



**Mutambi v Republic (Criminal Appeal 193 of 2019)  
[2024] KECA 1837 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1837 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 193 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**MAURICE AMULIESE MUTAMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of the High Court of Kenya at Bungoma  
Written by (R. Wendoh, J.) dated 8th May 2019 in HCCRA No. 132 of 2017)*

**JUDGMENT**

1. This is a second appeal by Maurice Amuliese Mutambi, the appellant, who was tried, convicted and sentenced to death by Senior Resident Magistrate at Sirisia, for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, which conviction and sentence was upheld by the 1<sup>st</sup> appellate court. Dissatisfied with the outcome of his first appeal, the appellant preferred the present appeal on sentence only.
2. The appellant was charged with 2 counts of robbery, 2 counts of robbery with violence and 2 counts of impersonation of a police officer, particularized that: on 10<sup>th</sup> October 2016, at Namutukholo village within Bungoma County, jointly with others not before the court while armed with a dangerous weapon namely a pistol robbed Tecla Chelimo Sambu of Kshs.300,000/- and at the time of the robbery threatened to use actual violence against her; on the same date and place, he, jointly with others not before the court while armed with a dangerous weapon namely a pistol robbed Senior Sgt. Barasa Mang'oli of two mobile phones make Nokia and Techno respectively, a wristwatch, Certificate of Appointment, Kshs.200/- and a firearms movement register, all to the total value of Kshs.16,489, and at the time of the robbery used actual violence, against the said Senior Sgt. Barasa Mang'oli.
3. As regards impersonation of a police officer, it was stated that on the same date and place, jointly with others not before the court, without authority of the Inspector General of Police, he presented himself



to Tecla Chelimo Sambu as a police officer; similarly, he was charged with presenting himself to Senior Sgt. Barasa Mang'oli as a police officer on the same date and place.

4. Briefly, the prosecution case was that 19<sup>th</sup> October, 2016 Senior Sgt. Barasa Mangoli (PW1), had been sent from Cheptais Police Post to deliver a firearm to Bungoma. On his way back to Cheptais, he boarded a motorcycle together with a certain lady but on the way, they were overtaken by a motor vehicle KBA 765H, Toyota Isis, which blocked their motorcycle. Five people got out of the vehicle and demanded to know why they did not have helmets and reflector jackets; the people claimed to be police officers. Senior Sgt. Barasa asked for their identification and one of them showed him an identification card of Chief Inspector of Police – CIP named Maurice A. Mutambi. The person wore a blue shirt and black trousers; had a Ceska pistol; threatened him with death and bundled him into the car. The lady he was with had already been shoved in the vehicle and they took her Kshs.300,000/= while his 2 phones and cash Kshs.200/= were taken. He was later bundled out of the vehicle and managed to get to Bungoma Police Station where he made a report. Later, the DCI Mumias informed him that some people had been arrested and he attended an identification parade where he identified the appellant as one of the robbers.
5. Tecla Chelimo, (PW2), corroborated Senior Sgt. Barasa's evidence stated that when Senior Sgt. Barasa introduced himself as a police officer the people said they were his seniors. They handcuffed him and the appellant who had a pistol showed his work identification, another one had a rifle, and another one was armed with a sharp wire. They were forced into the vehicle and her face was covered but she could hear them torturing Senior Sgt. Barasa as he screamed, and they threatened to kill him.
6. Fred Namasaka, PW3, a motorcycle rider, confirmed that he was carrying Senior Sgt. Barasa and Tecla Chelimo on his motorcycle when a vehicle blocked them. The occupants of the vehicle claimed to be police officers and purported to arrest Senior Sgt. Barasa and he resisted. He was slapped and ordered to leave.
7. Elias Adoka, PW7, a Clinical Officer at Bungoma Hospital examined Senior Sgt. Barasa who complained of pains in the left ear, chest, back and bruises on the wrist joint which had been handcuffed. He assessed the injuries as harm.
8. APC Moses Kiplegei of Isongo Police Post in Mumias was on duty on 21<sup>st</sup> October 2016 when the area chief reported having seen a suspicious vehicle. They saw the vehicle stopped about 50-100 meters away and people standing near it, but they dispersed and fled on seeing the officers. They managed to arrest one person, the appellant, and upon being searched, he was found with a pair of handcuffs in his pocket and a certificate of appointment from Kenya Police of rank of Inspector, 2 driving licenses, one for himself and one for another person. They found a man in the said motor vehicle who claimed to have been abducted from Webuye and robbed of Kshs.85,000/=. The vehicle KBA 765H white in colour was later towed to the police station.
9. During his investigation, Cpl. Aden Mohammed, PW6, got information that a suspect had been arrested in Mumias where Senior Sgt. Barasa and Tecla were asked to attend identification parades. Cpl. Aden searched and found that the vehicle was registered in the name of David Maina Njogu who informed him that it was hired by one Maurice Mutambi, the appellant, and gave him a copy of the agreement.
10. Placed on his defence, the appellant testified that he dealt in timber and was at his home in Kakamega. He explained that on 21<sup>st</sup> November 2016, he had a case in Mumias Court as the police had taken his driving license and identity card. He went to court on 22<sup>nd</sup> November 2016 and his documents were recovered while there, he was arrested by a police officer from Sirisia and was charged with an offence he did not know of.



11. In support of the appeal, the appellant submits that he was first sentenced to death on 13<sup>th</sup> December, 2017 yet its mandatory nature was declared unconstitutional in accordance with the decision of the Supreme Court case of *Francis Kariako Muruatetu & Another v Republic* [2017] eKLR (popularly referred to as Muruatetu1) in which the Court outlawed the mandatory aspect and unshackled the hands of the court allowing it to exercise its discretion in sentence in murder cases whose punishment is death.
12. In reply, the respondent contends that the sentence of death was not a subject of appeal in the High Court. It was being raised for the first time. It is further contended that in the directions issued on 6<sup>th</sup> July, 2021 in *Francis Kariako Muruatetu & Another v Republic, Katiba Institute & 5 Others* (2021) eKLR the Supreme Court clarified that its decision in *Muruatetu 1* applied only in respect of the sentences under section 203 as read with section 204 of the *Penal Code* and stated that:

“.....this Court’s decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal code, the Sexual Offences Act or any other statute.”
13. Relying in the case of *Douglas Nyamwaya Omudi v Republic Eldoret* Criminal Appeal No. 84 of 2018 where the court held that in recognition of the principle of *stare decisis*, and the binding nature of decisions of superior courts, they could not interfere with the decision of the trial court which was upheld by the High Court as it was in conformity with the legislative provisions, the respondent submitted that the appeal on sentence was not merited.
14. This being a second appeal, by dint of Section 361(1)(a) of the *Criminal Procedure Code*, only matters of law fall for the Court’s determination, unless it is demonstrated that the two courts below failed to consider matters, they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong, in which case this Court will consider such omission or action as matters of law. In the case of *David Njoroge Macharia v Republic*, [2011] eKLR the Court stated that under Section 361 of the *Criminal Procedure Code*:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213).”
15. In the present case, as pointed out above, the appellant’s appeal is against sentence only. Section 361 of the *Criminal Procedure Code* is clear that a second appeal to this Court on severity of sentence is a matter of fact and is not to be entertained by the Court. The circumstances under which this Court can interfere with sentence and the applicable principles were set out by the court in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”



16. Therefore, this Court will only interfere with the sentence if it is demonstrated that the trial court had acted upon wrong principles, or overlooked some material factors or considered irrelevant factors, or that the sentence was illegal or was so inordinately excessive to be an error of principle.
17. In the instant case, the appellant contends that the death sentence was wrongly imposed since its mandatory nature had been declared unconstitutional by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic* Petition No. 15 & 16(Consolidated) [2017] eKLR. This, the appellant argues, is unconstitutional as it denies the court the discretion in sentencing. That owing to its mandatory nature, the trial court sentenced the appellant to suffer death which the appellant urges this Court to interfere with and impose a term sentence.
18. Under Section 361(1)(a) of the *Criminal Procedure Code*, this Court's jurisdiction on second appeal is limited to issues of law and severity of sentence is excluded from the Court's jurisdiction as it is an issue of fact. Pursuant to Section 361(1)(b), this Court has jurisdiction to consider the issue of sentence only where it was enhanced by the High Court or where the subordinate court had no power to impose the sentence.
19. The offence of robbery with violence on which the appellant was charged is provided for under Section 296(2) of the *Penal Code* as follows:

“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.”
20. Upon finding the appellant guilty of the offence of robbery with violence the trial court sentenced him to death which sentence was affirmed by the 1<sup>st</sup> appellate court. Owing to Supreme Court decision in *Muruatetu 1* the appellant urges this Court to interfere with the death sentence imposed on him under section 296(2) of the *Penal Code*. We acknowledge that in the intervening period after the decision in *Muruatetu 1*, a wave had swept through the judicial landscape, adopting *Muruatetu 1* as the True North for every other offence that carried a mandatory minimum sentence; and the result was an avalanche of mandatory sentences being substituted with other term sentences. However, pursuant to the Supreme Court's directions of 6th July, 2021 in the case of *Muruatetu & Another v Republic; Katiba Institute & 4 Others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), it was stated thus;
  - (15) 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.
21. As this is yet to be done, the sentence of death that was imposed upon the appellant, remains a lawful sentence. Considering the above guidance, there is no basis upon which to disturb the sentence of death imposed by the trial court and upheld by the High Court. The appeal against the sentence imposed lacks merit and is dismissed.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**



**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

