Mwangi v Republic (Criminal Petition E014 of 2022)
[2025] KEHC 12395 (KLR) (3 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12395 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL PETITION E014 OF 2022

EM MURIITHI, J

SEPTEMBER 3, 2025

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLES 20 (1), (2), (4), 22(1), 23(1), 48, 165(3), (A) (B) (D) (I) (II), 25 (D), 51(2), 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(C), 27(1), (2), 28, 29, (F), 47, 50(2) (P) AND 51 (1) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 216, 329 AND 362 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF SECTION 295(1) AS READ WITH 296(2) OF THE PENAL CODE

BETWEEN

STEPHEN MAINA MWANGI ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. By an undated Petition filed on 29/8/2022, the Petitioner seeks that:

    1. This honourable court be pleased to allow this petition on the merit of the constitutional Petition No 618 of 2010.

2. May honourable court pleased to grant an order rendering my case to mitigation and determination as to the appropriate sentence that is in line with Article 25 [c], 28, 29 [f] and 50 [2] of *the constitution*.

3. May this court be pleased to grant an order rendering the Petitioner's case to the trial for mitigation and determination of re-sentencing as to the appropriate sentence to impose in substitute of the current one.

4. May this honourable court be pleased to offer a lenient sentence to be served by the Petitioner.

5. Any other order that this court may deem fit/just and reasonable in the circumstances of this petition.

2. The petition is grounded on the facts that the Petitioner was convicted of robbery with violence and sentenced to death. He lodged Kerugoya High Court appeal No. 55/2013 which was dismissed, and his death sentence has since been commuted to life imprisonment. The mandatory nature of the death penalty imposition under section 296 [2] of the penal code is barbaric, cruel, inhuman and a violation of Articles 25 [a], 28, 29 [d], [f], 50[2], [p] of *the constitution*, and this court has inherent jurisdiction under Articles 20 [4], 165 [3], [6], [7] and 259 [1], [a], [b], [c] of *the constitution* to grant the orders sought.

3. Directions were taken that the Petition be heard by way of written submissions which were duly filed.The Petitioner urged that he was entitled to the benefit of the least severe of the prescribed punishments for the offence, and cited Owners of the Motor Vessel "Lilian S" v Caltex Oil [Kenya] Limited [1989] KLR 1, Francis Karioko Muruatetu & Another v Republic [2017] eKLR, Edwin Wachira & 9 Others v Republic [2022] eKLR, Maingi & 5 others v Director of Public Prosecutions & another [Petition E017 of 2021] [2022] KEHC 13118 [KLR] [17 May 2022] [Judgment] and Ponoo v Attorney-General [SCA 38 of 2010] SCCA 30 [09 December 2011].

4. The Respondent cited Guyo Jarso Guyo v Republic [2018] eKLR, Baraka Safari v Republic [2018] eKLR and Johana Lwebe Muyugo v Republic [2019] eKLR in urging the court to consider the extenuating circumstances and the aggravating features, including the brutality of the crime, whether the Petitioner is remorseful regarding the offence he committed and the pain that the victim's family is feeling, in determining the sentence.

Analysis and Determination

5. 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."

6. As held in Republic v Manyeso [Petition E013 of 2024] [2025] KESC 16 [KLR] [11 April 2025] [Judgment], any departure from 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."

7. 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."

8. 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 Republic v Ayako [Petition E002 of 2024] [2025] KESC 20 [KLR] [11 April 2025] [Judgment], 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."

9. 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.

10. 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*.

11. The Court recalls the recent decision of this Court in Kerugoya Criminal Petition No. E018 of 2023, James Maina Njogu Versus Republic of 14/8/2025 where directions for the way forward in similar cases has been given as follows:

" 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."

15. 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 vs 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.""

Orders

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

13. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Petitioner in person.

Mr. Mamba for DPP.