REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION NO E001 OF 2025

DANIEL NJIHIA NJUGUNA……PETITIONER

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioner 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 first appeal at Nairobi **HCCRA No 1157 of 1998** as consolidated with **HCCRA No 1158 and 1217 of 1998**. The court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged a second appeal at Court of Appeal in Nairobi **Criminal Appeal No 122 of 2004**. The court dismissed his appeal and upheld his conviction and sentence.
4. On 14th January 2025, he filed this undated Notice of Motion seeking review of his sentence. He relied on Article 23 (3) and 50(2)(p) and (q) of the Constitution of Kenya, 2010 and urged the court to consider Section 333(2) of the Criminal Procedure Code once it awards him a determinate sentence. He added that should the eventual computation result into a balance of three (3) years or less, the court be pleased to grant him probation orders.

5. He placed reliance on the cases of **HCCR Petition No E037 of 2022 Harrison Kinyua Gatimu** and **HCCR Petition No 159 of 2020 Saroni Mengo Munene** (both eKLR citation not given) where he averred the death sentence was declared unconstitutional.
6. His undated Written Submissions were filed on 14th March 2025 while those of the Respondent were dated 7th July 2025 and filed on 15th July 2025. The Ruling herein is based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

7. The Petitioner invoked Section 354(3) of the Criminal Procedure Code and Articles 27, 50(1), (2)(p) and (q) and 165(3) of the Constitution of Kenya, 2010 and placed reliance on the case of **Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic** (eKLR citation not given) where it was held that mandatory minimum sentences were discriminatory in nature because they gave differential treatment to convicts from the kind of treatment accorded to convicts under other offences which did not impose mandatory sentences.
8. He placed reliance on the case of **MMI vs Republic [2022] eKLR** which cited several cases therein with the purport that being liable to life imprisonment meant that life imprisonment was the maximum and not the minimum.
9. He also relied on the case of **Dismas Wafula Kilwake vs Republic[2018]eKLR** where it was held that minimum mandatory

sentences should be interpreted so as not to take away the discretion of the court. He further invoked Paragraph 4.8.14 of the Sentencing Policy Guidelines, 2023 and Articles 2, 10, 19, 22 and 23 of the Constitution of Kenya and argued that this court was mandated to address the alleged violation of his fundamental right to benefit from the least possible sentence pursuant to Article 50(2)(p) of the Constitution of Kenya and which considers his mitigation and the facts of the case.

10. He further submitted that after soul searching, he took full responsibility for the crime. He asserted that he had undergone punishment and fell the effects of the crime while in custody. He regretted having committed the offence. He urged the court to consider that he was a first offender and which fact would have influenced the kind of sentence imposed on him to encourage reform and discourage recidivism.

11. He further cited Article 45 and 53 of the Constitution and noted that his family had lacked all that they required due to his incarceration. He argued that sentencing discretion could only be properly exercised on the basis of all the facts relevant to the matter. He added that the sixteen (16) years he had spent in prison had rehabilitated him and that it was sufficient for the protection of the community by his incapacitation. He sought for a second chance at life.

12. He further urged this court to impose upon him a sentence that would enable him benefit from Section 333(2) of the Criminal

Procedure Code. In this regard, he placed reliance on the case of **Ahmed Abolfathi Mohammed & Another vs Republic[2018]eKLR** where the court held that courts were obliged to take into consideration the period the convicts have stayed in custody before sentencing.

13. On its part, the Respondent invoked Articles 50(2)(q), (6) and 165 of the Constitution of Kenya, 2010 and submitted that the Applicant had exhausted all his avenues for appeal and this court could hear his resentencing application. It cited the case of **Petition No 15 and 16 (Consolidated) of 2015 Francis Karioko Muruatetu & Another vs Republic** (eKLR citation not given) where it was held that the High Court would entertain an application for re-sentencing upon being satisfied that the appeal at the Court of Appeal had been withdrawn.

14. It asserted that in considering the said decision and Sections 216 and 329 of the Criminal Procedure Code, the Petitioner was not given an opportunity to mitigate in the Trial Court before sentencing. It added that, however, the decision in **Muruatetu Case** did not outlaw the death sentence which was still applicable as discretionary maximum sentence.

15. It pointed out that the sentence meted out to the Petitioner herein was lawful at the time when it was passed and that the Trial Court found it appropriate for the particular case. It urged the court to consider the circumstances of the case in order to determine the appropriate sentence and guided by the Judiciary Sentencing Policy

Guidelines on objectives of sentencing which include the gravity of the offence, the threat of the violence against the victim and the nature of the weapon used to inflict harm as the sentence imposed on an offender must be commensurate to his blameworthiness.

16. 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.

17. 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.

18. 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 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)."

19. 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) and 296(2) of the Penal Code and declared it unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

20. 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."

21. In this regard, it 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.

22. While considering the present application for re-sentencing, this court was alive to the fact that the Court of Appeal upheld the death sentence that was meted out against the Petitioner 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.

23. 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.**

24. 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 Petitioner 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.

25. In this regard therefore, it 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.

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

DISPOSITION

27. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's undated Notice of Motion application that was filed on 14th January 2025 was merited and the same be and is hereby allowed in the following terms:-

a. **THAT the Petitioner do provide documents to support his mitigation by 16th May 2026.**
b. **THAT the Probation Office file a Pre-Sentence Report by 30th April 2026.**
c. **THAT the Petitioner be and is hereby directed to appear before this court for mitigation and sentencing on 7th May 2026.**

28. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **24th** day of **March** 2026

J. KAMAU
JUDGE