# Muriuki v Republic (Criminal Revision E177 of 2024) [2025] KEHC 62 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 62 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CRIMINAL REVISION E177 OF 2024**

**DKN MAGARE, J**

**JANUARY 16, 2025**

**BETWEEN**

**DENNIS GACHARA MURIUKI ......................................................... APPLICANT**

**AND**

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

## RULING

1. The Ruling arises from an application dated 13.5.2024 seeking review of the sentence of life imprisonment imposed upon the Applicant. The initial sentence imposed was a death penalty for which the Applicant appealed to this court and the court found that it is a proper sentence. A subsequent application challenging the death penalty was struck out for being *res judicata*. The sentence was subsequently commuted to a life sentence by the power of mercy committee.

2. It is in respect of the life sentence that the Applicant filed the instant application which is supported by his affidavit. He stated as doth:

    a. The Applicant was convicted of robbery with violence contrary to Section 296(2) of the *Penal Code* and convicted in Nyeri SPMCRC No. 604 of 2011.

    b. The Applicant exhausted all appeals on conviction and sentence.

    c. The original death sentence was commuted to life imprisonment in 2009.

    d. The Applicant was not granted fair trial of sentencing as required under Article 25, 27, 28 and 50 of the *Constitution*.

3. In response to the application, the Respondent filed a Replying Affidavit dated and sworn by the Prosecution Counsel, David Mwakio on 27.12.2024. It was deposed that the sentence as upheld by this court for the offence of robbery with violence was lawful. It was also stated that in the circumstances

of this case, and the principles governing sentencing as well as sentencing guidelines, a term of 30 years imprisonment was befitting to the Applicant.

**Submissions**

4. The Applicant submitted that he is aged 40 years and was convicted and sentenced to death on 11.7.2012. He relied on the case of Ramadhan & 8 others v Attorney General & another [2024] KEHC 1173 (KLR), where Justice OA Sewe held as: -

> A declaration be and is hereby made that the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the *Penal Code* is unconstitutional.

5. He submitted that the sentence of death was granted because it was the only available statutory sentence but the same is not a judicially evaluated sentence. He also relied on the case of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR to submit that this court had jurisdiction to apply the same reasoning to this matter even if it related to murder cases. It was his submission that he was a first offender, remorseful and had engaged in reform and rehabilitation while in prison where he also attained various certifications in life skills.

6. The Respondent also filed submissions dated 27.12.2024. It was submitted that the decision in Petition No. 5 of 2022- *Shaban Salim Ramadhan & Others v Attorney General & Another* (2024) eKLR declaring the mandatory nature of the sentence under Section 296(2) of the *Penal Code* unconstitutional was by a court of concurrent jurisdiction and so only persuasive.

7. Further, the Respondent relied on *Angoga v Republic* (Criminal Appeal No. 281 of 2018) [2014] KECA 132 (KLR) to submit that the *Penal Code* prescribed the death sentence for the offence of robbery with violence and that sentence is still legal. In conclusion, it was submitted that 30 years was appropriate sentence.

**Analysis**

8. The issue is whether the Applicant's sentence should be reviewed. The question of the death penalty is not before the court. The same was decided by the two previous predecessors and conclusively determined. It is thus irrelevant whether a declaration had been issued relating to unconstitutionality of the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the *Penal Code*. This is because the Applicant is not serving a death penalty.

9. The Supreme Court opined in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR that the mitigation factors that may reduce a sentence imposed by the law by no way replace judicial discretion. It is a settled principle that mandatory sentences deprive courts of discretion to impose appropriate sentences and are thus arbitrary and unconstitutional. However in view of subsequent directions limiting the applicability to murder cases in the case of *Francis Karioko Muruatetu* (*supra*), the said decision has no precedent value in this matter. None of the principles enunciated therein have been addressed by the Supreme Court vis-a vis matters that are not murder cases.

10. In view of the specialized jurisprudence relating to each offences, I will be persuaded by my sister O.A. Sewe that the mandatory nature of the death penalty is unconstitutional. Nevertheless, the decision does not apply to the case herein for two reasons. The question of death penalty has been fully dealt with in the other preceding applications. Handling the death penalty will thus be *res judicata*. This also applies to any mitigating circumstances he may have had.

11. The court will thus not be in a position to address breaches of Article 50(2)(q) of the *Constitution* for doing so will breach the principle of res Judicata. However, the death sentence originally meted out

on the Applicant was commuted to life imprisonment pursuant to the presidential decree. Though he indicated that this happened in 2009, it cannot be possible since the offence was committed in 2011. This has to be a subsequent date. The last available and proclamation was a presidential pardon through the power of mercy committee. The sentence is not being reviewed for legality as this court has no jurisdiction to do so given that the High Court had already pronounced itself on this aspect. However, on 21/7/2023, the President commuted the sentence of all capital offenders as at 21.11. 2022. Vide *Vol. CXXV—No. 168* of 21st July, 2023. The gazette notice read as follows: -

> Commutation of Death Sentence
>
> IT IS notified for general information of the public that in exercise of the powers conferred by Article 133 of the *Constitution of Kenya* and 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 the recommendation of the Advisory Committee on the Power of Mercy, commuted the death sentence imposed on every capital offender as at the 21st November, 2022, to a life sentence.
>
> Dated the 19th July, 2023.
>
> J. B. N. Muturi,
>
> Attorney-General and Chairperson, Power of Mercy Advisory Committee.

12. Effectively the Applicant's sentence became a life sentence. This is a matter the court can take judicial notice of. There is no doubt that the death sentence meted out was deserving as confirmed by this court. It is therefore in respect of the life sentence that the court can pronounce itself. It is only the commuted sentence that is amenable for revision. It is however not merit based as merit has already been dealt with. It is a narrow window the Applicant was given by the Court of Appeal and various cases by this court.

13. The sentence the applicant is serving is a life sentence. This has not been dealt with by the courts handling the matter. The matter herein is thus not *res judicata* when dealing with equating a life sentence, which was well deserved.

14. The Court of Appeal has dealt with the duty of the court to equate life sentence to a determinate sentence in a number of cases. The position of the Court of Appeal, which is binding on this court is that the life sentence is unconstitutional for not being a determinate sentence. In *Evans Nyamari Ayako v Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported) it translated life imprisonment to 30 years.

15. The Court of Appeal, differently constituted, in the case of *Barasa v Republic* (Criminal Appeal 219 of 2019) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a

term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*."

16. The Court of Appeal sitting in Malindi in in the case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) (Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment was unconstitutional and substituted the same with 40 years. In meting out the equated sentence they pronounced themselves as hereunder:

> "We recognize that although the Judiciary released elaborate and comprehensive *Sentencing Policy Guidelines* in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature…
>
> … We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

17. It is therefore not the sentence that is reviewed but translation to a determinate period. The guilt, mitigation, and any errors on procedure are not within the domain of the matters to be determined. It is thus the position as set out in binding precedent that the court is bound to translate life sentence to a determinate sentence. In other words, it is not the inherent merit of the sentence application but the sentence qua sentence. The Court of Appeal, did not however, give any guidance on the parameters to use. The discretion that this Court enjoys in sentencing permits a balanced and fair sentencing, which is also the hallmark of enlightened criminal justice. As was stated in *State v. Tom, State v. Bruce* (1990) SA 802 (A), Smalberger, JA:

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court … That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person."

18. Therefore, it is beyond peradventure that it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*. As was elaborated by the persuasive Constitutional Court of Uganda in *Susan Kigula & 417 Others v. Attorney General*, Const. App. No. 3 of 2006:

> "The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution."

19. I have no doubt that the purpose and objectives of sentencing as stated in the *[Judiciary Sentencing policy]* should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 *[Sentencing Guidelines]* are as follows: -

> " 1.3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
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> i. Retribution: To punish the offender for their criminal conduct in a just manner.
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> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
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> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
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> v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
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> vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
>
> vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> viii. Reintegration: To facilitate the re-entry of the offender into the society"

20. The court is also persuaded that a sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and so amounts to cruel, inhuman and degrading punishment. The Supreme Court of Appeal of South Africa in *S v Nkosi & others* 2003 (1) SACR 91 (SCA) considered the constitutionality of the sentence where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively. The Court stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the

> Constitution of the Republic of South Africa Act 108 of 1996.The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence, or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

21. It is the finding of this Court that death sentence or life imprisonment does not mean the natural life of the convict. This view has also been elucidated by the Court of Appeal in *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) as follows:

> On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

22. The Applicant expressed remorse in his Supporting Affidavit. He also stated that he underwent rehabilitation programs while at the prison. He is now 40 years of age and was sentenced to death on 11.7.2012. Further, it is clear that he was barely 21 years old when he was arrested. He has spent more time in custody than outside. Considering the degree heinousness during commission of the crime, the age of the offender, the rehabilitation, the need to tamper justice with mercy and the circumstances of the case generally, it is fair and just to equate the life sentence. To do so, court will rely on the sentencing guidelines. The prison also stated that the Applicant maintained a clean record.

23. The Appellant stole a DVD make LG, 2 mobile phones Nokia and Samsung, a remote, a Samsung battery and cash of 9,200/-. They threatened to use violence but did not use actual violence. The crime was not committed with particular heinousness.

24. Having considered the foregoing, I shall, substitute the life sentence, with its equivalent, that is 20 years. In accordance with Section 333 (2) of the *Criminal Procedure Code*, the sentence shall run from 14.7.2011, the date of arrest.

**Determination**

25. I therefore make the following orders: -

    a. The sentence of life is substituted with a sentence of 20 years imprisonment starting from the date of arrest on 14.7.2011.

    b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF JANUARY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Pro se Applicant

Ms. Kaniu for the Respondent

Court Assistant – Jedidah