



REPUBLIC OF KENYA



KENYA LAW
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**Musau v Republic (Criminal Revision E329 of 2024)
[2025] KEHC 5121 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E329 OF 2024
RC RUTTO, J
APRIL 28, 2025**

BETWEEN

JOSHUA MUEKE MUSAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has moved Court seeks inter alia the following orders:
 - a. That the Court be pleased to order for a non custodial sentence for the remainder of sentence
 - b. That the Honourable court be pleased to issue any other orders it may deem necessary.
2. The application is based on the grounds on the face of it and supported by an affidavit, sworn on 26th November 2024 by Joshua Mueke Musau, the Applicant herein. The applicant states that he is the sole bread winner to his family; he is remorseful and regrets his actions; he is not contesting the conviction and sentence but pleading for leniency since he has been in custody since 27th July 2017; he has been unwell in custody and has provided his medical documents.
3. The facts leading to this application are as follows; the applicant was charged with the offence of robbery with violence contrary to section 296 as read together with section 296(2) of the *Penal Code* and were convicted and sentenced to 20 years imprisonment. Aggrieved, by this decision the applicant appealed to the High Court whereupon the appellate court upheld the conviction.
4. On sentencing the High Court noted that in arriving at the sentence the trial court took into consideration the Supreme Court decision in *Francis Kariako Muruatetu & Another vs Republic*, Petition No 15 of 2015 (Muruatetu's case) where the mandatory sentence was declared to be unconstitutional. The court also took into account the directions issued by the Supreme Court on 6th July 2021 in *Francis Kariako Muruatetu & Another vs Republic; Katiba Institute and 5 others (Amicus*



- Curiae*) 2021 eKLR (Muruatetu 2) that the decision of Muruatetu 1 and these guidelines apply only in respect to sentence of murder under sections 203 and 204 of the *Penal Code*. The court also took into account the sentencing guidelines that refer to aggravating, compelling and mitigating reasons to be considered in sentencing and proceeded to reduce the sentence from 20 to 15 years imprisonment.
5. During hearing the respondent stated that the court is functus officio since the issue of resentencing was dealt with in appeal no E009 of 2021 by a court of concurrent jurisdiction; that the appeal was determined and the time spent in custody considered under section 333(2) of the *Criminal Procedure Code*; that the offence of robbery with violence attracts a death penalty yet the court granted a lower sentence of 15 years hence he should proceed to serve the remainder of the term. They prayed that the application be dismissed.
 6. I have considered the application, the Supporting Affidavit, and submissions by both parties. The issue arising for determination is whether the application before court is competent and secondly whether this Court can grant a non-custodial sentence for the remainder of sentence.
 7. The Court in addressing the first issue, acknowledges that the death sentence statutory prescribed for the offence of robbery with violence is still the legal and valid. Thus, this Court finds that the 15 years imprisonment is illegal as the proper sentence ought to be death. So that while the applicant is seeking that this Court interfere with the 15 years sentence and mete out a non-custodial sentence, being bound by the Supreme Court decision, this Court first finds the sentence illegal. Should this Court proceed and impose the legal sentence?
 8. In determining this issue, I am guided by the Court of Appeal decision in *J.J.W. v Republic* [2013] eKLR, where the Court held as follows on enhancement of a sentence by the High Court;

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”
 9. Consequently, as there was no notice of enhancement issued to the applicant before this Court, this court will maintain the status quo. This alone is enough to dispose off this application.
 10. Be that as it may, on the second limb, this Court notes that the applicant herein seeks to review the decision of High Court vide Judgment delivered on 18th November 2021 by Hon Lady Justice M. W Muigai, which allowed the appeal, reducing the sentence from 20 to 15 years imprisonment. This Court is being called upon to review a decision of a similar, competent and concurrent jurisdiction. This Court has no jurisdiction to exercise such a mandate. On that ground also, the application before this court is incompetent.
 11. The upshot of the above is that the application is dismissed.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF APRIL, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Sam Court Assistant

