



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. E064 OF 2023

JOASH ANGATIGA.....

PETITIONER

VERSUS

REPUBLIC.....

RESPONDENT

(Being a Petition from the conviction and re-sentencing from Kakamega High Court Criminal Appeal No. 2 of 2005 dated 23rd February 2012)

RULING ON RE-SENTENCING

1. The Petitioner herein was convicted of the offence of robbery with violence. The charge sheet stated that Suleiman Mohammed and Joash Angatiga, on the 2nd day of April 2003, at Scheme Estate Municipality in Kakamega district within Western Province, jointly with others not before the court armed with offensive weapons, namely a toy pistol, robbed Zedekiah Omondi Ogolla Kshs. 500/= and immediately before or immediately after the time of such robbery, used actual violence against the said Zedekiah Omondi Ogolla.

2. The Accused persons pleaded not guilty, and the matter proceeded for hearing. In a judgment delivered on 16th December 2004, the trial magistrate found that the prosecution had proved the case beyond reasonable doubt and, upon considering the parties' mitigation, found the Accused persons guilty and sentenced them to suffer death.
3. The two Accused persons filed an appeal against the decision of the trial court at the High Court in Kakamega HCCRA No. 2 of 2005, which was dismissed on 23rd February 2012 as the Honourable Judges found that the appeal lacked merit. They upheld the conviction and sentence.
4. The Petitioner Joash Angatiga has now filed a constitutional petition at the High Court, invoking the original jurisdiction of this court to determine the constitutionality of his sentence of life imprisonment.
5. The Petitioner prays for a review of his sentence and prays for a lenient definite sentence and further that the court consider the time spent in remand custody pursuant to the provisions of section 333(2) of the Criminal Procedure Code.
6. The Respondent opposed the petition, stating that there had not been any amendment to the law on robbery with violence and maintaining that the law remained valid and the court lacked jurisdiction to interfere with the sentence. They prayed that the petition be dismissed for lack of merit.
7. The petition was canvassed by way of written submissions.

Petitioner's Submissions

8. The Petitioner has invoked the Supreme Court decision in ***Francis Karioko Muruatetu's Petition no 15 of 2015 as consolidated with Petition No. 16 of 2015***, contending that the death penalty is inhumane and cruel and violated his rights. He prays for a re-sentencing and a favourable definite sentence.
9. He avers that the death penalty is a violation of his constitutional right, specifically Article 50 on fair hearing and Article 25(c) on the non-derogable rights. He further claims that the trial court failed to consider his mitigation and further that the trial court lacked the discretion and thus awarded the maximum sentence of death as provided for the offence of robbery with violence, which is a violation of his right to life under the Constitution.
10. On the issue of reform and rehabilitation, he submits that he was a young man influenced by peer pressure and forced to commit the offence and has now learnt his lesson. He states that he has reformed and should be given a second chance. He avers that he has been in custody for 22 years and has undergone rehabilitation programs and skills that will help him integrate back into society.
11. He prays that the court consider the time spent in custody pursuant to section 333 (2) of the Criminal Procedure Code, stating that he has been in custody from the date of his arrest on 3/4/2003 and prays that the court give him a lenient sentence and the court find that the time he served is appropriate.

Respondent's Submissions

12. In their submissions dated 27th October 2025, the Respondent opposes the application for re-sentencing, averring that the court cannot substitute a life sentence with a determinate sentence as it would be usurping the role conferred to the legislature. They quote the case of ***Republic v Ayako [2025] KESC 20 (KLR)*** and ***Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)***.
13. The Respondent further analyses the rationale in the *Muruatetu* case, stating that it offended the principle of stare decisis. They assert that the case only applied to murder cases, as was later elaborated and clarified in *Muruatetu II*. They contend that the reduction of the mandatory minimum sentence was a court acting outside its jurisdiction. In support of their argument, they rely on several cases, including ***Apopo v Republic [2025] KEHC 6429 (KLR)*** and ***Otieno v Republic [2025] KEHC (86150 (KLR)*** where the court stated that commutation of the sentence from death to life imprisonment was by the act of the executive, not the judiciary. They posit that the court cannot now purport to review, in these proceedings, an executive act.
14. The Respondent contends that as the Petitioner is serving a life sentence, Section 333(2) of the Criminal Procedure Code is not applicable.

Analysis and Determination

15. Having considered the petition, the replying affidavit and the rival submissions, the two main issues that arise for determination are;

- a) *Whether this court has jurisdiction to re-open and review the sentence imposed upon the Petitioner, and if so,*
- b) *Whether the Petitioner has established a proper basis for re-sentencing.*

16. Article 165 (3) (b) and (d) of the Constitution vests the High Court with original unlimited jurisdiction to determine issues concerning the constitutional rights of a Petitioner and provides that: -

“(3) Subject to clause (5), the High Court shall have—

(b)jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d)jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of—

(i)the question whether any law is inconsistent with or in contravention of this Constitution;

(ii)the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii)any matter relating to constitutional powers of State organs in respect of county governments and any

matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191.”

17. The Petitioner was convicted under Section 296(2) of the Penal Code which stipulates that:-

“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.”

18. The offence prescribes the death sentence upon conviction where any of the ingredients set out in the section are proved.

19. The Petitioner argues that the mandatory nature of the sentence deprived the trial court of discretion to consider mitigation. He based his Constitutional petition on the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic 2015***, where the court declared the mandatory nature of the death penalty under section 204 of the Penal Code unconstitutional, as it deprives courts of judicial discretion in sentencing. The court stated that:

“A law that deprives the court of the use of judicial discretion in a matter of life and death is harsh, unjust and unfair. Such a law denies the accused person the right to mitigate before the sentence is imposed.”

20. The court further observed: ***“The mandatory nature of the death sentence as provided under section 204 of the Penal Code deprives the court of the discretion to consider the circumstances of the offender and the offence.”***
21. However, the decision was later clarified by the Supreme Court in the directions issued on July 6, 2021, in ***Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR***, where the court stated as follows:-
- “The decision of this Court in Muruatetu was specific to the offence of murder under section 204 of the Penal Code. It did not invalidate mandatory sentences or minimum sentences in other offences.”***
22. The court further warned that: ***“Courts should not apply the Muruatetu decision to other capital offences such as robbery with violence or defilement unless a proper constitutional challenge is mounted.”***
23. This clarification significantly restricted the automatic extension of the *Muruatetu* principles to other offences such as Sexual Offences and Robbery with Violence.
24. In ***Chege v Republic [2025] KECA 1207 (KLR)***, the Court of Appeal explicitly held that the mandatory death penalty for robbery with violence remained valid and was not affected by *Muruatetu*, noting the need for legislative review of the apparent

discriminatory sentencing regime between murder and robbery with violence.

25. The Supreme Court in ***Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR)*** reaffirmed the doctrine of *stare decisis* and clarified that the decision on mandatory sentencing applied strictly to murder cases, thereby overturning attempts by lower courts to invalidate statutory minimum or mandatory sentences in offences other than murder.

26. In light of the binding precedents from the Supreme Court and recent Court of Appeal jurisprudence, which this court must follow under the doctrine of *stare decisis*, I find that the mandatory death sentence under section 296(2) of the Penal Code remains constitutional. Section 296(2) provides:-

"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."

The mandatory nature of the sentence does not offend the Constitution in the manner declared for murder in the *Muruatetu* case.

27. On whether the Petitioner has established a proper basis for re-sentencing, I note that he was convicted of robbery with violence under section 296(2) of the Penal Code and sentenced to death,

which sentence was upheld on appeal. It is a matter of public record that following the presidential commutation of death sentences, convicts serving the death penalty had their sentences commuted to life imprisonment by executive action.

28. The Respondent argues that the current life sentence being served by the Petitioner is the result of such executive commutation and therefore cannot be altered by the court in these proceedings.

29. I am inclined to agree with the Respondent as the Supreme Court recently addressed the interaction between judicial sentencing powers and executive commutation in **Republic v Ayako and Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra)** and underscored the constitutional separation of powers between the Judiciary and the Executive in matters of commutation and clemency. In **Republic v Ayako (supra)**, the court held that:-
“The Judiciary’s role is to impose lawful sentences in accordance with the law, while the executive retains the constitutional authority to exercise the power of mercy.”

30. Article 133(1)(c) provides:-

“The President may exercise the power of mercy in accordance with the advice of the Advisory Committee on the Power of Mercy by substituting a less severe form of punishment.”

31. The court observes that where a sentence has been commuted by the executive pursuant to the power of mercy, such an act is

not a judicial sentence capable of revision through ordinary judicial proceedings.

32. In the present case, the Petitioner is presently serving a life sentence following commutation of the death penalty. That commutation was an executive act and not a judicial determination.
33. Consequently, this court cannot purport to substitute that sentence with a determinate sentence without trespassing into powers constitutionally reserved for the executive. Even assuming jurisdiction existed, the Petitioner relies heavily on the principles established in the *Muruatetu* case.
34. However, as already noted, the Supreme Court expressly clarified that the *Muruatetu* decision does not apply to the offence of robbery with violence unless a specific constitutional challenge is mounted against Section 296(2) of the Penal Code.
35. The Petitioner herein has not mounted such a constitutional challenge nor demonstrated that the statutory provision itself violates the Constitution. What is before this court is merely a request for resentencing based on his mitigation that he is a young man, that he needs to take care of his elderly parents, and that he has been rehabilitated by undertaking training skills while being incarcerated.
36. While this court appreciates the Petitioner's claim that he has been in custody for approximately twenty-two years and has undergone rehabilitation, the absence of jurisdiction renders the court unable to entertain the merits of the request.

37. The Petitioner has further urged the court to consider the time spent in custody pursuant to Section 333(2) of the Criminal Procedure Code.
38. The provision provides that:-
“Subject to the provisions of section 38 of the Penal Code, where a person is sentenced to imprisonment for an offence, any period which he has spent in custody in connection with that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.”
39. The purpose of this provision is to ensure that the period spent in remand custody is factored into the sentence imposed by the trial court.
40. However, the Petitioner is currently serving a life sentence following a commutation. A life sentence is indeterminate in nature, and therefore the application of Section 333(2) becomes impracticable.
41. The provision requires a sentencing court to consider the time an accused person spent in pre-trial custody when imposing a custodial sentence.
42. Courts have reiterated this position in several decisions, holding that the provision cannot be effectively applied where the sentence imposed is life imprisonment. In view of the foregoing analysis, this court finds that:-

- a) The Petitioner was lawfully convicted and sentenced to death for the offence of robbery with violence under Section 296(2) of the Penal Code.
- b) The death sentence imposed by the trial court was subsequently commuted to life imprisonment through an executive action.
- c) This court lacks jurisdiction to review or alter an executive commutation in the absence of a constitutional challenge against that executive act.
- d) Section 333(2) of the Criminal Procedure Code cannot be meaningfully applied to a life sentence imposed through commutation.

43. Accordingly, the Petition for re-sentencing is hereby dismissed for lack of merit.

44. It is so ordered.

Dated, signed, and delivered at Kakamega, this 17th day of March 2026.

**A. C. BETT
JUDGE**

In the presence of:

Petitioner virtually in person

Ms. Chala for the Respondent

Court Assistant: Polycap/Micah