



REPUBLIC OF KENYA



**Otiato v Republic (Criminal Petition E008 of 2024)
[2025] KEHC 5473 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL PETITION E008 OF 2024**

JN KAMAU, J

APRIL 29, 2025

BETWEEN

DAVID OTIATO PETITIONER

AND

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 Kakamega HCCRA No E032 of 2013. The court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged a second appeal at Kisumu HCCRA No 152 of 2016. The court dismissed his appeal and upheld his conviction and sentence.
4. On 4th March 2024, he filed this Petition dated 26th February 2024 seeking review of his sentence. He relied on Article 50(1) of *the Constitution* of Kenya, 2010 and pointed out that Article 165(3)(a) and (b), (4) of *the Constitution* vested power in this court to hear and determine matters of this nature.
5. He said that he was remorseful, a first offender, a prisoner of good character and had totally reformed and was ready to be a law-abiding citizen.
6. He asserted that he had exhausted all his appeal remedies where both conviction and sentence were upheld and had now brought this Petition pursuant to Section 216 and 329 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya). He pleaded with this court to consider his mitigation and proceed to review his life sentence (sic) to a definite sentence as he had reformed.



7. He added that Article 27(1), (2), (3) and (4) of *the Constitution* of Kenya, 2010 prohibited the discrimination in criminal matters. He placed reliance on the cases of Oplodi Peter Omukanga vs Republic[2023]eKLR and John Sila Mutua vs Republic [2022]eKLR where the accused persons therein who had been charged and convicted of robbery with violence and sentenced to death had their sentences reviewed to definite sentences with one of the petitioners being sentenced to a non-custodial sentence.
8. His Written Submissions were dated 18th June 2024 and filed on 19th August 2024 while those of the Respondent were dated and filed on 25th November 2024. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.

LEGAL ANALYSIS

9. The Petitioner submitted that the mandatory nature of death sentence as provided for under Section 296(2) of the *Penal Code* was unconstitutional as it denied the trial court the power to exercise discretion and denied the convict an opportunity to mitigate pursuant to Section 216 and 329 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) and thus attain fair trial.
10. It was his contention that as it was held that the death penalty was not unconstitutional, it followed that the main focus was to put into consideration Article 50(2)(p) of *the Constitution* of Kenya, 2010 and Section 216 and 329 of the *Criminal Procedure Code*. He invoked paragraph 4.2.1, 4.5.5, 4.5.6 and 4.5.3 of the Sentencing Policy Guidelines, 2023 and argued that convicted offenders should be given opportunities to present their submissions on mitigations which would create room for the sitting judge to see which sentence would be favourable in the circumstances.
11. He further submitted that being a culprit of robbery with violence did not mean that all offenders had common intention and that there were those of who were trapped in committing the same as was held in the case of Omuse vs Republic [2009]KLR 214.
12. He further relied on the case of Oplodi Peter Omukanga vs Republic [2023] KECA 430 KLR where it was held that although Muruatetu case only applied to murder convicts, there was no doubt that the deficits identified by the court in the said case applied to all mandatory death sentences. He urged the court to declare his death sentence as unconstitutional.
13. He pleaded with this court to review his death sentence that was commuted to life imprisonment by an executive order to a definite sentence of less than twenty-five (25) years. In this regard, he placed reliance on the case of Julius Kitsao Manyeso vs Republic[2023]eKLR where it was held that it was unfair to abolish death sentence only to have convicts spend their lives behind bars. He added that the sentence of death under Section 296(2) of the *Penal Code* Cap 63 (Laws of Kenya) was full of fundamental flaws thus his application should be allowed on that basis while putting into consideration the provisions of Section 26(2) of the *Penal Code*.
14. 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.
15. On its part, the Respondent invoked Section 216 and 329 of the *Criminal Procedure Code* and placed reliance on the cases of Ogolla s/o Owuor vs Republic[1954]EACA 270 and Shadrack Kipkoech Kogo vs Republic Eldoret Criminal Appeal No 253 of 2003(eKLR citation not given) where the common thread was that a court would not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors.



16. It further cited Section 296(2) of the Penal Code and pointed out that the Trial Court considered the offence and mitigating circumstances of the Petitioner before imposing the mandatory sentence hence the sentence was not discriminatory and indefinite as it was meted out in accordance with the Penal Code. It was emphatic that the Petitioner had failed to demonstrate any irrelevant factors relied on by the Trial Court in arriving at the sentence meted out. It urged the court to uphold the Petitioner's sentence as it was lawful.

1. 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.
2. 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.
3. 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).”

20. 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 297(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

21. 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.”
22. 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.
23. 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.
24. 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.
25. 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.
26. 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.



27. 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

28. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition that was dated 26th February 2024 and filed on 4th March 2024 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 14th May 2025.
- b. That the Probation Office file a Pre-Sentence Report by 30th May 2025.
- c. That the Petitioner be and is hereby directed to appear before this court for mitigation and sentencing on 19th June 2025.

29. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF APRIL 2025

J. KAMAU

JUDGE

