Mutembei v Republic (Miscellaneous Criminal Petition E009 of 2024) [2025] KEHC 10132 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

MISCELLANEOUS CRIMINAL PETITION E009 OF 2024

RL KORIR, J

JUNE 30, 2025

BETWEEN

BENSON MUNENE MUTEMBEI ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Benson Munene Mutembei (Applicant) was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The offence was committed on 24th November, 2020. At the conclusion of the trial he was found guilty and sentenced to suffer death.

2. The Applicant then appealed to his conviction and sentence. The Appeal was heard and determined by Gitari J. In her Judgement dated 23rd March 2023, Gitari J dismissed the appeal in its entirety.

3. The Applicant has now approached this court for a review of his sentence. In his Petition which is headed "Amended Grounds of Appeal under Section 350(V) of the *Criminal Procedure Code*," and received in court on 24th March 2025 the Applicant submitted that the trial court did not consider his mitigation leading to a harsh sentence particularly because the complainant only sustained superficial injuries. He submitted the life sentence was excessive and harsh and denied him a second chance in life. That it violated Articles 27, 28 and 29 of the *Constitution*.

4. In response, the Respondent vide submissions dated 16th October, 2024 stated that they were not opposed to the court commuting the death sentence to quantifiable years and thereafter reducing the same proportionately by deducting the years spent in pre-trial custody. The Respondents relied on the case of *Francis Karioko Muruatetu v Republic* [2021] KESC 31 (KLR) and Section 332 (2) of the *Criminal Procedure Code*.

Analysis and Determination

5. I have looked at the trial record. It confirms that the Applicant was sentenced to the mandatory death sentence under Section 296(2). The Applicant moved to the High Court and as earlier stated, his conviction and sentence were upheld by Gitari J.

6. His sentence having been confirmed by a Court of equal and concurrent jurisdiction means that the Applicant's recourse was to the Court of Appeal. In dealing with a similar Application, Lesiit J (as she then was) held as follows:-

> " The law is clear that the period a person was held in custody prior to being sentenced shall be taken into account. The sentence in this case was imposed by Lagat-Korir, J, a court of parallel jurisdiction, which was the trial court in this matter. That means that if the Applicant was aggrieved in the manner in which the period he spent in custody before sentence was considered, or not, his recourse is not before this court. His grievance should be addressed on appeal before the Court of Appeal.
>
> He cannot return back to this same court to consider his grievance, for two reasons. First and most, it is this court which passed the impugned sentence. Having delivered itself on the matter, this court is functus officio. Secondly, the grievance he now has should be a ground of appeal which can only be considered on appeal before the Court of Appeal."

7. Both parties asked the court to commute the death sentence and impose a quantifiable life sentence taking into consideration he time spent in pre-trial custody. They cite the Muruatetu case. This court however observes that the Supreme Court has since clarified that its decision in the Muruatetu case did not invalidate the mandatory death sentence which remained a valid but discretionary sentence in murder cases. It held thus:-

> " 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."

8. With respect to discretion to depart from the mandatory death sentence for robbery with violence, the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicaus Curiae)* Petition 15&16 of 2025) [2021] KESC 31 (KLR) clarified that the case applied only to the offence of murder under Section 204 of the *Penal Code*. The Court held:-

> "We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentence or minimum sentences in the *Penal Code*, the Sexual Offence Act or any other statute."

9. Further, in the case of *Republic v Julius Kitsao Manyeso*, Petition No E013 of 2024, the Supreme Court while dealing with the issue of mandatory life sentences, held that life imprisonment remained a lawful sentence under the *Sexual Offences Act*. The court categorically held that:

> " (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*....."

10. I find therefore that the Applicant and the Prosecution could not rely on the Muruatetu case to persuade this Court to review the Applicant's sentence.

11. In the result, it is my finding that the Application lacks merit. The Applicant's recourse is to the Court of Appeal. The Application is dismissed.

    Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 30TH DAY OF JUNE, 2025.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant in person at Embu Prison and Ms Rukunga for State; Muriuki (Court Assistant).