REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 68 OF 2020

MICHAEL SHIVEKA MUSONYE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The petitioner was the accused person in **Kapsabet Criminal Case No. 1008 of 2012** in which he was charged, jointly with another not involved in this Petition, with robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. He was also charged with one other count of gang rape contrary to **Section 10** of the **Sexual Offences Act, No. 3 of 2006**; as well as an alternative charge of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act.**

[2] He was tried and found guilty of the offences charged in the 1st and 3rd substantive counts. He was convicted and sentenced to death in connection with Count I; while the sentence in respect of Count 3 was held in abeyance. The petitioner appealed the decision in **Eldoret High Court Criminal Appeal No. 187 of 2013: Francis Inyanje Ingosi & Another v Republic.** The appeal was dismissed for lack of merit on **19th December 2018.** The petitioner thereafter filed the instant petition on **1st October 2020** on the following grounds:

> **[a]** That he was convicted and sentenced to suffer death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**; which was later commuted to life by the President;
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> **[b]** That he had been in prison for 8 years, including the time spent in remand custody;
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> **[c]** That he is remorseful, repentant and reformed because he had learnt from his incarceration;
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> **[d]** That the Court has unlimited original jurisdiction and discretion as contemplated under **Articles 22(1), 23 and 165(3)** of the **Constitution** to handle matters of this nature;
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> **[e]** That he would rely on **Supreme Court Petition No. 15 of 2015: Francis Karioko Muruatetu & Another v Republic**; and,
>
> **[f]** That the sentence meted upon him is too harsh considering the fact that he was a first offender.

[3] The petitioner urged the petition by way of written submissions filed on **14th October 2020**. He reiterated his posturing that he has been in prison since **2012** and had therefore served the equivalent of 8 years' imprisonment; and that he had learnt from his mistake. He also mentioned that he is remorseful, repentant and reformed; and therefore that his incarceration has not been a waste of time. He urged the Court to note that he had learnt important life skills that have helped improve his outlook in life. Consequently, in addition to **Muruatetu** the petitioner relied on **Raphael Mutunga Mutinda v Republic** [2019] Ekl/R in which it was observed that:

> **"The court is aware that following the decision in MURUATETU CASE, some capital convicts have had their sentences reduced from death to even 15 years."**

[4] Accordingly, the petitioner pleaded that he be considered among the lot that have had their sentences reduced on the strength of **Muruatetu.** He added that, as was held in **Muruatetu**, the mandatory nature of the death sentence is not only inimical to international law and customs but also violates **Article 2(5) and (6)** as well as other provisions of the **Constitution**, such as **Articles 25(a) and (c), 29(f) and 50** of the **Constitution.** He consequently prayed that his life imprisonment be substituted with an ideal term of imprisonment.

[5] Although the State was given ample time to file written submissions, there appears to be no such submissions on the file. Nevertheless,

having perused and considered the Petition along with its Supporting Affidavit as well as the written submissions filed herein by the petitioner, I have no hesitation in holding that the Petition is misconceived. Misconceived because, the Supreme Court has since issued directions dated **6th July 2021** to the effect that **Muruatetu** does not apply to cases of robbery with violence or sexual offences under the **Sexual Offences Act.** Here is what the Supreme Court had to say, at paragraphs 11, 12 and 14 thereof the Supreme Court stated thus:

> **[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".**
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> **[12] 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.**
>
> **…**
>
> **[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."**

[6] It is consequently my finding that this Petition as framed is devoid of merit and is consequently dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF MARCH 2022.

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OLGA SEWE

JUDGE