Njogu v Republic (Criminal Petition E018 of 2023)
[2025] KEHC 12012 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL PETITION E018 OF 2023

EM MURIITHI, J

AUGUST 14, 2025

BETWEEN

JAMES MAINA NJOGU ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The judgment in this case turns on the application of the Supreme Court decisions in Manyeso and Ayako delivered on the same day 11/4/2025.

2. The applicant who had been sentenced to the death penalty for the offence of Robbery with Violence under Section 296(2) of the Penal Code following enhancement of sentence upon appeal by the High Court at Nyeri (Criminal Appeal No. 251 of 2001)m, and whose second appeal to the Court of Appeal (Criminal Appeal No. 38 of 2004) was dismissed and is now serving a life sentence upon presidential commutation of the sentence, now seeks re-sentencing and cites his reformation during his 25 years of prison custody.

3. The Petition dated 12/10/2023 sought the following specific reliefs:

> " D. Petitioners' Humble Prayer
>
> The Petitioners therefore humbly pray:-
>
> 1. That, may this Hon. Court be pleased to find that it has jurisdiction to entertain this petition and grant orders sought by the petitioner considering, time already served in custody, rehabilitation and other mitigating factors as constant variables in determining a sentence.
>
> 2. That, may this honourable court be pleased to declare rights for the violations, denial of and threat to rights of the petitioner herein as a result of the sentence,

and grant appropriate remedy which are not exhaustive by dint of Article 23 of *the Constitution*.

3. That, may this Honourable Court be pleased to observe that with appropriate correction every person would be of value to the society through skills earned during rehabilitation for a transgression.

4. That, may this honourable court be pleased to observe that the petitioner herein has exhausted the right of appeal, and has served over 23 years from the date of arrest, for the offence convicted of under the Penal Code; and find that he deserves an opportunity to adduce post-conviction evidence by dint of Section 329 of the CPC to be considered for alternative sentences to enable him be of value to himself and the society considering time already served under the orders of the court from the date of arrest.

5. That, this Hon. Court may be pleased to make such plausible orders that it deems fit and just for expedite conclusion of this case and access to Justice for all."

4. By a ruling of 24/4/2025 following, and in view of, the twin decisions of the Supreme Court in Manyeso and Ayako on the same issue of resentencing where the Court of Appeal, differently constituted, had interpreted the sentence of life imprisonment for life to mean a sentence for imprisonment for 40 and 30 years, respectively, this court invited the applicant "to make further and fuller submissions, or otherwise as he may be advised by his legal advisors."

5. The Petitioner/applicant then filed submissions dated 28/5/2025 set out in full as follows:

" Petitioner's Further Submissions

A. Brief facts

1. May it Please this Honourable Court, The Petitioner wish to extend further submissions following the new developing jurisprudence in appellate jurisdiction as under:

2. Whether the High Court has unlimited original jurisdiction in criminal matters and authority to determine violations of rights under Article 165(3)(a).

3. Whether Judicial independence under Article 160 empowers the court to exercise discretion in sentencing.

4. Whether Life imprisonment negates rehabilitation and disproportionately impacts the Petitioner as contemplated in Article 10 of *the Constitution*.

5. Whether revising the sentence aligns with constitutional principles and evolving legal standards

Deliberations

Grounds One, Two, Three And Four Consolidated.

The Petitioner approaches this court seeking reconsideration of his sentence, arguing that the continued incarceration under

life imprisonment contravenes fundamental constitutional provisions. The mandatory nature of the sentence imposed has led to an outcome that disregards judicial discretion and evolving jurisprudence on sentencing. The Petitioner submits that the sentence of life imprisonment negates the principles of rehabilitation, fairness, and equity as enshrined in *the Constitution*. The Petitioner was initially charged with the offence of Robbery with Violence under Section 296(2) of the Penal Code in 2000. Following a full trial, he was convicted and sentenced to five years' imprisonment on May 24, 2001. However, upon appeal to the High Court at Nyeri (Criminal Appeal No. 251 of 2001), the sentence was enhanced to the mandatory death sentence. Further appeal to the Court of Appeal (Criminal Appeal No. 38 of 2004) resulted in the dismissal of the petition, with the death sentence being retained. Subsequently, following a presidential commutation of all death sentences, the Petitioner is now serving life imprisonment. This Honourable Court is vested with the authority to uphold the rule of law and ensure that sentences imposed align with constitutional principles, particularly those relating to human dignity, fairness, and rehabilitation, as per *the constitution* in enforcing the evolving legal landscape regarding sentencing discretion.

a. Legal Issues & Judicial Discretion in Sentencing

The Petitioner submits that at the time of sentencing, the court was constrained by the mandatory nature of Section 296(2) of the Penal Code, which limited judicial discretion. However, emerging jurisprudence now emphasizes the necessity for courts to exercise discretion in sentencing to ensure proportionality and fairness. This Honourable Court is guided by Article 3 of *the Constitution*, which mandates state organs, including the judiciary, to exercise their functions in strict adherence to constitutional principles. Moreover, Article 10 obligates courts to uphold human dignity, equity, social justice, inclusiveness, equality, human rights, and non-discrimination in their rulings. The continued incarceration of the Petitioner under life imprisonment directly contradicts these principles.

b) *The Constitution* & Human Rights Considerations

The Constitution of Kenya places a strong emphasis on judicial independence and the protection of fundamental rights. Article 20(4) requires courts to promote values that underpin an open and democratic society, ensuring that sentencing

decisions reflect principles of dignity, equity, and fairness. The continued life imprisonment of the Petitioner disregards these constitutional imperatives, denying him the opportunity for rehabilitation and the possibility of reintegration into society. Furthermore, Article 23(1) vests the High Court with the authority to enforce fundamental rights, including reviewing sentences that may constitute a violation of human rights. The Petitioner argues that life imprisonment deprives him of the benefits of sentence remission and rehabilitation prospects, effectively eliminating any hope of release despite demonstrating reform.

c) Judicial Authority to Intervene

The Petitioner submits that this Honourable Court possesses the requisite jurisdiction under Article 165(3)(a) to determine whether his continued imprisonment infringes upon his constitutional rights. This provision affirms the High Court's authority to hear and resolve matters pertaining to violations of fundamental freedoms. Additionally, Article 160 recognizes the judiciary's independence, ensuring that judicial officers can exercise discretion in sentencing without undue external influence. The Petitioner was arrested at the youthful age of 22 years and has now been incarcerated for 25 years without any prospects for release. While the initial trial court imposed a five-year sentence, subsequent appeal decisions enhanced the sentence to mandatory death, which was later commuted to life imprisonment. However, in light of modern jurisprudence and the principles enshrined in *the Constitution*, the court is empowered to exercise discretion and pronounce a revised sentence that aligns with justice and fairness.

d) Conclusion & Prayer for Relief Based on the constitutional provisions and legal arguments presented, the Petitioner humbly urges this Honourable Court to exercise its judicial discretion and determine that the sentence served is sufficient punishment. The evolving legal principles surrounding sentencing, including rehabilitation and proportionality, support the revision of the Petitioner's sentence to time served. The Petitioner respectfully prays that this Court considers the injustices perpetuated by life imprisonment and pronounces a determinate

sentence that reflects fairness, rehabilitation, and constitutional principles. Upholding the spirit of *the Constitution*, the Petitioner requests that this Court grant him a second chance and revise his sentence accordingly."

6. The DPP relied on submissions filed by Mr. Mamba earlier on 10/3/2025 as follows:

> " We submit that Article 165(1) establishes the HIGH COURT and vests in it vast powers including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated or denied, infringed on or threatened and the jurisdiction to hear any question respecting the interpretation of *the Constitution*.
>
> Article 23(1) provides that: -
>
> "The High Court has Jurisdiction, in accordance with Article 165.
>
> Article 165(6) provides
>
> The High Court has supervisory Jurisdiction over the subordinate Courts and over any person, body or authority excising a judicial or quasi-judicial fiction"
>
> We submit that the Applicant has to demonstrate that he was not afforded the opportunity by the trial Court to Mitigate as envisaged under Section 216 and 329 of the Criminal Procedure Code/
>
> Section 323 of the Criminal Procedure Code affords the Applicant to answer whether he had anything to say after he is found guilty and the Applicant's previous records are also called and if he is a first offender, the trial Court will factor in before rendering itself.
>
> We submit that the provisions of the law that impose the death sentence are still couched in mandatory terms. In Joseph Njuguna Mwaura, the Court of Appeal held;
>
> "A look at all the provisions if the law that impose the death sentence show that these are couched in mandatory terms, using the word "shall. It is not for thejudiciary to usurp the mandate if parliament and outlaw a sentence that has been put in place by Kenyans, or purports to impose another sentence than has been provided in law"
>
> However, after the interpretation by the Courts under the Bill of Rights as envisaged in *the Constitution* of Kenya 2010, the mandatory sentences since been declared unconstitutional although the death sentence itself is not a cruel, inhuman or degrading as Article 26 (3) of *the Constitution* of Kenya 2010 provides that where the death sentence is provided under any law, it shall not amount to the deprivation of the right to serve a death sentence.
>
> We submit that the Applicant was convicted of a capital offence without the trial Court having considered the mitigating factors as such, this Court has jurisdiction to consider the mitigating factor and render itself appropriately."
>
> Mamba Vincent
>
> Prosecution Counsel
>
> Kerugoya
>
> For: Director Of Public Prosecutions"

Issue for determination

7. The issue for determination is whether the court has jurisdiction to resentence the petitioner who was sentenced to suffer death for robbery with violence subsequently commuted to life imprisonment to a lesser sentence.

Determination

8. Republic v Manyeso was a case of defilement where, as set in the judgment facts:

> "2. On January 28, 2013, the respondent, Julius Kitsao Manyeso, was arraigned before the Senior Principal Magistrates Court at Malindi and charged in Criminal Case No 64 of 2013 with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that, on January 24, 2013 at [Particulars Withheld] Village in Malindi District within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.M. a girl aged 4 ½ years. The Respondent was further charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. On October 3, 2013, the trial court found the Respondent guilty as charged on the main count and sentenced him to life imprisonment. The conviction and sentence were upheld on the first appeal at the High Court but overturned by the Court of Appeal, prompting the present appeal at the instance of the Republic."

9. The facts of the case in Ayako were similar as set out in the Judgment were that

> "(2) The Respondent, Evans Nyamari Ayako, was arraigned before the Senior Principal Magistrate's Court at Ogembo on 18th July 2011 and charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, Cap 63A of the Laws of Kenya. He was also charged with the alternative offence of committing an indecent act on a child contrary to Section 11(1) of the *Sexual Offences Act*. He pleaded not guilty to both offences. Upon hearing the prosecution's witnesses and weighing the evidence adduced, the trial Court found the Respondent guilty, convicted and sentenced him to serve life imprisonment in accordance with Section 8(2) of the *Sexual Offences Act*. The conviction and sentence were upheld on first appeal at the High Court but the sentence was later overturned by the Court of Appeal, and substituted with a sentence of 30 years imprisonment to run from 18th July 2011 which was the date he was arraigned in court."

10. Earlier, in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) SC Petition No E018 of 2023 [2024] KESC 34 (KLR) the Supreme Court last year considered the question of declaration of unconstitutionality of statute or parts thereof at the appellate stage without prior consideration at trial court, saying that unless a proper case is filed and the matter escalated to it, a declaration of unconstitutionality of a whole statute or sections of a statute cannot be made in the manner the Court of Appeal did in that case.

11. The procedure for challenging the constitutionality of other capital sentences, was laid down in the Muruatetu Directions (Muruatetu II), Muruatetu & another v Republic; Katiba Institute & 4 others

(Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), as follows:

> " 11. The ratio decidendi in the decision was summarized as follows:
>
> "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".
>
> We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.
>
> 12. Likewise, our orders set out in the previous paragraphs specifically directed the Attorney General to prepare a detailed professional review "in the context of this judgment.... with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein", and no other case. We stated fairly clearly too, at paragraph 111 of the Judgment, the extent to which our holding was applicable as follows:
>
> "It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein. In the meantime, existing or intending petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."
>
> 13. Further, at paragraph 71 of the Judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the Judgment in question, those paragraphs were no longer applicable.
>
> 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.
>
> 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."

12. The Petitioner's submission that the court's judicial independence under Article 160 of *the Constitution* provides a basis for an order for resentencing in this case is not properly founded as it odes not factor the role of the stare decisis and the binding nature of the decisions of the Supreme Court on all court below it under Article 163 (7) of *the Constitution*. The submissions of the DPP as to the discretion of the Court in resentencing made before the Supreme Court decisions must similarly be taken in the background of the directions in the Manyeso and Ayako cases.

13. The Supreme Court faulted the Court of Appeal in the Manyeso and Ayako decisions for failure to observe the stare decisis rule. As held in Manyeso, departure for the decisions of the Supreme Court must be justified by serious consideration of the facts of the case, as follows:

> " 61. By express provision of *the Constitution* under article 163 (7), requiring courts below to abide by decisions of the Supreme Court, a constitutional duty is imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In Wanjohi v Kariuki & 2 others (Petition 2A of 2014) [2014] KESC 26 (KLR) Rawal, DCJ in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this court by a lower court must be based on well-reasoned distinction of the facts."

14. There is nothing in the facts of the present case to distinguish it from the facts in Manyeso and Ayako.

Directions on way forward

15. So, what is the way forward for applicants in this and other many similar cases which have been affected by the recent clarifications by the Supreme Court in Mwangi, Manyeso and Ayako case?

16. The Court cannot set a term of imprisonment to substitute or to be deemed as equivalent to the sentence of life imprisonment decreed by the Statute, as held by the Manyeso decision at paragraphs 67 and 68 as follows:

> " 67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165(3)(b) grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the

constitutionality of a statute is therefore confined to its interpretation and adjudication.

68. Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption."

17. The Court may not also apply the ratio in Muruatetu I case to other capital offences other than murder in other statutes, as discussed in Ayako decision with the Supreme Court outlawing such action as follows:

"(52) In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.

(53) In the Republic v Mwangi Case, we explained as follows:

"[52] We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance."

(54) It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter."

Conclusion

18. The Court must, therefore, find that the sentence of life imprisonment in this case may not be changed to one of imprisonment for a term of years or, flowing from a mandatory sentence of death for robbery with violence under section 296 (2) of the Penal Code, be substituted with any other form of sentence.

19. As directed in Muruatetu II Directions, the Petitioner, and this matter would be a suitable case for a class action for all the many persons who are similarly affected in cases for robbery with violence, and the same for persons sentenced under the *Sexual Offences Act* to file a petition directed to the determination as to the constitutionality of the death penalty in offences other than murder which was the subject of Muruatetu I as well as constitutionality of the mandatory and minimum sentences in the *Sexual Offences Act*.

20. In this case, the Petitioner did not seek to amend the petition to seek such relief, and the Court is not able, on the Petition before it, without full argument on the question, to declare that the death

sentence in cases of robbery with violence is unconstitutional. Consequently, the Court has no basis for the resentencing sought by the Petitioner herein.

21. The regrettable conclusion in this case where the petitioner has served a long custodial sentence after his death penalty was commuted to life imprisonment is that the re-sentencing application must be declined.

Orders

22. Accordingly, for the reasons set out above, the Petition for resentencing is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF AUGUST 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP.

The Applicant in person.