, since the applicant filed an appeal to the Court of Appeal which dismissed his appeal and therefore the only valid judgement on record as regards this cause is the judgement of the Court of Appeal delivered on 20th December 2013 P.Kihara Kariuki , Dk Maraga and PM Mwilu the last two who rose to become the Chief Justice and the Deputy Chief Justice, and therefore as John said of Jesus , I have no capacity to untie the string of their

shoe noting that I cannot match the wisdom of the court of appeal.

17. It therefore follows that the application herein lacks merit as the age of the applicant is not a good ground for this small judge sitting in the small High Court at Makadara to go against the wise decision of the two courts above it.

18. The applicant can wait for the time when the President is exercising his powers of mercy to put his name forward as at now he can wait for "*Paulo na Silla*" to sing and open for him the prison doors.

DATED SIGNED AND DELIVERED THIS 19th DAY OF NOVEMBER 2025

**J WAKIAGA
JUDGE**

In the Presence of

Court Assistant - Irene

Ms Kariuki for the state

The applicant in person