

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E283 OF 2025**

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 10, 25(a) & (c) ,50(1) AND 51(3) OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 24, 27, 258, AND 259 OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF ARTICLES 23 AND 165 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**AGGREY MANG'ONG'O AMUGUNE.....PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup>  
RESPONDENT**

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**JUDGMENT**

1. This Petition, dated 31<sup>st</sup> March 2025, challenges the Petitioner's sentence arising from Nairobi High Court Criminal Case No. 21 of 2013 and Court of Appeal Criminal Appeal No. 123 of 2019, and seeks declarations of violation of constitutional rights together with an order remitting the matter to the trial court for determination of an "appropriate remedy or sentence" including liberty in the interests of justice.
2. In Nairobi High Court Criminal Case No. 21 of 2013, the Petitioner was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
3. The 2<sup>nd</sup> Respondent states that the Petitioner was convicted and sentenced to death, and that the High Court judgment was delivered on 15<sup>th</sup> September 2016. The 2<sup>nd</sup> Respondent further states that the Petitioner appealed in Criminal Appeal No. 123 of 2019, which was dismissed, with the Court of Appeal affirming both conviction and sentence.
4. The Petitioner being an inmate having been convicted to serve a life sentence at Kamiti Maximum Prison. In the supporting affidavit sworn on 31<sup>st</sup> March 2025, he again states that he was sentenced to suffer death and that the appeal was dismissed, and he avers that he has served twelve years in prison and seeks commutation to time served.
5. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 19<sup>th</sup> August 2025 and written submissions dated 19<sup>th</sup> August 2025 opposing the Petition. The

Petitioner filed written submissions dated 25<sup>th</sup> August 2025 and further rejoinder and rebuttal.

6. The Petitioner's position is that he is currently serving a life sentence at Kamiti Maximum Security Prison, and that the original death sentence for murder under section 203 as read with section 204 of the Penal Code was commuted by the President. He states that the Petition challenges the imposition of a life sentence as a discretionary alternative to the previously mandatory death sentence. He frames issues including whether this Court has jurisdiction, whether the life sentence imposed is consistent with Articles 25(c) and 50(2)(p) of the Constitution as a less severe and discretionary alternative, and whether Kenya's criminal jurisprudence should evolve towards greater judicial discretion.
7. On jurisdiction, he contends that the High Court is vested with authority by Article 165(3) to determine whether rights have been violated and to interpret the Constitution, and he relies on the principle that jurisdiction is foundational. He invokes the Muruatetu decision and the subsequent Supreme Court Directions in support of resentencing. He also relies on the Judiciary Sentencing Policy Guidelines (Gazette Notice No. 2970 of 2016) and advances rehabilitation and restorative justice considerations.
8. In his rejoinder and rebuttal, he maintains that the Petition does not seek retrial of the criminal case but seeks a constitutional challenge to the sentence; he contends that the Petition meets the specificity test, and he disputes that Article 165(6) ousts the High Court's jurisdiction to address constitutional violations in sentencing.

9. The 2<sup>nd</sup> Respondent's position, set out in the replying affidavit and submissions, is that the Petition is incompetent on two main grounds.

10. First, on jurisdiction, the 2<sup>nd</sup> Respondent contends that this Court lacks jurisdiction because the matter has already been determined by a superior court, the Court of Appeal, and that Article 165(6) bars the High Court from exercising supervisory jurisdiction over a superior court. The 2<sup>nd</sup> Respondent submits that the Petition seeks to challenge a conviction and sentence upheld on appeal, and that entertaining the Petition would amount to an impermissible appellate review of a superior court decision. The 2<sup>nd</sup> Respondent further submits that the Petition presents no new or compelling evidence and offers no legal or factual basis to disturb the sentence.

11. Second, on specificity, the 2<sup>nd</sup> Respondent submits that the Petition fails to "set out with reasonable degree of precision" that which the Petitioner complains of, the provisions said to have been violated, and the manner of violation, relying on *Anarita Karimi Njeru* and *Mumo Matemu*. The 2<sup>nd</sup> Respondent urges that the Petition fails the specificity test and should be dismissed as misconceived, bad in law, and an abuse of process.

### **Issues for determination**

12. Having considered the pleadings and the submissions, the Court identifies the following issues for determination.

- a. *Whether this Court has jurisdiction to entertain the Petition, in light of Articles 165(3) and 165(6) of the Constitution, and the concluded criminal appeal.*
- b. *Whether the Petition satisfies the constitutional pleading threshold of reasonable precision for alleged rights violations*
- c. *Whether, in light of the Muruatetu decision and the later Supreme Court Directions on resentencing, the Petition discloses a proper basis for the reliefs sought.*

### **Analysis and determination**

13. In ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)***, the Court of Appeal stated: *"Jurisdiction is everything. Without it, a court has no power to make one more step."*
14. The Supreme Court in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)*** emphasised that *"a court's jurisdiction flows from either the Constitution or legislation or both"* and that it *"cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law."*
15. The Petitioner invokes Article 165(3), which indeed allocates to the High Court jurisdiction to determine alleged violations of rights and to interpret the Constitution. That jurisdiction, however, operates within an architecture that includes Article 165(6), which restricts the High Court's supervisory jurisdiction to subordinate courts and specified bodies *"but not over a superior court."* The

question is therefore not whether the High Court has constitutional jurisdiction in the abstract, but whether the specific relief sought requires this Court to exercise a prohibited supervisory or appellate role over a superior court's concluded decision.

16. On the record before Court, the Petitioner confirms that he appealed both conviction and sentence and that the appeal was dismissed. The Petition then asks this Court to remit the case to the trial court for determination of an appropriate sentence and in the same breath seeks liberty “in the interests of justice.” Those prayers, framed as constitutional remedies, operate in substance as a further challenge to a sentence already affirmed on appeal and as an invitation to this Court to reopen the sentencing outcome outside the structured framework designed for such review.

17. Our courts have repeatedly cautioned against employing constitutional process to bypass clear procedures for redress. In ***Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)***, the Court of Appeal held: “where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.” That principle is not a technicality; it is tied to the rule of law, institutional competence, and coherence of remedies.

18. The post Muruatetu resentencing is now a clear procedure for murder resentencing. In ***Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR)***, the Supreme Court ordered that “the mandatory nature of the death sentence as provided for

under section 204 of the Penal Code is hereby declared unconstitutional,” and clarified that this order did not disturb the constitutional validity of the death sentence as a discretionary maximum.

19. The Supreme Court then remitted the matter to the High Court for rehearing on sentence. The later Directions of 6 July 2021 clarified the operational framework, including that *“an application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court.”* They also require recording of prosecution, offender, and victim submissions and consideration of aggravating and mitigating factors before a suitable sentence is reached.

20. These binding directions do not support the proposition that any prisoner may file a stand alone constitutional Petition seeking broad declarations and immediate liberty, without the sentencing record and without the structured material the Directions contemplate. Rather, the Directions contemplate a resentencing application, anchored to the criminal process and sentence rehearing, with relevant reports and participation, and with the Court exercising sentencing discretion within the limits of law.

21. In the petition, the Petitioner states that he is serving a life sentence, yet he also states he was sentenced to death and that he seeks commutation. In the supporting affidavit, he characterises the death sentence confirmed by the Court of Appeal as “an indeterminate sentence” and unconstitutional.

22. In **Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR)**, the High Court stated that a person seeking constitutional redress should “*set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*” The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)** stressed the importance of “*precise legal and factual claims,*” while noting that “*precision is not coterminous with exactitude.*”

23. Applying those standards, this Petition does not meet the threshold.

24. The Petition cites numerous constitutional provisions, but the factual narrative is confined largely to conviction, appeal dismissal, and time served, with conclusory assertions that rights were violated. It does not identify what specific act or omission by the Attorney General or the Director of Public Prosecutions violated which constitutional right, and in what manner.

25. The Court of Appeal in **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR)** reproduced section 7 of the Civil Procedure Act and underscored that res judicata has jurisdictional consequences, and that the statutory elements are conjunctive. The Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** stated that “*the doctrine of res judicata, in effect, allows a litigant only one bite at the cherry.*”

26. This Petition arises from a criminal trial and a criminal appeal. The Petitioner confirms that the appeal challenged conviction and sentence, and that it was dismissed. The Petition then asks this Court to disturb the sentencing outcome by remitting for an appropriate remedy or sentence and by ordering liberty.

27. The Petitioner seeks a second judicial bite at a sentencing challenge, without demonstrating the kind of exceptional circumstances that could justify reopening through a properly framed and procedurally compliant resentencing application. The combination of a concluded appeal and a new constitutional petition seeking sentencing relief on the same sentence presents features of forum shopping that the doctrines of res judicata and abuse of process are designed to restrain.

**Conclusion**

28. For the reasons set out above, the Court makes the following orders.

- a. The Petition dated 31<sup>st</sup> March 2025 is dismissed.
- b. There shall be no order as to costs.
- c. Orders accordingly. File closed accordingly.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF FEBRUARY 2026.**

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**BAHATI MWAMUYE MBS  
JUDGE.**

In the presence of :

Petitioner in person at Kamiti Maximum – Mr. Aggrey Mang'ong'o

Counsel for the 2<sup>nd</sup> Respondent- Mr. Mulati

Court Assistant – Ms. Lwambia