



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 001 OF 2025**

**ISSA OMAR AHMED.....**

**APPLICANT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**RULING**

1. The Applicant herein was charged with the offence of **Robbery with violence contrary to section 296 (2) of the Penal Code** and sentenced to death which was later commuted to life Imprisonment.
2. The applicant filed a notice of motion application dated 8<sup>th</sup> January 2025 seeking orders that the life sentence from be declared unconstitutional and thus he be resented to a determinate term.

3. The application was supported by an affidavit sworn by the applicant wherein he deposed that he was charged with the offence of robbery with violence and was sentenced to death which was later commuted to life imprisonment. He appealed in **criminal appeal No. 78 of 2009** which appeal was summarily dismissed. That life sentence has since been declared unconstitutional.
4. The application was vehemently opposed by the prosecution.
5. The application was canvassed by way of written submissions. The applicant submitted that the mandate donated to this superior court vide article **165 (3) of the Constitution** enables it to provide a remedy; in this case resentencing.
6. The respondent on the other hand submitted that this court is functus officio. Reliance was placed in the case of **Mokua & another versus Republic (2024)**.
7. It was submitted that the application was frivolous and abuse of the court process.

## **Determination/Analysis**

8. I have carefully considered the application herein, the supporting affidavit, the rival submissions and the law.
9. Article 165(3) of the Constitution vests the High Court with inter alia;
- (a) unlimited original jurisdiction in criminal and civil matters;....***
- (e) any other jurisdiction, original or appellate, conferred on it by legislation. ....***
- (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....”***
10. Whereas the jurisdiction of this court in criminal cases is unlimited the same must be exercised within the law not at a whim or arbitrarily.

11. The applicant admits that his death sentence was commuted to life imprisonment. He is therefore no longer under the death sentence. Moreover, even was he under such a sentence it would not be unconstitutional as **Article 26(3) of the Constitution** recognizes that the right to life can be limited by statute. The sub article states;

**“(3) A person shall not be deprived of life intentionally, except to the extent authorized by this constitution or other written law.”**

12. It is instructive that even in the Muruatetu case cited by the applicant the Supreme Court did not declare the death sentence unconstitutional. It is the mandatory nature of the death sentence that was found to be unconstitutional and even then, that court has been categorical that the decision applies solely to murder cases. In regard to the sentence of life imprisonment the same court has pronounced itself in the case of **Republic v Ayako(Petition E002 of 2024) [2025[KESC 20 (KLR)(11 April 2025)(Judgment)** where it stated;

**“(43) Each of the three branches of the Government has its own unique role in ensuring the proper functioning of the State. These roles also complement each other. To achieve this**

**delicate yet essential balance between the Executive, the Legislature and the Judiciary, the Constitution specifically outlines the obligations and mandate of each arm of Government. This division fosters a system of checks and balances, where each branch operates independently yet works collaboratively to uphold constitutional governance, to prevent abuse of power and ensure the rule of law. This balance is vital for maintaining the trust and functionality of a democratic government.**

**44. Article 94 of the Constitution in particular vests Parliament with the power to make provisions with the force of law. It further provides that other persons or bodies may also do so only under legislative fiat or the Constitution, but this authority has to be express and specific as to the purpose, objectives, limits, nature and scope of the law to be made. In this way, the Constitution is comprehensive with the necessary safeguards that protect the people of Kenya. We would also add that, before a provision has the full effect of the law, it has to go through various stages of the legislative process, principal among them being public participation. The enactment of legislation without going through these necessary safeguards means that the**

**resultant law would lack legitimacy and will be rendered unconstitutional.**

**45. In the Republic v Mwangi Case, this Court held that, whilst sentencing is an exercise of judicial discretion, Parliament sets the parameters for sentencing for each crime in statute. We stated as follows: “66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed”.**

**46. In *Muruatetu I*, faced with a similar question of ascribing a term sentence to life imprisonment, this Court considered Article 51 of the Constitution which provides for the rights of detained persons. Sub article 3 thereof specifically tasks Parliament with enacting legislation for the humane treatment of detainees, persons in remand and convicts. We, therefore, held that while life imprisonment ought not necessarily mean a prisoner's natural life, it is for the Legislature to prescribe what constitutes life imprisonment and the parameters applicable, if at all. In that connection, we did, as the Supreme Court, recommend that the Attorney General and Parliament ought to commence an enquiry on this issue, and develop legislation on what constitutes a life sentence. Despite making this recommendation on 14th December 2017, and making an order that the Judgment be placed before the Speakers of the National Assembly and the Senate to, among other things, set the parameters of what constitutes life imprisonment, we note this recommendation has not been given consideration by the two offices of Parliament.**

**47. In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect**

***would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers.”***

13. Similarly, the case of **Republic v Manyeso[2025]KESC 16 (KLR)** the court stated;

***“(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 rectifying 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. As a court we have invoked this remedy in various instances; in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) we suggested the consideration of reforms over the recourse parties have upon the declaration of trust by the courts and how to actualize the same, especially regarding the aspect of shareholding. In *Malcolm Bell v Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak* (Application 1 of 2013) [2013] KESC 23 (KLR) Hon. Justice Kaplana Rawal, DCJ in her concurring opinion made recommendations to amend section 16 of the Supreme Court Act. In *Communications Commission of Kenya & 5***

***others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) we urged CAK to set a timeline for the digital migration. In National Bank of Kenya Limited v Anaj Warehousing Limited (Petition No 36 of 2014) [2015] KESC 4 (KLR) we suggested appropriate legislative action to be taken to address the gaps and inconsistencies apparent in the Advocates Act.***

***69. We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.”***

14. In light of the above decisions and in view of the doctrine of stare decisis, this court cannot grant the prayer sought and accordingly the application dated 8<sup>th</sup> January 2025 is dismissed.

It is so ordered.

**Judgment signed, dated and delivered virtually on this 4<sup>th</sup> December, 2025.**

**E. N. MAINA  
JUDGE**

ORIGINAL