Muteshi v Republic (Criminal Miscellaneous Application E060 of 2025) [2026] KEHC 6164 (KLR) (11 May 2026) (Ruling)

Neutral citation: [2026] KEHC 6164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E060 OF 2025

RN NYAKUNDI, J

MAY 11, 2026

IN THE MATTER OF ARTICLE 50(2)(Q), 51, 165(3) (A)(B)(D)(I)(II)(5) (6) (7) OF THE CONSTITUTIONAL AND SECTION 327 (3), 346, 362, 364 OF THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA

AND

IN THE MATTER OF INVOCATION OF SENTENCE REVIEW PURSUANT, THE HIGH COURT CONSOLIDATED CONSTITUTIONAL PETITION NO E002 AND E003 OF 2024 AT VIHIGA

BETWEEN

ARTHUR ANGUBA MUTESHI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 3rd November 2025, the Applicant seeks the following orders:

    a. That, may this Hon. Court be pleased to grant this resentencing application filed, heard and determined on priority basis for interest of justice.

    b. That, may this Hon. Court be pleased to grant an order that will render sentence hearing and determination of the appropriate sentence to substitute the imposed mandatory death penalty.

    c. That, may this Hon. Court be pleased to grant an order that will render there consideration of the applicant further mitigation inter alia relevant factors of consideration of consideration in determination as to the appropriate proportionate sentence to substitute the original mandatory death sentence.

d. That, may this Hon. Court be pleased to give other deem tit just reasonable in the circumstances of this apported.

2. The applicant grounded his application on the facts that:

a. The applicant was initially charged with the offence of robbery with violence contrary to section 296 (2) of the penal code, tried upon the charge, convicted and sentenced to death.

b. The applicant's 1st and 2nd appeals were subsequently dismissed hence exhausted all avenues of appeals vide court of appeal criminal appeal No. 132 of 2014 and court appeal criminal appeal No. 69 of 2016 and hence exhausted all my avenues of appeal.

c. The original death penalty was committed to life sentence as per presidential decree.

3. In support of the application is the annexed affidavit of one Arthur Anguba Muteshi who deposed as follows:

a. That, I am a Kenyan citizen adult of sound mind hence competent to swear this affidavit in the court of law.

b. That, I was initially arraigned in court and charged with offence of robbery with violence contrary to section 296 (2) of penal code vide Kakamega cm's court criminal case No. 2418 of 2013 tried upon the charges found guilty as charged hence convicted and sentenced to death.

c. That, both of my appeals in the first and second appellate courts were subsequently dismissed, hence exhausted all avenues of appeals vide court of appeal criminal appeal vide court of appeal No. 69 of 2016.

d. That, the original death penalty commuted to life imprisonment as per presidential decree in the year 2013.

e. That, feeling oppressed by the indefinite nature of the imposed mandatory death sentence and later commuted to life sentence and as per the supreme court directive in Muruatetu 11, ten inmates (death new convicts) including me petitioner the High court vide constitutional petition No. E002 of 2024 challenging constitutionality of the current sentence and upon its determination the indefinite nature of the same declared inconsistent to Article 28 of *the constitution* of Kenya 2010.

f. That, by the dint of foregoing in regard of this application I humbly approach this Hon. Court Article 50 (2) (9) of *the constitution* section 327 (1)(2),346 362 of the criminal procedure code and pursuant with the High court disposition in the fore stated annexed judgment in consolidated constitutional petitions No. E002 and E003 of 2024 at Vihiga.

g. That, I humbly argue this Hon. Court to invoke the above provisions of the law including section 69,78(1)(2) and 81 (I) (b) (c)(e) (1)(ii) of the criminal procedure code if so necessary to warrant expeditions access to justice and quick disposal of this matter.

h. That, may this Hon. Court be pleased to consider that during the incarceration period have been engaging in various rehabilitation based program as the annexed herein copies of certificate and prison recommendation latter.

i. That, I humbly urge this Hon. Court to adopt the imposed sentence upon I the applicant in criminal case No. 2415 of 2013 at CM's court Vihiga in the annexed herein for re-sentence application.

4. This application was canvassed by way of written submission in which the applicant sought leave of this court to revisit the issue of the death penalty for the offence of robbery with violence contrary to section 296(2) of the penal code. In agitating for this cause of action to be entertained by this court, the applicant relied on the following cases: Silas Maliolo Zakayo and James Masinde Wafula & 5 Others vs Republic criminal petition E002 of 2024, Kipsang v R Criminal Pettion no. E008 of 2023) 2024 KEHC 249 (KLR) and Willy Joel Makudo v Rep (2019) eKLR.

5. The Judges of the superior courts in Kenya are always confronted with this issue following the dawn of the Muruatetu jurisprudence. That is how Mrima J in the Kipsang (Supra) case made the following observations: "for an offence to be established there must be actual use of violence on the victim, but no more that the threat, then the offence of robbery with violence, may be committed. Further in such circumstances, the offence of robbery with violence cannot stand even if it's proved that the offender was in company of one or more other person of persons or had offensive weapons as long as there was no evidence of actual use of violence". The applicant in his submissions prayed that the court sets aside the sentence and have him resentenced to a lesser severe sentence bearing in mind the provisions of the citied authorities.

6. The respondent brief submissions were to the effect that based on the authorities in Muruatetu & Another v Republic Katiba Institute & 5 Others (Amicus Curiae) Petition 15 and 16 of 2015 (2021) KESC 31 KLR and Joseph Kinyuru Kirimbi vs Republic Misc. Cr. App No. E401 of 2021. With regard to the above principles learned prosecution counsel urged this court to find that the decision by the President to exercise the powers under Article 133 of eth Constitution on the prerogative of mercy did not infringe procedural fairness for the court to interfere with the decision.

7. The applicant initially was aggrieved with the decision of the trial court magistrate to pass a death penalty for the offence of robbery with violence. The appeal which was consolidated and referenced as Criminal Appeal no. 132 & 133 of 2014 was heard and determined by the High Court of Kenya and the Session Judge was Mwangi J sitting as a bench of two in collaboration with Sitati J and on 8th Day March 2016 the benched ruled as follows:

    a. It is our considered finding that the description given by PW1 of how one of the robbers was dressed and the recovery of the same attire from the 2nd appellant's house was not by sheer coincidence. We are satisfied beyond reasonable doubt that the 2nd appellant was part of the gang that raided PW1 and PW2's house on the night of the robbery. We are satisfied that the 2nd appellant, just as the 1st appellant was convicted on sound evidence. In addition, it was the 1st appellant who identified the 2nd appellant's house. The discrepancy in PW2's evidence as to the date when the robbery occurred does not vitiate the fact that it happened. PW1 was consistent that the robbery happened on 6th November, 2013 and the recoveries made on the night of 7th and 8th November, 2013.

    b. The appellants in their grounds of appeal indicated that the court did not comply with articles 50 (c) and 50 (j) of *the Constitution* of Kenya. A perusal of the lower court record shows that the 1st appellant on 2nd January, 2014 requested for witness statements. On 30th January, 2014, the 2nd appellant requested to be supplied with the first report and the P3 form. The hearing of the case commenced on 4th March, 2014 when both the appellants said that they were ready to proceed. They did not raise the said issues with the court again. The only presumption that we can arrive at is that the appellants were supplied with the witness statements and documentary exhibits that they required.

c. The only variance that we see in the charge sheet is in respect to the amount of money that was stolen. It is given as Kshs. 6,150/= whereas in PW1's evidence, he said he was robbed of Kshs. 3,150/=. The error in the charge is curable under the provisions of section 382 of the Criminal Procedure Code.

d. Failure on the part of PW5 to prepare an inventory of the recovered goods does not weaken the prosecution case as PW1 and PW4 were present when the recoveries were made.

e. The appellants did not raise alibi defence as they contend in their petitions of appeal. We find that the defence the appellants tendered was properly rejected in view of the overwhelming evidence adduced by the prosecution connecting them to the commission of the offence.

f. The appellants were 3 and they were armed with offensive weapons and robbed PW1 of money and goods which satisfied the requirements of a conviction for the offence of robbery with violence.

g. We therefore uphold the conviction of the 1st and 2nd appellants and the death sentence meted out against each of them by the trial court. The appeals are hereby dismissed.

8. The applicant did not stop there and with his co-offender. They were aggrieved with the decision of the High Court and preferred an appeal to the Court of Appeal and in their judgment dated 2nd December 2022 in a bench of three they opined as follows:

a. The appellants are inviting us to quash the concurrent findings of the courts below based on the grounds that; there was no proper identification of the appellants; there were glaring inconsistencies in the prosecution's evidence; and the unfairness of the sentence due to its mandatory nature as prescribed in section 296(2) of the Penal Code.

b. The appellants insist that the there was no proper identification. They maintain that the prosecution failed to establish that the identification was safe hence the conviction and sentence ought to be quashed. From our perusal of the record, we are satisfied that, the High Court properly re-evaluated the evidence and erred not in its affirmation of the trial court's finding that the identification was safe. The detailed description by PW1 of what the appellant swore was proof that PW1 positively identified the appellants. The ample time taken by the appellants during the incident, including indulging in the luxury of taking tea during the robbery and coupled by the lighting that was available was adequate for positive and error-free identification. Additionally, PW1 knew the 1st appellant by name. PW1 and PW2 both knew him as a charcoal seller, which was corroborated by the 1st appellant himself in his defence testimony that indeed he was a charcoal seller. Thus, the identification was by recognition which is more reliable as it is based on the witnesses' personal knowledge of an accused. See Hashon Bundi Gitonga -vs- Republic [2016] eKLR. Additionally, the positive identification was buttressed by the evidence of recent possession. See Benson Maxwel Muigai -vs- Republic [2014] eKLR.

c. We are thus satisfied that the appellants are guilty of the offence charged. The minor discrepancies alluded to by the appellants did not affect the overwhelming evidence presented by the prosecution and their conviction was therefore safe.

d. On sentence, the appellants relied on the holding of the Supreme Court in Francis Muruatetu & another vs Republic(supra) and criticized the lower courts for declining to use their discretion to mete out a lesser sentence to accord with the circumstances of the case. However, the apex court did subsequently provide guidelines currently referred to as Muruatetu 2, by

which it limited the application of that holding to murder cases unless a challenge should be mounted in a proper manner and granted in respect of other mandatory sentences. We are unaware of such petition having been decided in respect of the offence charged herein. In the premises, we defer to the superior court's guidance and will therefore not interfere with the sentence imposed.

e. In conclusion, we found that this appeal lacks merit and we dismiss it in its entirety in respect of both appellants.

9. It is from this background the court proceeds to pronounce itself on the facts and the law with regard to the notice of motion.

Decision

10. This application essentially is about sentence. The applicant has exhausted the trial and its appeal process to the apex court conditioned by *the constitution* to hear such matters. The last forum in which a case can be made by the applicant to have his appeal admitted for further reconsideration is the Supreme court of Kenya.

11. It is trite law that a court on appeal or reviewed against conviction or sentence may increase or reduce the sentence and it has also the power to impose any such sentence or make any such orders for the ends of justice to be met. There is no law or jurisdiction which shall empower the court dealing with sentencing issues to exercise discretion to increase or reduce any sentence imposed in taking into account evidence that was not given at the trial. It is further settled law that no court in our legal system shall interfere with a sentence just because if it were in trial court, it would have imposed a different sentence, unless the sentence is wrong in principle or comes to court with a sense of shock.

12. In the instant application, the applicant moved the court in his chamber summons praying inter alia that the court be pleased to grant an order that would render a re-consideration of the applicant's issues on sentence by taking into account the mitigation as outlined in the supporting affidavit. What this means is that the appellant appeals against his sentence on the grounds that the learned trial judge at the appeals court and further in the Court of Appeal a bench of three judges didn't taken into account the facts on mitigation. This is therefore a disguised appeal against the decisions of the High court and Court of Appeal.

13. The doctrine of res judicata has been applied in several civil cases in the last few decades. This is a doctrine which is invoked to apply to a final judicial decision pronounced by a judicial court or tribunal having competent jurisdiction over the cause or a matter in litigation, and over the parties thereto. There is different characteristic which gives raise to res judicata under the following subheadings:

    a. The person is estopped,

    b. The subject matter of the estoppel,

    c. The form of the previous decision,

    d. The authority of the court, as duly constituted under Article 50 (1) of *the constitution* 2010.

    It does not matter whether the impugned decisions turned on different points there are underlying unity between them, they all involved to re-litigate in some way. A very illuminating explanation of the doctrine was given by Lord Diplock in Thoday v Thoday [1964] P. 181, 198 in the following terms:

> " The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or

more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

14. This was also the perspective by the court in Henderson v Henderson (1843) 3 Hare 100, 114-115, where Sir James Wigram V-C stated:

> " In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

15. This petition for resentencing as submitted by the applicant is premised on the nature of the issues which already been canvassed before the High Court and Court of Appeal respectively and therefore the court lacks jurisdiction to entertain the matter. The doctrine of estoppel and res judicata directly ousts the jurisdiction of this court in entertaining the subject matter with regard to conviction and sentence absolutely.

16. The supreme court in Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 others CA. No.2 of 2011 as follows:

> " A court's jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"

17. This question of res judicata is tied with whether on the factual matter before the court within the scope of *the constitution* and the CPC the court is competent to exercise discretion and entertain the issue of resentencing. In my considered view the answer is in the negative. That is the very reason the court in the Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd & Another Motion no. 42 of 2014 [2016] eKLR stated as follows concerning the doctrine of res judicata:

> Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....[55]..Res Judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.."

18. This court does hold that jurisdiction is the lifeblood of adjudication of disputes under Article 50(1) of *the constitution* and its absence renders proceedings however well conducted a nullity. The hub of the applicant's motion is impaired to reach the finishing lane for want of jurisdiction. The application stands dismissed under Section 382 of Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT VIHIGA THIS 11TH DAY OF MAY 2026

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R. NYAKUNDI

JUDGE