Kinyua v Republic (Miscellaneous Criminal Application E003 of 2022) [2025] KEHC 9165 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2022

EM MURIITHI, J

JUNE 30, 2025

BETWEEN

DAVID WACHIRA KINYUA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This is a ruling on an application for re-sentencing. The applicant was convicted for robbery with violence c/s 296(2) od the *Penal Code* and sentenced to death on 2/10/2002, and his two appeals to the High Court and the Court of Appeal were unsuccessful. However, his sentence of death was commuted to imprisonment for life by Presidential order. He now sought a reduction of his sentence in light of prevailing jurisprudential thought at the time of his filing in 2022. As the Court awaited production of the trial court file and on account of non-production of the applicant before the Court over a long period from 26/7/2023 to 19/2/2025, his application was not heard until 6/3/2025 when the Court directed submissions to be filed within 14 days.

2. By Submissions entitled Mitigation Submissions, the applicant urges the Court to reduce his sentence taking into account the minimal la violence inflicted in his robbery with violence case, the recovery of the robbed item and his status as a first offender as mitigating factors under section 216 and 329 as well as section 333(2) of the *Criminal Procedure* for his pre-trial detention awaiting conclusion of his trial.

3. The applicant urged the authority of the court to review sentences in reliance of Court of Appeal and High Court decisions reducing the sentence of life imprisonment or construing the sentences of life imprisonment to mean a determinate sentence of 30 years as follows:

> " Mitigation Submissions
>
> (Under section 216, 329, and 333(2) & 50(2)(q))

1. My lord, may it please you these are my humble submissions prepared and filed pursuant to the court's directions dated 6th March.2025 by Hon. E. Muriithi (J).

2. 1 My Lord r am the humble applicant before you, having been arrested on 11TH Sept. 2000, charged with an offence of robbery with violence contrary to section 296(2) of the *Penal Code*. Vide criminal case No 656 of 2001. The case went for a full trial where I was convicted on 2nd October 2002 by Hon. N.M Kiriba (SRM) at Kerugoya Law Court and sentenced to suffer death.

3. My lord, on 2009, the President commuted the death low to a life sentence, which I have been serving to date.

4. My lord. after being aggrieved by the trial court's decision, i lodged an appeal to the High Court at Nyeri vide HCCRA 447 and 467 of2002 '(consolidated), where the appeal was dismissed on 14th October 2004 by Hon. (Khamoni & Okwengu, JJ). I further lodged my second appeal to the Court of Appeal at Nyeri vide. criminal appeal No 21 of 2005, which was also dismissed on 4th August 2006. Therefore, I have no other matter in the Republic of Kenya other than the present matter.

5. My lord, I respectfully submit that my application arises from the emerging jurisprudence in criminal justice. Recent legal developments have consistently underscored that mandatory death and life sentences are inconsistent with constitutional principles, particularly with respect to the rights enshrined in Articles 25, 27, 28, and 50 of the *Constitution*. I argue that such sentences fail to consider the individual circumstances of each defendant, potentially leading to unjust and disproportionate outcomes. Consequently, I believe that there i a growing recognition that mandatory sentencing provisions should be re-evaluated to align with constitutional mandates and principles of fairness and justice.

....

10. My lord, Recent jurisprudence has seen the Courts re-evaluate the constitutionality and proportionality of mandatory life and death sentences. In *Francis Karioko Muruafetu & another v Republic* [2017] eKLR, the Supreme Court declared the mandatory death sentence for murder unconstitutional, paving the way for similar considerations in other offences. In *Zakavo v Republic* (Criminal Revision 261 0[2024) [20251 KEHC 857 (KLR), the High Court at Kibera set aside a life sentence and substituted it with a sentence of twenty-five years' imprisonment, guided by the Court of Appeal's decision in the case of *Evan Nyamari Ayako* criminal appeal number 22 of 2018 [2025] KEHC 857 (KLR (supra), which construed life imprisonment to mean a maximum of 30 years. Further, In *Atot v Republic* (Miscellaneous Criminal Application E023 of 2021) [202-11KEHC 10842 (KLR), the High Court at Eldoret set aside a life sentence commuted from the death sentence and substituted it with a sentence of 20 years' imprisonment.

....

16. This court is further enjoined to consider other jurisprudence and apply itself to recent case law in the Court of Appeal sitting at Nyeri on 27th May 2022 in a case of robbery with violence c/s 296 (2) of the *Penal Code*, in Isaac Mwangi Wamuyu in Criminal Appeal No 960[2015, where the court substituted a death sentence with a sentence of 20 years to run from the date of arrest."

4. The applicant concluded that –

Conclusion

17. In light of the arguments I have presented, it is evident that I have demonstrated significant mitigating factors that warrant a review of my sentence. The principles of proportionality and fairness, as enshrined in our Constitution, mandate that punishments should not only be appropriate but also considerate of my individual circumstances. The Court of Appeal's decisions in the referenced cases provide a precedent for leniency in sentencing where I have shown genuine remorse and have minimal previous criminal history. Furthermore, the broader objective of the criminal justice system emphasize the importance of rehabilitation alongside retribution and deterrence."

5. The DPP did not file submissions.

6. The Supreme Court has found fault with the reasoning of the High and the Court of Appeal in resentencing cases reducing the mandatory and minimum sentences and in construing the sentence of imprisonment for life to mean imprisonment for a number of years, 30 (as in Ayako's case relied on by the Applicant) and 40 years in Manyeso , and ruled that what it considers the amendment of the penal provisions is the province of Parliament.

7. The issue of resentencing to reduce the sentence of death as a mandatory sentence in cases other than murder and the sentence of life to a term of years and to sentences other than the minimum or mandatory sentences has been brought to an end by the Supreme Court in a continuum of cases being the *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) (Muruatetu II Directions) of July 2021, *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) of 12/7/2024, and most recently on 11/4/2025 (after the applicant's submissions herein), *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) and (the Manyeso and Ayako cases). The Supreme Court decisions by virtue of Article 163(7) bind all courts subordinate to it, and this Court is, respectfully, guided by these decisions.

8. In *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (*supra*), the Supreme Court discussed the question of validity of minimum sentences and after noting emerging comparative international trends held as follows:

"62. Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This

was our approach and direction in Muruatetu which must remain binding to all courts below."

9. The Court set aside the Court of Appeal decision which had reduced the sentence of the trial court to imprisonment for 15 years and reinstated the trial court's sentence of the minimum sentence of 20 years for the offence of defilement, saying:

> " 69. We take cognizance of the fact that upon delivery of the judgment of the Court of Appeal reducing the Respondent sentence from 20 years to 15 years, the Respondent had since been released from prison. The consequent effect of our decision herein of setting aside the judgment of the Court of Appeal would be reinstating the initial sentence of 20 years and it is upon the relevant organs of State to abide by our decision."

10. In *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment), the Supreme Court outlawed the application of the Muruatetu I decision, which related to murder, to offences in other statutes with minimum and mandatory sentences said:

> " 64. Paragraph 11 to 14 of the Muruatetu directions are very clear that the decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, *Sexual Offences Act* or any other statute. Further, that the Muruatetu case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with the *Constitution*. Paragraphs 93 to 97 of the Muruatetu decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this Court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:
>
> > " 94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.
> >
> > 95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily

mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing."

65. From the above paragraphs of the Muruatetu case any reading of that decision ought to lead to the conclusion that it is upon the Legislature to enact legislation on what constitutes a life sentence and not the courts.

66. We therefore find that the Court of Appeal violated the principle of stare decisis by misapplying the decision in Muruatetu and in finding the life sentences of imprisonment to be unconstitutional."

11. In *Republic v Ayako* (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment), the Supreme Court overruled the Court of Appeal decision, which is relied on by the Applicant herein, *Ayako v Republic* [2023] KECA 1563 (KLR), which held:

> " On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

12. The Supreme Court found that the Court of Appeal had usurped the legislative mandate of Parliament to make laws by fixing, as this court is asked to do, an equivalent term of years of imprisonment, and held:

> " Whether the Court usurped the powers of Parliament by setting a term sentence as a substitute for life imprisonment.
>
> 43. Each of the three branches of the Government has its own unique role in ensuring the proper functioning of the State. These roles also complement each other. To achieve this delicate yet essential balance between the Executive, the Legislature and the Judiciary, the *Constitution* specifically outlines the obligations and mandate of each arm of Government. This division fosters a system of checks and balances, where each branch operates independently yet works collaboratively to uphold constitutional governance, to prevent abuse of power and ensure the rule of law. This balance is vital for maintaining the trust and functionality of a democratic government.

44. Article 94 of the *Constitution* in particular vests Parliament with the power to make provisions with the force of law. It further provides that other persons or bodies may also do so only under legislative fiat or the *Constitution*, but this authority has to be express and specific as to the purpose, objectives, limits, nature and scope of the law to be made. In this way, the *Constitution* is comprehensive with the necessary safeguards that protect the people of Kenya. We would also add that, before a provision has the full effect of the law, it has to go through various stages of the legislative process, principal among them being public participation. The enactment of legislation without going through these necessary safeguards means that the resultant law would lack legitimacy and will be rendered unconstitutional.

45. In the *Republic v Mwangi* Case, this Court held that, whilst sentencing is an exercise of judicial discretion, Parliament sets the parameters for sentencing for each crime in statute. We stated as follows:

> "66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed".

46. In Muruatetu I, faced with a similar question of ascribing a term sentence to life imprisonment, this Court considered Article 51 of the *Constitution* which provides for the rights of detained persons. Sub article 3 thereof specifically tasks Parliament with enacting legislation for the humane treatment of detainees, persons in remand and convicts. We, therefore, held that while life imprisonment ought not necessarily mean a prisoner's natural life, it is for the Legislature to prescribe what constitutes life imprisonment and the parameters applicable, if at all. In that connection, we did, as the Supreme Court, recommend that the Attorney General and Parliament ought to commence an enquiry on this issue, and develop legislation on what constitutes a life sentence. Despite making this recommendation on 14th December 2017, and making an order that the Judgment be placed before the Speakers of the

National Assembly and the Senate to, among other things, set the parameters of what constitutes life imprisonment, we note this recommendation has not been given consideration by the two offences of Parliament.

47. In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers."

13. In Muruatetu II case, the Court distinguished other capital offences from the offence of murder which had been the subject of *Francis Karioko Muruafetu & another v Republic* [2017] eKLR (Muruatetu I) and gave directions that the ratio of Muruatetu I that the sentence of death as a mandatory sentence for the offence of murder did not apply to capital sentences on other offences attracting a mandatory death sentence such as robbery with violence, attempted robbery with violence and treason, as follows:

> " 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.
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> 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."

Four propositions

14. The consequence of these Supreme Court decisions is four-fold:

1. The sentence of death for offences other than murder c/s 203 as read with 204 is constitutionally valid until a declaration of invalidity is made in that regard.
2. The mandatory and minimum sentences for various offences such as robbery with violence c/s 296 (2) of the *Penal Code* and offences under the *Sexual Offences Act* are constitutionally valid.
3. The Court has no discretion to reduce the minimum sentences or to substitute the life imprisonment with a sentence of imprisonment with, or construe it as imprisonment for, a determinate term of years.
4. The mandatory sentence of death for offences other than murder c/s 203 as read with 204 of the *Penal Code* may only be challenged by a suitable petition for declaration of constitutional invalidity filed in that behalf in the High Court as the Constitutional Court through the

process of appeal to the Court of Appeal and finally to the Supreme Court as happened in Muruatetu I.

15. Consequently, this Court finds that the applicant in this application must by a suitable petition in that behalf seek for declaration of invalidity of the sentence of death imposed on him by the trial court and subsequently reduced by executive act of the Presidential clemency.

16. Upon declaration of invalidity of the sentence of death for the offence of robbery with violence, the court may, bearing in mind the mitigation presented by the applicant herein, then reduce that sentence to imprisonment for a term of years or otherwise in the discretion of the court.

17. In the meantime, the Court, though sympathetic of the applicant who has, for the last almost 25 years, been in custody since arrest on 11/9/2000, must decline this miscellaneous application for re-sentencing.

Orders

18. Accordingly, for the reasons set out above, the Court makes the following orders:

    1. The application for re-sentencing dated 22/2//2022 is declined.

    2. The applicant is at liberty to file a full petition for declaration of constitutional invalidity of the death sentence in robbery with violence cases as counselled in Muruatetu II Directions (2021) eKLR.

19. File closed.

    Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE, 2025

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for the DPP.

Applicant in person.