



REPUBLIC OF KENYA



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**Republic v Wesonga (Criminal Case E016 of 2023)
[2025] KEHC 7467 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL CASE E016 OF 2023
WM MUSYOKA, J
MAY 29, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

MOSES WAFULA WESONGA ACCUSED

RULING

1. On 4th April 2025, I delivered a Judgement herein, where I convicted the accused herein for murder. I called for a pre-sentence report, and fixed the matter for sentencing hearing. A pre-sentence report was prepared, and filed herein on 24th April 2025. The said report was dated 25th April 2025. The sentencing hearing happened on 30th April 2025. Mr. Omeri made a statement in mitigation, on behalf of the accused. That the accused person was a young father of children of tender years and sole breadwinner for his elderly parents. He was said to be remorseful. He prayed for non-custodial measures. Mr. Onanda, for the Republic, invited the court to be guided by the pre-sentence report.
2. I have considered both the pre-sentence report and the speeches made by both sides on sentence. A person lost their life, for no justifiable cause at all. Justice must be served for him and his family.
3. The accused was convicted of murder, under the [Penal Code](#), Cap 63, Laws of Kenya. The death penalty remains the mandatory sentence for murder under that law. There had been some reprieve, by the Supreme Court, in [Francis Karioko Muruatetu & another vs. Republic](#) [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where mandatory death, as a penalty for murder, was decried, but not outlawed. It was declared to be unconstitutional, yet still lawful to the extent of Article 26(3) of the [Constitution](#). Then it was said a trial court could still exercise discretion, in sentencing, despite the mandatory nature of the provision prescribing the penalty, in the [Penal Code](#).



4. Later pronouncements of the Supreme Court, although not on murder, but other offences, make the picture a little uncertain. I have in mind [Republic vs. Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), [Republic vs. Manyeso](#) [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) and [Republic vs. Ayako](#) [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), where it has been asserted that the penalties prescribed by Parliament are lawful and constitutional, and that it should not be up to the courts to change them.
5. The position, stated in [Republic vs. Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), [Republic vs. Manyeso](#) [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) and [Republic vs. Ayako](#) [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ), is, in my humble view, inconsistent with that in [Francis Karioko Muruatetu & another vs. Republic](#) [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ). In [Francis Karioko Muruatetu & another vs. Republic](#) [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), the court appeared to say that the court can change the penalty prescribed for murder in the [Penal Code](#), by exercising discretion, to award sentences other than what is prescribed in the relevant provision prescribing the penalty for the offence, but in these recent decisions the court appears to be saying that that discretion is not available for other offences. The question then would be, why should different standards be employed.
6. I do not now know exactly what [Francis Karioko Muruatetu & another vs. Republic](#) [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) means, in view of [Republic vs. Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), [Republic vs. Manyeso](#) [2025] KESC 16 (KLR) (Mwilu, DCJ & VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) and [Republic vs. Ayako](#) [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ). Am I still bound by the [Penal Code](#), which prescribes mandatory death for murder? That provision has not yet been amended by Parliament. If I exercise discretion here to impose a sentence other than mandatory death, where would the power to exercise discretion come from? From the [Penal Code](#) or from [Francis Karioko Muruatetu & another vs. Republic](#) [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and [Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others \(Amicus Curiae\)](#) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)?
7. I understand [Republic vs. Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), [Republic vs. Manyeso](#) [2025] KESC 16 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) and [Republic vs. Ayako](#) [2025] KESC 20 (KLR)(Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) to be saying that courts can only exercise the statutory mandate conferred to them, at sentencing by the law of Parliament creating the offence and prescribing the sentence, and the courts should not create their own jurisdiction on discretion. I am also alive to the principle that jurisdiction is conferred by the [Constitution](#) or statute, and the court cannot arrogate itself jurisdiction, by what is known as judicial craft, as was pronounced in [Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR (Mutunga CJ&P, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ), [Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel](#) [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and [Kibos Distillers Limited vs. Benson Ambuti Adega & 3 others](#) [2020] eKLR (Makhandia, Kiage & Odek, JJA).



8. My mind is a little cloudy on this. The Penal Code gives me the jurisdiction to impose mandatory death, as the penalty for murder, but Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) have changed that and given me a discretion. Yet, the more recent decisions of the court are telling me, that I have no discretion, where mandatory and minimum sentences are concerned, for other offences, and that I am bound to go by the statute. There is some level of uncertainty there. It is compounded by the notion, in Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that a provision can be both unconstitutional and lawful, which, with respect, is a constitutional impossibility, in view of Article 2(4) of the Constitution. However, a higher court has spoken, and I shall abide.
9. In spite of the uncertainty, I still have to impose sentence, which I hereby proceed to do. I hereby sentence the accused herein, not to mandatory death, as prescribed by the Penal Code, but to 30 years' imprisonment, guided, as I am, by Francis Karioko Muruatetu & another vs. Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), to run from the date of sentencing. I note that the accused person was in pre-sentence detention for a few days, before he was released on bond, hence he should not benefit from section 333(2) of the Criminal Procedure Code, Cap 75, Laws of Kenya. It is so ordered.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 29TH DAY OF MAY 2025.

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Tony Omeri, Advocate for the accused person.

Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the Republic.

