

**IN THE COURT OF
APPEAL AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA,

JJ.A.) CRIMINAL APPEAL NO. NAK E004 OF

2023 BETWEEN

SAMUEL KIIRU HASSAN.....APPELLANT

AND

REPUBLIC

RESPONDENT

*(Being an appeal against the conviction and sentence from High Court of Kenya at Nakuru (**Chemitei, J.**) dated 4th September 2021*

in

HCCRA No. 40 of 2019).

JUDGMENT OF THE COURT

1. This is a second appeal lodged by the appellant against the sentence delivered on 4th September 2021 by **Chemitei, J.** in Nakuru High Court Criminal Appeal No. 40 of 2019. The appeal emanated from the judgement of the Chief Magistrate's Court at Nakuru in Criminal Case No. 2167 of 2018 in which the appellant and his co-accused were charged, tried and convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal code. The appellant also faced a charge of rape contrary to section 10 of the Sexual Offences Act. He was sentenced to death on

the first count and 30 years

for the offence of rape but the sentence was held in abeyance since he had been sentenced to suffer death.

2. The appellant's appeal against both conviction and sentence being Nakuru High Court HCCRA No. 40 of 2019 was dismissed by **Chemitei, J.** on 4th September 2021 for lack of merit. Dissatisfied by the said decision, the appellant filed an undated notice of appeal and undated memorandum of appeal citing the following grounds: (a) the learned judge failed to note that the ingredients of the offence were not conclusively proved; (b) the learned judge erred in law and fact by sentencing him to a term that is not only harsh but also excessive in light of the facts and circumstances of the case; and (c) the learned judge failed to consider his mitigating circumstances.
3. We virtually heard this appeal on 9th December 2025. The appellant was present and represented by Mr. Ochieng advocate while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions.
4. The appellant filed written submissions, a list of authorities and case digest all dated 17th June 2025. Mr. Ochieng

informed the Court that the appellant was only pursuing the

appeal against sentence and cited the Supreme Court decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR** in support of his argument that mandatory minimum sentences prescribed by the Penal Code are unconstitutional, therefore, the sentence passed by the trial court and affirmed by the High Court was not harsh and unconstitutional since the death sentence flouted the appellant's constitutional rights under Article 50 (2) of the Constitution.

5. Counsel also relied on **Christopher Ochieng vs. Republic [2018] eKLR** contending that this Court (differently constituted) in a second appeal similar to the present case stated that it was not in support of minimum sentences passed without considering mitigating circumstances. Counsel submitted that while imposing the mandatory sentence, the trial court did not consider his mitigation, remorsefulness and willingness to reform. To buttress his submissions, counsel cited the case of **Paul Ouma Otieno & Another vs. Republic [2018] eKLR** where in this Court (differently constituted) quashed the death sentence passed by the trial court and upheld by the High Court and

substituted it with 20 years imprisonment. Counsel proposed that the appellant's sentence

be reduced to a 20-year imprisonment considering the time already served in custody to date.

6. Mr. Omutelema, the respondent's counsel filed written submissions, a case digest and a list of authorities all dated 19th June 2025. He submitted that the prosecution proved the ingredients of the offence of robbery with violence beyond reasonable doubt. Regarding the sentence, Mr. Omutelema maintained that the appellant did not appeal against the sentences and as such, the first appellate court upheld the sentences, but the sentence of 30 years for the offence of rape was held in abeyance.
7. Mr. Omutelema also submitted that there were aggravating circumstances that justified the imposition of a severe sentence and the aggravating circumstance included the strong evidence of planning, preparation and the commission of the offence and the fact that the appellant lied to the complainant that he had secured a job for her only for him to take her to the club, then to the forest before raping her and abandoning her in the forest. Consequently, Mr. Omutelema prayed that the appeal on sentence be dismissed.

8. We have considered the parties' submissions. This Court's jurisdiction in a second appeal is circumscribed by the law. Section 361 (1) of the Criminal Procedure Code provides that:

A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

- a. on a matter of fact, and severity of sentence is a matter of fact; or***
- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."***

9. In **Ahmed Abolfathi Mohammed & Another vs. Republic**

[2018] KECA 743 (KLR) this Court stated:

“As it is a second appeal, we are obliged, by dint of section 361(1)(a) of the Criminal Procedure Code to consider only issues of law... In M’Riungu vs Republic [1983] KLR 455, this Court was emphatic that:

“[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion,

which would be the same as holding that the decision is bad in law.”

10. 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 Supreme Court on 6th July 2021 in **Francis Karioko Muruatetu & Another vs. Republic;** **Katiba Institute & 5 Others (Amicus Curiae) [2021]** eKLR reiterated that mandatory/minimum sentences prescribed in the statutes remain lawful. Further, the Apex Court in the above decision clarified that its decision in **Francis Karioko Muruatetu vs. Republic [2017] eKLR** cited by the appellant only applied to murder cases.

11. Furthermore, the Supreme Court in **Republic vs. Mwangi;** **Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)** emphasized the lawfulness of mandatory sentences provided in the statutes.

12. By now, it is evidently clear that this appeal against

sentence is a non-starter. Our hands are tied by the law and the Supreme Court decisions. We cannot interfere with the

sentence. Accordingly, the appellant's appeal is
hereby dismissed.

**Dated and delivered at Nakuru this 16th day of January,
2026.**

M. WARSAME

.....
**JUDGE OF
APPEAL**

J. MATIVO

.....
**JUDGE OF
APPEAL**

M. GACHOKA C.Arb, FCI Arb.

.....
**JUDGE OF
APPEAL**

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR.