Mukenya v Republic (Criminal Revision E048 of 2024)
[2025] KEHC 17161 (KLR) (19 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E048 OF 2024

DKN MAGARE, J

NOVEMBER 19, 2025

BETWEEN

JOSEPH WAFULA MUKENYA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a Ruling over an Application dated and filed on 2.7.2024 seeking criminal revision of the sentence of death as commuted to life imprisonment.

2. The Application is supported by the Affidavit of the Applicant and it was deposed in material as follows:

    a. The Applicant was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

    b. The Applicant exhausted all appeals on conviction and sentence.

    c. The Applicant has served 26 years in prison.

    d. The Applicant seeks this court to uphold *the constitution* to do substantial justice under Article 165(3)(b) of *the Constitution*.

3. The Respondent filed a Replying Affidavit sworn by David Mwakio, Prosecution counsel on 7.1.2025, opposing the Application on the grounds as follows:

    a. The death sentence, as upheld by the High Court and affirmed by the Court of Appeal, was lawful.

    b. A term sentence of 50 years is befitting to the Applicant owing to the developing jurisprudence on the death penalty.

Submissions

4. The Applicant submitted vide the submissions dated 4.9.2024 that under Article 50 (e) (f) of *the Constitution*, this court could review the sentence. he relied on Shaban Salim Ramadhan & Others v ODPP & AG (2024)e KLR to submit that a predetermined sentence ought to replace the death sentence.

5. The Respondent did not file submissions.

Analysis

6. The issue is whether the Applicant's sentence to death should be reviewed.

7. The instant Application is premised, among others, on Article 50 (2) (q) of *the Constitution*. Discretion in sentencing is a matter of justice and pertains to fair trial. Therefore, a person who suffers this deprivation may claim violation of the right to an appropriate or less severe sentence- a principle embodied in *the Constitution*, including article 50(2)(p) of *the Constitution* as follows:

> Every accused person has the right to a fair trial, which includes the right:
>
> ... 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.

8. Re-sentencing merely provides an effective remedy to an injustice that may arise from a violation of a right or fundamental freedom. This was equally the view of this Court in Michael Kathewa Laichena & Another -v- Republic (2018) eKLR thus:

> " ...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence.'

9. There is no straight-jacket formula for sentencing an accused person on proof of crime. As was held by the Court of Appeal in Thomas Mwambu Wenyi Vs Republic (2017) eKLR citing the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just, and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

10. The Applicant is serving life imprisonment following the death sentence being commuted by the committee of the power of mercy advising President Mwai Kibaki in 2009.

11. The question of the mandatory nature of the death penalty has not been addressed together with mitigation. In the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu II):

> In respect of other capital offences such as treason under Section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under Section 297(2) of the Penal Code, 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 the decision in question could be reached.
>
> ... 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.
>
> 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.

12. Therefore, the decision relating to the mandatory nature of the death penalty has been dealt with in respect to sentences of murder under Sections 203 and 204 of the Penal Code. The court is yet to decide on the same in respect of robbery with violence. The question of the constitutionality of the death sentence is settled, with the implication that it is constitutional and a lawful sentence to be meted out.

13. In Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR), the Supreme Court referred to the case of Vinter and others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that:

> "
>
> > " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognized by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
>
> Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment.

14. The discretion to sentence permits a balanced and fair sentencing, which is a hallmark of enlightened criminal justice and proper consideration of the individual circumstances of each accused person

is essential for substantive justice. In State vs. Tom, State v. Bruce (1990) SA 802 (A), Smalberger, JA, writing for the majority of the Supreme Court of South Africa, made the following pertinent observations about sentencing in general and mandatory sentences in particular:

> "The first principle is that the infliction of punishment is preeminently a matter for the discretion of the trial court ... That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law... A mandatory sentence runs counter to these principles. (I use the term "mandatory sentence" in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence... Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences...as they are detrimental to the proper administration of justice and the image and standing of the courts."

15. A provision of law should not deprive the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence for this can only be regarded as harsh, unjust and unfair. The Court in Mithu Singh vs. State of Punjab, 1983 AIR 473 stated as follows:

> "...a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair. It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example 'Theft, Breach of Trust' or 'Murder'. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. Equity and good conscience are the hall-marks of justice. The mandatory sentence of death prescribed by section 303, with no discretion left to the court to have regard to the circumstances which led to the commission of the crime, is a relic of ancient history. In the times in which we live, that is the lawless law of military regimes. We, the people of India, are pledged to a different set of values. For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead."

16. It is beyond peradventure that the cardinal duty of this court does not rest until it ensures that the sentences so prescribed are imposed in accordance with *the Constitution*. In the Constitutional Court

of Uganda's decision in Susan Kigula & 417 Others vs. Attorney General, Const. App. No. 3 of 2006 the Court observed thus:

> " The legislature has all the powers to make laws, including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with *the Constitution*."

17. The court also notes that the purpose and objectives of sentencing, as stated in the Judiciary Sentencing policy, should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence, and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 Sentencing Guidelines are as follows: -

> " 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
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> i. Retribution: To punish the offender for their criminal conduct in a just manner.
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> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
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> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
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> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
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> v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
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> vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
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> vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> viii. Reintegration: To facilitate the re-entry of the offender into the society"

18. It is high time this court exercises its complete jurisdiction against nondeterminate Methuselah sentences. The Supreme Court of Appeal of South Africa in S v Nkosi & others 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence imposed by the trial court, which sentenced

the appellants to terms of imprisonment of 120 years, 65 years, 65 years, and 45 years, respectively. The Court stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of *the Constitution* of the Republic of South Africa Act 108 of 1996.The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

19. The appellant was heard and exhausted his appeal under the old constitutional dispensation. He has not filed any other application under the new constitutional dispensation. It is important to note that parties to related criminal litigation have to catch up and live with the reality. In the case of Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> "Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

20. However, there must be certainty achieved by consistency in the judicial decision-making for there to be confidence in our courts. The doctrine of stare decisis obliges this Court to follow the binding decisions of the Supreme Court. Article 163(7) of *the Constitution* provides that:

> "all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

21. The Supreme Court in Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR) directed that a proper challenge on the constitutional validity of the mandatory death penalty in such cases like robbery with violence should be filed appropriately, 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 the decision in question could be reached. This has now reached the High Court. By placing a mandatory death penalty, the statute places all offenders on the same pedestal. However, this should not be, as the degree of culpability is different. In this case, if the mandatory

nature of the death penalty is not handled well, there will be a loss of punishment for various degrees of heinousness. The death penalty should be reserved for the very deserving cases.

22. Further, in the recent Supreme Court's case of Joshua Gichuki Mwangi & Others in Petition No. E018 of 2023 it was decreed that any challenge on the constitutional validity of mandatory sentences for other capital offences, other than murder, in respect of which the Supreme Court has already delivered itself in the famous Muruatetu case, is welcome for determination by the High Court and the Court of Appeal, where necessary, in the event of an appeal.

23. *The constitution* does not envisage that there has to be a formula to approach the court. article 20 of *the Constitution* provides as follows:

(1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;

and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

24. The most essential factor is that in meting out punishment, there can be no privileged children. I fully submit to the Supreme Court's decision, as it is binding on this court. Nevertheless, the said decision gave a wide window to address the question of the mandatory death sentence for the other offences arising from the High Court. In the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KESC 31 (KLR), the supreme court addressed the question as follows:

> In respect of other capital offences such as treason under section 40(3) of the Penal Code, robbery with violence under section 296(2) of the Penal Code, and attempted robbery with violence under section 297(2) of the Penal Code, 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 the decision in question could be reached.

25. The court requested the decisions relating to the court of appeal and was satisfied that there were no pending proceedings in the court of appeal. This caused a considerable delay in hearing of this application as the court was getting satisfied with the non-pendency of any matter in the court of appeal in line with the decision of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [supra]

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.

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.

26. Due to the passage of time, the victims could not be found as the appellant has been in custody for over 27 years. The learned prosecution counsel suggested a period of 50 years as sufficient to substitute the death sentence. Before venturing into the substitution, it is important to determine whether the court has jurisdiction to deal with the mandatory nature of the death sentence, in particular for the applicant.

27. In the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR), the supreme court [DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ], while addressing the mandatory nature of the death penalty for murder held as follows:

With regard to murder convicts, mitigation is an important facet of fair trial. In Woodson as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

> 50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. article 28 of *the Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.
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> 51. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.
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> 52. We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst *the Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with

the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

53. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

54. A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher court as prescribed by law. Counsel for the petitioners and amici curiae both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under article 50(2)(q) of *the Constitution*. On this issue, we are persuaded by the decision in Edwards v The Bahamas (Report No 48/01, April 4, 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him.

28. Having looked at the mandatory nature of the death penalty, I note that two classes of death penalties have been created. This is to say, the death penalty for murder, whose mandatory nature was declared unconstitutional. The mandatory nature of the death penalty in robbery with violence and allied offences, including treason, has not been dealt with by our courts.

29. The effect is that the convicts for robbery with violence are treated as children of a lesser god. this does not align with article 27 of *the constitution* which provides as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

30. Having one class of capital offenders protected while another class is left to their own devices leaves the concept of 'equal beneficiary of the law' in limbo. The applicant urged the court that the path had been beaten before. I respectively agree, a capital offender remains a capital offender whether or not he committed treason, murder, or robbery with violence. I therefore find that the mandatory nature of the death penalty for robbery with violence is unconstitutional. It leaves convicts without a chance to be punished depending on the degree of culpability. the applicant has stayed in custody for 27 years

without ever having a chance to be executed. He also has no chance to complete his sentence. he remains in a state of perpetual fear of the unknown. This is a worse punishment than knowing your fate and facing a hangman's noose.

31. In this state, it's essential that convicts have a chance to reform and that their sentences be reduced according to culpability. This helps to shape the heinousness of crimes. A robber, who knows that the lesser violence he metes out, the lower the sentence will be, will not have utter disregard for human life. he will mete out violence only to accomplish the robbery and not be extreme.

32. On the other hand, some sentences must be reserved for the very worst of the criminals. The death penalty, qua death penalty, is constitutional and a valid sentence to mete out. However, the applicant is concerned with the mandatory nature. The mandatory nature of the death penalty removes discretion from the court.

33. Section 296 of the Penal Code provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections (1) and (2) as follows:

296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. [Emphasis mine]

34. Robbery itself as an offence is created, and section 295 of the Penal Code provides as follows:

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

35. The sentencing bit of the offence recognizes that it is a graduated offence. There is a simple primary school type of robbery and PHD level of robbery, forgiving the intended pun. The punishment cannot be the same. It follows that, though it is indicated that the offender shall be sentenced to death, the word shall can be read to mean may. It therefore means that the death penalty for robbery with violence is the highest sentence. The court must have discretion to mete out a sentence depending on mitigation, personal facts, and the offender's age, and must exercise that discretion among others.

36. The discretion as set out in sentencing guidelines consider the following:

4.8.20 The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:

i. Age of the offender.

ii. Being a first offender.

iii. Whether the offender pleaded guilty.

iv. Character and record of the offender.

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

vi. Remorsefulness of the offender.

vii. The possibility of reform and social re-adaptation of the offender. viii. Any other factor that the court considers relevant.

ix. Time already spent in prison by the convict.

x. Duress, provocation, less participation in the offence (including progressive provocation).

xi. Any attempt to make reparation for the offence.

4.8.21 As in any sentencing hearing, proper investigations must address the above factors. This may be done by way of, for example, a pre-sentence report, completed by PACS, any victim impact statement, a witness protection report (where relevant), and a report from the prison where the convict was in custody.

37. All these guidelines do not help to reach a guided sentence since there is only one sentence. Consequently, I allow the application to the extent. However, discretion does not include meting out a sentence that is less than 14 years, as the legislative intent is to set 14 years as the maximum sentence for offences punished under 296(1) of the penal code

38. Coming to the applicant, he was a young offender who committed a heinous robbery. His sentence has since been commuted to life. However, the judicial sentence is the death penalty. He has been trained in prison and reformed. However, the element of crime was removed and retribution must take effect. For the last 27 years, he has not been executed. He has a capacity to be useful, however late in life that will be. Given the circumstances set out in the original judgment, a sentence of 40 years will be proper.

Determination

39. I therefore make the following orders: -

a. The Notice of Motion Application dated 2.7.2024 is allowed.

b. The mandatory nature of the death penalty removes discretion from the court and is thus unconstitutional; a death penalty remains a proper sentence that can be meted out.

c. In respect of the applicant, he received a mandatory death penalty. Without the benefit of mitigation, especially at his age. The sentence is set aside and substituted with 40 years' imprisonment to run from the date of arrest.

d. The file is closed.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 19TH DAY OF NOVEMBER, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Applicant – Present

Mr. Kimani for the for the State Respondent

Court Assistant- Michael