# Mugwanga alias Bodo v Republic (Criminal Miscellaneous Application E005 of 2024) [2025] KEHC 9153 (KLR) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9153 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VIHIGA**

**CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2024**

**JN KAMAU, J**

**JUNE 24, 2025**

**BETWEEN**

**AINEA MUGWANGA ALIAS BODO .................................................... APPLICANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

**RULING**

## Introduction

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. He was convicted and sentenced to death.
2. Being aggrieved by the said decision, he lodged an appeal at Kakamega HCCRA No 12 of 2013. The court ordered a re-trial where he was sentenced to thirty (30) years imprisonment.
3. On 15th January 2024, he filed the Notice of Motion application dated 19th October 2023 seeking review of his sentence.
4. He averred that he had served eleven (11) years and seven (7) months since his conviction. He pointed out that he was rehabilitated as he had undergone spiritual guidance and other courses and had been awarded certificates in Mechanics Grade II and II (sic). He pleaded with court to grant him a non-custodial sentence.
5. He was remorseful and sought for court's leniency. He added that he was now a law-abiding citizen due to his long incarceration. He was categorical that his right to mitigate lay with Section 216 and 329 of the *Criminal Procedure Code*.
6. His Written Submissions were dated 13th November 2024 and filed on 14th November 2024 while those of the Respondent were dated 4th January 2025 and filed on 4th February 2025. The Judgment herein is based on the said Written Submissions that both parties relied upon in their entirety.

## Legal Analysis

7. The Applicant pleaded with court to exercise its discretion to review his sentence to a least severe sentence as stipulated under Article 50(2)(p) of *the Constitution* of Kenya by considering his mitigating circumstances.

8. He pointed out that the Trial Court was unjust and unfair. He relied on the cases of Machakos Petition No E017 of 2021 and Jacob Mwangoma Mwandigha vs Republic [2017]eKLR without highlighting the holding he relied on therein.

9. He asserted that he was a first-offender and that he was reformed and rehabilitated and was no longer a threat to the society. He urged the court to hold that the period he had already served was sufficient punishment.

10. He averred that his sentence of thirty (30) years was still harsh, punitive and excess. He urged the court to reduce the said sentence for justice to be seen to have been done, served and safeguarded. In this regard, he relied on the case of *Samson Boyii vs Republic* KLR 2019 where a violent robber was ordered to serve a lenient sentence of ten (10) years imprisonment.

11. On its part, the Respondent submitted that the sentence of thirty (30) years was commensurate to the offence committed and this court should not interfere with it.

12. It invoked Section 329 of the *Criminal Procedure Code* and placed reliance on the cases of *Shadrack Kipkoech Kogo vs Republic* Eldoret Criminal Appeal No 253 of 2003(eKLR citation not given) and *Benard Kimani Gacheru vs Republic*[2002]eKLR where the common thread was that sentencing was a discretion of the court and that an appellate court would not alter a sentence unless the trial judge had acted upon wrong principles or overlooked some material factors.

13. It further relied on the case of *Republic vs Jagani & Another* (2001) KLR 590 where it was held that the purpose of the sentence was deterrence, rehabilitation and reparation for harm done to victims in particular and to society in general. It further submitted that the Applicant had previously appealed to this court which upheld the conviction and reviewed the sentence.

14. In this regard, it placed reliance on the case of *John Kagunda Kariuki vs Republic* [2019]eKLR where it was held that as the applicant's appeal had already been heard by the High Court, he could not return to the same court for review of his sentence but he was at liberty to make an argument for reduced sentence at the Court of Appeal.

15. It asserted that the Applicant's sentence was lawful and that he had not demonstrated why this court should interfere with the same. It was its contention that this application lacked merit and should be dismissed.

    1. In the case of Mbugua & 6 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment), this very court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right.

    2. It recognised that under Article 27(1) of *the Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted robbery with violence were also equal before the law, they had a right to be protected before the law and had to derive equal benefit from the law as the non- capital offenders.

3. The court's decision was in line with the directions of the Supreme Court on 6th July 2021 in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR (commonly now known as Muruatetu II) that the question of constitutionality of the death sentence in robbery with violence cases ought to commence at the High Court and thereafter escalated to the Court of Appeal, if necessary. It rendered itself as follows:-

> " 46. 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 (emphasis court)."

19. In the case of Ramadhan *& 8 others v General & another (Petition 5 of 2022* & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024) (Judgment), Sewe J looked at the mandatory nature of the death sentence under Section 296(2) and 296(2) of the *Penal Code* and declared it unconstitutional. She further directed that the petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications

20. In the case of *Mbugua & 6 Others vs The Hon Attorney General* (Supra) as consolidated with Alfred Eyase Kinamundu & 2 Others vs the Hon Attorney General & Others (Supra), this court looked at the aspect of re-sentencing of persons who had been convicted under Section 296(2) and Section 297(2) of the *Penal Code* and rendered itself as follows:-

> " 67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.
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> 68. The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of *the Constitution* of Kenya....
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> 86. For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of *the Constitution* of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of *the Constitution* of Kenya.

87. Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction."

21. In this regard, it found that applicants seeking re-sentencing ought to file documents to support their mitigating factors. These documents could include certificates of programmes they had undergone in prison leading to their rehabilitation and recommendation letters from the in charges of prisons.

22. While considering the present application for re-sentencing, this court was alive to the fact that his death sentence had been reduced to thirty (30) years. It noted that the issue of mitigation had already been addressed in HCCRA No 12 of 2013 where in his decision of 24th March 2023, Musyoka J rendered himself as follows:-

32. I note from the trial record, that the appellant was afforded an opportunity to mitigate after his conviction. He took advantage of the chance, for he made a statement in mitigation. He said that he was a family man, with a wife and children, and asked the court to exercise leniency. The prosecution invited the court to treat him as a first offender. The trial court was conscious of the fact that he was a first offender, but expressed that its hands were tied by the sentence imposed by the law. I believe I should not have the appellant mitigate a second time. After all, am not sitting as the trial court. I shall consider sentence based on his mitigation of 4th January 2013.

33. The maximum penalty for simple robbery is 14 years in jail. Where discretion has to be exercised for a sentence for robbery with violence, that has to be taken into account, for robbery with violence is the aggravated form of simple robbery. I note that the injuries inflicted on PW1, in the course of the robbery, were life threatening. He lost consciousness for 1½ days, and was in hospital for slightly over 1 week. I note that the appellant is a first offender, and prayed for leniency. Consequently, I hereby sentence the appellant to 30 years in prison for robbery with violence, contrary to section 296(2) of the *Penal Code*. Section 333(2), of the *Criminal Procedure Code*, shall be reckoned, with respect to calculation of sentence.

23. This court could not therefore reduce the sentence that had already been upheld by a court of competent jurisdiction where mitigation had already been done. This court could not give the Applicant an opportunity to mitigate afresh as he had already done so in the Trial Court. This matter was therefore res judicata in terms of re-sentencing him. The only option that he had was to appeal at the Court of Appeal if he was still aggrieved by the said sentence.

**Disposition**

24. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 19th October 2023 and filed on 15th January 2024 was not merited and the same be and is dismissed.

25. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JUNE 2025**

**J. KAMAU**

**JUDGE**