



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wanyama v Republic (Criminal Appeal 196 of 2016)  
[2022] KECA 926 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 926 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 196 OF 2016  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
JUNE 24, 2022**

**BETWEEN**

**SILVESTER MATEKWA WANYAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. In this appeal, the appellant, Silvester Matekwa Wanyama raises a single complaint against the decision of the High Court at Kakamega (R. Sitati and N. Mwangi, JJ.) made on 28<sup>th</sup> January, 2016. By that decision the court dismissed the appellant's first appeal against his conviction and the sentence of death meted upon him by the Chief Magistrate's Court at Kakamega, for the offence of robbery with violence.
2. The appellant does not contest conviction. His sole complaint in the memorandum of appeal dated 25<sup>th</sup> March, is as follows;

“The learned Judges erred in upholding the death sentence delivered by the trial court to the appellant with no due regard that the mandatory nature of the sentence was declared unconstitutional as per the law.”

In arguments before us, the appellant's learned counsel, Mr. Mirembe, sought to rely on the Supreme Court's decision in *Francis Karioko Muruatetu & Another -vs- Republic* [2017] eKLR, a decision rendered on the 14<sup>th</sup> of December, 2017, popularly referred to as Muruatetu 1 in arguing the point.



He was, however, confronted by and was at pains to try and side-step the Directions issued by the apex court on 6<sup>th</sup> July, 2021 as a sequel to that decision, in which it stated as follows;

“ [11]. We therefore reiterate that this Court’s decision in Muruatetu did not invalidate mandatory sentences and minimum sentences in the Penal Code, the *Sexual Offences Act* or any other Statute.

...

[15]. To clear the confusions that exists with regard to the mandatory sentence in offences other than murder, we direct in respect of other capital sentences 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 in original).

3. We think that given the explicit pronouncement of the Supreme Court on the non-applicability of Muruatetu 1 to offences such as the appellant was convicted of, and it having been stated in unambiguous terms that the mandatory death penalty therefor is not unconstitutional or otherwise illegal, section 361 of the *Criminal Procedure Code* debars our consideration of the sentence in this second appeal in express terms.
4. In the end, we have to agree with Mr. Shitsama, learned counsel for the respondent, that we cannot proceed as urged by the appellant without the unseeingly specter of seeming to defy the Supreme Court.
5. As and when the roadmap given by that court is properly engaged, the appellant and others similarly situated may yet have their sentences reconsidered, but not now, not here.
6. In the result, we find that this appeal is devoid of merit and we accordingly dismiss it in entirety.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

*I confirm that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**

