Ndau v Republic (Petition E066 of 2023) [2025] KEHC 11236 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

PETITION E066 OF 2023

SM GITHINJI, J

JULY 29, 2025

IN THE MATTER OF ENFORCEMENT OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2 (5) (6), 3, 19 (3), 22, 23 (1) (3), 26, 27 (1) (2) (4), 28, 29 (D) (F), 50 (2) (P) AND 160 (1) OF THE CONSTITUTION OF KENYA AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF SECTION 216 AND 329 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF SECTION 296 (2) OF THE PENAL CODE

AND

IN THE MATTER OF THE SENTENCING POLICY GUIDELINES IN THE REPUBLIC OF KENYA

BETWEEN

DAVID MWETERI ALIAS NDAU ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. By a Petition dated 22/5/2023, the Petitioner seeks that;

    1. A declaration be made subject to Section 216 and 329 of the *Criminal Procedure Code* and Article 50 (2) (p) of the *Constitution* that the petitioner herein be heard on his mitigating factors and appropriate sentence awarded which is commensurate to the offence committed.

    2. The Petitioner was convicted of robbery with violence and sentenced to death in Tigania Criminal case No.1844/2015. He lodged Meru High Court Criminal Appeal No. 115/2018

which was dismissed on 9/5/2019. He now challenges the constitutional validity of the mandatory death penalty in capital offences following the directive of the Supreme Court on 6/7/2021 in Muruatetu decision. He asserts that the mandatory nature of the death penalty under Section 296 (2) of the *Penal Code* deprives the courts their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases under the provisions of Section 216 and Section 329 of the *Criminal Procedure Code*.

3. The Petitioner verily believes that the mandatory death penalty is unjust and unfair as it deprives the court the power to exercise judicial discretion and award appropriate sentences after receiving such evidence as it thinks fit to inform itself as to the proper sentence to be passed under the provisions of Section 216 and 329 of the *Criminal Procedure Code*. He avers that he is entitled to benefit from the least severe of the prescribed punishment under Article 50 (2) (p) of the *Constitution*, and this court has judicial powers under Articles 23 (1) and 165(3) (b) of the *Constitution* to hear and determine the petition for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

4. The Respondent filed grounds of opposition dated 3/6/2025 that;

    1. The instant matter is res judicata on the basis that the applicant's appeal on sentence vide Meru Criminal Appeal No. 115 of 2018 was dismissed.

    2. This court is thus functus officio and cannot revisit the matter.

    3. The directive of the Supreme Court issued on 06/07/2021 in the Francis Muruatetu's decision does not apply retrospectively.

    4. Given that the Applicant's appeal against sentence has already been heard and determined by this Court, he is not entitled to file a new application for re-sentencing based on the new decisional law.

    5. The Application lacks merit, is ill advised and should be dismissed entirely.

Submissions

5. The Petitioner filed submissions dated 22/5/2023 contending that this court is properly seized of this matter and it has the jurisdiction to hear and determine the issues of invalidity of the mandatory death sentence under Section 296 (2) of the *Penal Code* which is a threat to his inherent fundamental rights and freedoms as enshrined under the constitution, and cited *Francis Karioko Muruatetu & Another Petition No. 15 & 16 (Consolidated) of 2015 v Republic* and *Charles Kabwi Laibon v The DPP* Petition No. E026/2023. He submitted that the mandatory death sentence under Section 296 (2) of the *Penal Code* is inconsistent with or goes against the letter and spirit of Articles 28 and 50 (2) (p) of the *Constitution*. He contended that Section 296 (2) of the *Penal Code* failed to conform to the principles of fair trial that accrue to accused persons as provided under Article 25 (c) of the *Constitution* which is an absolute right. He asserted that the mandatory death penalty robbed him an opportunity for an individualized sentence that took into consideration factors relating to his personal information and the circumstances surrounding the offence committed, and it prohibited him from being considered after presenting mitigating evidence to the court under the provisions of Sections 216 and 329 of the *Criminal Procedure Code*.

6. The Respondent intimated to court that it would wholly rely on its grounds of opposition filed on 9/6/2025.

Determination

7. The Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), espoused that, " Having laid bare the brutal reality of the mandatory nature of the sentence under section 204 of the *Penal Code*, it becomes crystal clear that that section is out of sync with the progressive Bill of Rights enshrined in our *Constitution* specifically; articles 25 (c), 27, 28, 48 and 50 (1) and (2) (q). That section therefore cannot stand, particularly, in light of article 19 (3) (a) of the *Constitution* which provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and are not granted by the State, and in light of article 20 (1) and (2) which provide that: (1) The Bill of Rights applies to all law and binds all state organs and all persons and (2) Every person shall enjoy this rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. In light of these provisions therefore, the timing of the constitutional challenge to section 204 of the *Penal Code* is propitious and will succeed...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. The Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) issued the following guidelines;

> "1. All offenders who had been subject to the mandatory death penalty and desired to be heard on sentence were entitled to a re-sentencing hearing.
>
> 2. Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.
>
> 3. In the re-sentencing hearing, the court had to record the prosecution's and the appellant's submissions under section 329 of the *Criminal Procedure Code*, as well as those of the victims before deciding on a suitable sentence.
>
> 4. An application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which had jurisdiction to do so and not the subordinate court.
>
> 5. In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court: -
>
> i. Age of the offender;
>
> ii. Being a first offender;
>
> iii. Whether the offender pleaded guilty;
>
> iv. Character and record of the offender;
>
> v. Commission of the offence in response to gender-based violence;
>
> vi. The manner in which the offence was committed on the victim;

vii. The physical and psychological effect of the offence on the victim's family;

viii. Remorsefulness of the offender;

ix. The possibility of reform and social re-adaptation of the offender; and,

x. Any other factor that the court considered relevant.

6. Where the appellant had lodged an appeal against the sentence alone, the appellate court would proceed to receive submissions on re-sentencing."

9. In its judgment dated 9/5/2019, relating to this matter, this court (A. Ong'injo J), properly guided by the principles laid down by the Supreme Court in *Francis Karioko Muruatetu* (*supra*) rendered thus; "With regard to sentencing, the Appellant was handed a death penalty. The Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR held that mandatory death penalty for murder is unconstitutional the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances. In the instant case 3 robberies were committed by the Appellant and his accomplices in one night in a span of hours. In all the said robberies actual violence was used on the victims. PW1 for instance was hit on the head and right hand with a metal bar. PW2 on the other hand suffered a fractured left hand and was subjected to degrading treatment whereby the robbers whipped her buttocks with sticks, poured water on her and inserted fingers on her anus as they searched for money and sat on her naked body as they swigged beer bottles they were carrying. PW3 on the other hand was hit on the head and on the right eye with a machete until she lost sight. The prosecutor intimated to court that though there were no records, the Appellant had in the year 2009 been convicted for the offence of stealing stock. The Appellant indeed appeared to admit this fact in his defence when he stated that in the year 2005, he had been framed up. It is also not lost on this court that the Appellant was not even remorseful in the mitigation when he simply stated that he left his fate in the hands of the court. Taking into totality all the circumstances in this case, it is my considered opinion that there are aggravating circumstances warranting this court not to interfere with the death sentence imposed upon the Appellant herein and I see no reason to disturb the same. Accordingly, the Appellant's appeal is without merit and the same is accordingly dismissed in its entirety."

10. I find that the callous manner in which the offence was committed, without a doubt, profoundly traumatized the victims, coupled with the fact that the Appellant was a repeat offender who did not exhibit any ounce of remorse, were aggravating factors which justified the imposition of the severest sentence on him.

11. The decision in Criminal Appeal No. 115 of 2018 was made bearing in mind the finding in *Francis Korioko Muruatetu & Another v Republic* [2017] eKLR; before the further explanation by the Supreme Court on its effects on other crimes bearing mandatory sentences. The court then considered sufficiently whether any other sentence was appropriate for the petitioner (Appellant) and settled on the death sentence.

12. Given the finding, there is no constitutional right of the petitioner which was infringed in the entire process of trial and appeal. Mitigation was weighed appropriately.

13. Consequently, there is nothing more left for this court to do.

14. The upshot from the foregoing analysis is that the Petition dated 22/5/2023 is in want of merit and it is hereby dismissed.

DATED AND DELIVERED AT MERU THIS 29TH JULY, 2025

S.M. GITHINJI

JUDGE

Apperances:-

Petitioner present at Embu Prison.

Ms. Adhi for the state.