



**Mwiti v Republic (Criminal Petition E004 of 2024)
[2025] KEHC 11291 (KLR) (Crim) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL PETITION E004 OF 2024
SC CHIRCHIR, J
JULY 30, 2025**

BETWEEN

BENSON MWITI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner was charged, tried and convicted at the Chief Magistrate’s Court in Isiolo with the offence of Robbery with Violence. His appeal to the High Court in Meru was dismissed. He has moved to this court by way of a constitutional petition seeking that he be given a chance to mitigate and the court to resentence him. He has based his plea on Article 50 (2) (p) of *the Constitution* and Sections 214 and 329 of the *Criminal Procedure Code*.

The Petitioner’s case

2. It is the petitioner’s case that section 296(2) of the *Penal Code* deprives the court of the use of its judicial discretion in a matter ‘touching on life and death’; That the mandatory nature of death sentence deprives the court the legitimate jurisdiction not to impose death sentence in appropriate cases; That because of the mandatory nature of the death sentence the court is unable to benefit from any evidence it may receive under section 216 and 329 of the *Criminal Procedure Code*, when sentencing an Accused person.
3. The petitioner further states that he was entitled to benefit from a less severe punishment in terms of Article 50(2) of *the Constitution*.
4. It is the petitioner’s final submissions The petitioner that pursuant to Article 23(10) and 165 (3) (b) of *the constitution* this court is clothed with the jurisdiction to make the declaration being sought.



The Respondent's case

5. The respondent states that following the publication of gazette notice number 9566 dated 19/7/2023, published pursuant to the President's exercise of the power of mercy under Article 133 of *the constitution* , all death sentences were commuted to life sentence for those who were serving the sentence as at 21/11/22. That consequently the petitioner is not serving a death sentence as alleged.
6. It is further submitted that the findings in the Muruatetu case was only in respect of section 204 of the *Penal Code*; That in any event the court did not outlaw death sentence; It is finally submitted that in the present case, death sentence was warranted as there was evidence to that the petitioner used a firearm against the victim.

Determination

7. I have considered the parties' rival submissions and in my view the issues requiring determination are:
 - a. Whether the petitioner is currently under death sentence .
 - b. Whether the sentence should be reduced.

whether the petitioner is under death sentence.

8. The petitioner was sentenced to death on 24.08.2006. His appeal to the high court was disallowed. On 21.7.23 the president, pursuant to the powers bestowed on him under Article 133 of *the constitution*, published gazette Notice number 9566 dated 19.7.2023, in which he commuted all death sentences that had been imposed as at 21.11.22, to life sentences.
9. The said Gazette Notice reads: - "it is notified for general information to the public that in exercise of powers conferred by Article 133 of *the Constitution* of Kenya under section 23(1) of the *Power of Mercy Act* 2011 the President and 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 offence as at 21.11.22 to life sentence. "
10. The petitioner was convicted in the year 2006 as aforesaid and consequently he is covered by the above stated notice. It follows that the death sentence has been substituted with life sentence. I am therefore in agreement with the prosecution that the petitioner is no longer under death sentence.
11. The petitioner's application is moot. To proceed to consider it on merit would be an engagement in a purely an academic exercise.
12. The petition is incompetent, it is hereby struck off.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF JULY, 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant.

Benson Mwiti- The petitioner

Mr. Ngetich – For the Respondent

