Wanjohi v Republic (Petition E048 of 2022) [2025] KEHC 7185 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

PETITION E048 OF 2022

EM MURIITHI, J

MAY 29, 2025

BETWEEN

CHARLES KAGO WANJOHI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner was charged with the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence are that: (1) Stanley Karimi Kago, (2) Charles Kago Wanjohi, on the 18th October, 2001 at Kimuri village in Kirinyaga, jointly with others not before the court while armed with pangas, bows, arrows and crow bars robbed Peterson Kinyua Mwangi cash kshs 1000/and at or immediately before or immediately after the time of such robbery wounded the said Peterson Kinyua.
2. Upon trial, he was convicted and sentenced to suffer death on 23rd April, 2002.
3. The death sentence was commuted to life imprisonment, by presidential decree in the 2009. He appealed vide Criminal Appeal No. 204 of 2002 at Nyeri High Court the same was dismissed on 31st May, 2006. A second appeal to the Court of Appeal in Criminal Appeal No. 228 & 234 of 2006 at the Court of Appeal at Nyeri was dismissed 29th October, 2010.
4. He moved this Court by way of Petition seeking resentencing of his sentence to a lenient sentence.

ISSUES.

5. Whether this court has jurisdiction.
6. Whether the applicant is entitled to resentencing.

ANALYSIS

7. The petitioner person was charged with the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code*; he was convicted and sentenced to suffer death on 23rd April, 2002. His appeals at both the high court and court of appeal were dismissed.

8. On 21/7/2023 Gazette Notice number 9566 dated 19/7/2023 was published. It stated: "it is notified to the general information of the public that in exercise of the powers conferred by Article 133 of *the Constitution* of Kenya and Section 23(1) of the *Power of Mercy Act* 2011, the President and the Commander – in – Chief of the Defence Forces of the Republic of Kenya, upon Recommendation of the Advisory committee on the Power of Mercy commuted the death sentence imposed on every capital offender as at 21.11.2022 to a Life Sentence. Thus, the petitioner's death sentence has already been commuted to a life sentence vide the Gazette Notice.

9. The petitioner seeks resentencing as the imposed life sentence is harsh and excessive, humiliating punishment due to its indefinite nature. The petition was filed on 25th November, 2022 after the commutation of the sentence of death and he now seeks resentencing of the life sentence to a definite sentence.

10. Article 23(1) of *the Constitution* provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.

11. Article 165(3)(b) and (d) of *the Constitution* of Kenya 2010 entrenches the constitutional jurisdiction of the Court to interpret *the constitution* and enforcement of rights and fundamental freedoms. The Court does have jurisdiction. The question is whether on the material and submissions made before the court, it is possible to make the declarations of constitutionality or invalidity of the death sentence and life sentence.

Whether the petitioner is entitled to resentencing.

12. As explained in the Supreme Court's recent decision on the applicability of the Muruatetu Case in relation to mandatory and minimum sentences in sexual offences in Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment):

> 52. In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the *Penal Code*. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.
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> 53. In the Republic vs Mwangi Case, we explained as follows:
> "(52) We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance."

54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore, to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.

13. Similarly in Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) the Supreme Court said:

62. In the Muruatetu Directions, this Court pronounced itself on the application of the ratio in the Muruatetu case to other statutes prescribing mandatory sentences as follows:

"10.It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgement in this matter, or indeed the spirit of the Judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it.

11. The ratio decidendi in the decision was summarized as follows:

i. "69.Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate 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."

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court." [Emphasis added]"

14. The Manyeso court was categorical at paragraphs 67 – 69 of the Judgment that:

"67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165 (3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the constitutionality of a statute is therefore confined to its interpretation and adjudication.

68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption. As a Court we have invoked this remedy in various instances; in Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) we suggested the consideration of reforms over the recourse parties have upon the declaration of trust by the courts and how to actualize the same, especially regarding the aspect of shareholding. In Malcolm Bell v Daniel Toroitich Arap Moi & Board of Governors Moi High School Kabarak (Application 1 of 2013) [2013] KESC 23 (KLR) Hon. Justice Kaplana Rawal, DCJ in her concurring opinion made recommendations to amend Section 16 of the *Supreme Court Act*. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) we urged CAK to set a timeline for the digital migration. In National Bank of Kenya Limited v Anaj Warehousing Limited (Petition No. 36 of 2014) [2015] KESC 4 (KLR) we suggested appropriate legislative action to be taken to address the gaps and inconsistencies apparent in the *Advocates Act*.

69. We therefore find no difficulty in finding that the Court of Appeal erred in law by substituting the life imprisonment sentence with a 40-year sentence, thereby usurping the legislative power to define sentences.""

15. The Court notes that the Petitioner has been in custody for 24 years of his death sentence commuted to life imprisonment. The reduction of the death sentence or life sentence to a sentence for a term of years has now been outlawed by the Supreme Court in the Directions in Muruatetu II case as regards offences other than murder contrary to section 203 as read with 204 of the *Penal Code*.

16. The Supreme Court has determined in Ayacko and Manyeso decisions, supra, that the Court has no jurisdiction to define the life sentence as being equal or equivalent to a term of years for 30 or 40 years. Consequently, the prayer for reduction of the life sentence must fail.

17. As regards the death sentence a successful petition against the constitutionality of the death sentence in robbery with violence cases as herein may result in the imposition of imprisonment for a term of years for the petitioner in place of the death sentence.

18. However, as counselled in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu II), the applicant is required to petition for a declaration of unconstitutionality of the death sentence in cases of robbery with violence under section 296 (2) of the *Penal Code* in a petition brough in that behalf in the words of the Supreme Court:

"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."

ORDERS.

19. Accordingly, for the reasons set out above, the petition for reduction of the sentence imposed herein on the applicant is declined.

20. File Closed.

Order Accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mamba for DPP.

Applicant in person.