REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E016 OF 2025

SIMON KADIVANI ALIAS SOLOMON KADAGAYA……. ……..APPLICANT

VERSUS

REPUBLIC…… RESPONDENT

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death.
2. Being aggrieved by the said decision, he lodged a first appeal at Kakamega **HCCRA No 151 of 2014**. The court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged a second appeal in the Court of Appeal Kisumu **Criminal Appeal No 70 of 2016** which was equally dismissed.
4. On 5th March 2025, he filed an undated Notice of Motion application that was supported by his Affidavit that was dated 25th February 2025 seeking review of his sentence.
5. He averred that he had undergone several rehabilitative programs in prison. He urged the court to review his sentence to a lenient one putting into account the time he had served since 2013 pursuant to Section 333(2) of the Criminal Procedure Code. He added that if there was any other sentence the court would prefer, then he ought

to be ordered to serve the remaining sentence under community service (probation).

6. Parties did not file any Written Submissions. The Ruling herein is, therefore, based on the Applicant's affidavit evidence.

LEGAL ANALYSIS

7. In the case of **Mbugua & 6 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment)**, this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right.
8. It recognised that under Article 27(1) of the Constitution of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they had a right to be protected before the law and had to derive equal benefit from the law as the non- capital offenders.
9. The court's decision was in line with the directions of the Supreme Court on 6th July 2021 in **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR (commonly now known as Muruatetu II)** that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the

High Court and thereafter be escalated to the Court of Appeal, if necessary. It rendered itself as follows:-

"46. 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 court)."

10. In the case of **Ramadhan & 8 others v General & another (Petition 5 of 2022 & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024) (Judgment)**, Sewe J looked at the mandatory nature of the death sentence under Section 296(2) of the Penal Code and declared it unconstitutional. She further directed that the petitioners therein be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications.

11. In the case of **Mbugua & 6 Others vs The Hon Attorney General** (Supra) as consolidated with **Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others** (Supra), this

court looked at the aspect of re-sentencing of persons who had been convicted under Section 296(2) and Section 297(2) of the Penal Code and rendered itself as follows:-

"67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.

68. The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of the Constitution of Kenya….

86. For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of the Constitution of Kenya which sets out some of the

principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of the Constitution of Kenya.

87. Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction."

12. In this regard, this court found that applicants seeking re-sentencing ought to file documents to support their mitigating factors. These documents could include certificates of programmes they had undergone in prison leading to their rehabilitation and recommendation letters from the In charges of prisons.

13. While considering the present application for re-sentencing, this court was alive to the fact that the High Court and the Court of Appeal upheld the death sentence that was meted out against the Applicant herein. It was the mandatory nature of the death sentence that this court found to have been unconstitutional and found that persons who had been convicted for the offence of robbery with violence and attempted robbery ought to be allowed to mitigate and be re-sentenced.

14. This court noted that Appellants who included Francis Karioko Muruatetu in the Court of Appeal case of **Gachanja & 7 Others (Criminal Appeal 51 of 2004) [2011] KECA 402 (KLR) (20 May 2011) Judgment** were re-sentenced by the High Court on 16th December 2019 in **Misc Criminal No 394 of 2017 consolidated with Misc Criminal Applications Nos 614, 28, 560, 589, 590 and 586 of 2018.**

15. In the same vein, as the Court of Appeal had not yet dealt with the constitutionality of the mandatory nature of death sentence in respect of the Applicant herein, this court therefore found and held that it would not be violating the doctrine of *stare decisis* if it determined that it could allow him to mitigate and then re-sentence him in line with the case of **Mbugua & 6 Others vs The Hon Attorney General** (Supra) as consolidated with **Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others** (Supra) and **Ramadhan & 8 others v General & another** (Supra) despite the Court of Appeal having upheld his death sentence on appeal.

16. In this regard therefore, this court recognised that as it had both original and appellate jurisdiction to hear criminal and civil cases as provided in Article 165(3)(a) of the Constitution of Kenya and further it could review the decision of the lower court as provided under Article 50 (2) (q**)** of the Constitution of Kenya, it did not have to send the lower court file back to the lower court for re-sentencing.

17. To avoid further delays in this matter, this court found it prudent to consider the mitigation and re-sentencing of the Applicant herein as it already had the lower court file.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 25th February 2025 and filed on 5th March 2025 was merited and the same be and is hereby allowed in the following terms:-

    a. **THAT the Applicant be and is hereby directed to appear before this court for mitigation and sentencing on 14th January 2026.**

19. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **14th** day of **January** 2026

J. KAMAU
JUDGE