

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**MISC CRIMINAL APPLICATION NO E050 OF 2025**  
**MUYADET LEKUMO SAIRA .....**  
**APPLICANT**

**VERSUS**

**REPUBLIC .....**  
**RESPONDENT**

**(Being an application for resentencing from the original conviction and sentence in criminal case no 2211 of 2011 of the Chief Magistrates Court at Makadara)**

**RULING**

1. The applicant by a Notice of Urgency dated 9<sup>th</sup> July 2024 filed at the High Court Criminal Registry at Milimani as Misc. Criminal application no E 412 of 2024 moved the court for orders that
  - a) The honourable court be pleased to revise the life sentence meted on the applicant on a sentence re-hearing following the directives in petition no 5 of 2022 consolidated with petition no 6 of 2022
  - b) That the honourable court when revising the sentence be pleased to consider the period served in remand custody pending the hearing and disposal of the trial.
2. The application was based on the grounds that the applicant was convicted of the offence of robbery with violence and sentence to serve death sentence on November 2013.

3. That the applicant filed an appeal to this court vide criminal appeal no 221 of 2013 which appeal was dismissed leading to the same filing an appeal to the court of appeal at Nairobi being Criminal Appeal No 72 of 2019. Which appeal was withdrawn vide an order dated 12<sup>th</sup> February 2020 due to the change in jurisprudence arising from the ruling in Muruatetu 2.
4. That the court should consider the persuasive decision in petition no 5 consolidated with no 6 of 2022 where the court declared the mandatory nature of death sentence under section 296(2) and 297 (2) of the penal code unconstitutional .
5. The application was supported by an annexed affidavit sworn by the applicant in which he deposed that the mandatory nature of death sentence is contrary to the provisions of section 216 and 329 of the CPC which gives the court discretion in sentencing.
6. By an order issued on 13<sup>th</sup> February 2025 , this matter was transferred to this criminal registry and at the hearing hereof the applicant stated that he had withdrawn his appeal to the court of appeal so as to benefit from the provision of re-sentencing and that the life sentence be given term sentence.
7. Ms Kariuki for the state submitted that the court lacked jurisdiction in the matter as resentencing was only limited to murder .

### **DETERMINATION**

8. This court has said and will continue to say so until it is heard that the issue of sentence re-hearing and or review is one which needs to be looked at in a more wholistic manner than as currently being done. The same started with the determination of the Supreme Court in *Muruatetu 1* in which it declared the mandatory nature of the death sentence as regards murder to be unconstitutional as denying the trial court the discretion to impose a just sentence based on the circumstances of each case and directed that those who were sentenced on account of the court's hands being untied so go for re-sentencing .

9. Based on the ration of *Muruatetu 1* ,the superior courts rightly extended the principle to all the mandatory sentences including the one for robbery with violence under which the applicant herein was charged and proceeded to substitute the same with term sentence. The court of appeal did not stop there, it proceeded to extend the trajectory to life sentence which it considered to be unconstitutional and substituted the same with a defined time of either 30 or 40 years depending on the bench .

10. As is in the nature of criminal litigation in Kenya , there are many inmates who benefited from that jurisprudence only for the Supreme Court to put a stop thereto by stating in *Muruatetu 2* that the decision was strictly in respect to murder and nothing more or less as regards life sentence it proceeded to state that it is for

parliament to prescribe sentence and punishment thereby tying the hand of the courts as before Muruatetu 1 .

11. What should I do with the applicant herein ? having withdrawn his appeal which was pending before the court of appeal in criminal appeal no 72 of 2019 vide the order thereof dated 12<sup>th</sup> February 2020 , there is only one valid judgement being the Judgement of this Court (Ngenye Judge) as she then was delivered on 3<sup>rd</sup> November 2016 and therefore any decision by this court herein will be a kin to sitting on appeal from its own decision akin to judicial incest and against the express determination by the Supreme Court.
12. It therefore follows that this court has no jurisdiction under the provisions of Section 362 of the CPC which is only limited to revision of the decisions of the Subordinate Courts and not courts of concurrent jurisdiction.
13. On the provision of Section 333(2) of the CPC the same is only applicable to term sentence.
14. The application herein lacks merit and is dismissed .

**DATED SIGNED AND DELIVERED THIS 22<sup>nd</sup> DAY OF APRIL 2026**

**J WAKIAGA  
JUDGE**

In the presence of

MAKADARA MISC CRIMINAL APPLICATION NO E050 OF 2025 RULING