



REPUBLIC OF KENYA



KENYA LAW
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**Omoyo v Republic (Criminal Petition E016 of 2021)
[2022] KEHC 10461 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL PETITION E016 OF 2021
WM MUSYOKA, J
JUNE 24, 2022**

BETWEEN

DANIEL ONYANGO OMOYO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The matter for me to determine is the petition herein, which is undated, but was filed herein on 4th June 2021. It is supported by an affidavit that the petitioner swore on an unknown date. It was filed simultaneously with a Motion, which is also undated. In the petition, he avers that he had been convicted of murder, contrary to section 203 as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, in Kakamega HCCRC No. 2 of 2012, and was sentenced to death, which was upheld on appeal, in Kisumu CACRA No. 74 of 2016.
2. The petition herein is no doubt founded on the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ & VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), where the Supreme Court decreed that the mandatory death sentence prescribed for the offence of murder by the Penal Code was unconstitutional and a violation of human rights and dignity. It was stated that the High Court had discretion, when sentencing persons convicted of murder, to consider other sentences.
3. In *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), the court gave guidelines to the High Court with respect to rehearings on sentences, where the mandatory death sentence had been imposed. This is one such case. The petitioner has a right to be reheard. However, I note that the petitioner had been heard on the matter, and mitigation was presented. The prosecution stated that he had no previous criminal record, and urged that he be treated as a first offender. His Advocate, Mr. Ondieki, submitted, in mitigation, that he was a young man, then aged



28, who was remorseful, and who had been in custody since 2012. However, the hands of the court were tied, then, and the only available sentence was death.

4. By way of review, I note that the Court of Appeal, in the appeal, had noted the heinous nature of the offence. The deceased had been strangled, her hand chopped off and her genital organs mutilated. The decision of the appellate court was made on 31st of October 2019, after *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) had been made, and had that decision in mind, and declined to exercise the discretion in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) due to the gruesome manner of the killing of the deceased, and chose not to interfere with the sentence. Since *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) was considered and applied by the Court of Appeal, I cannot revisit the matter on similar grounds. The petitioner should have moved on to the Supreme Court on appeal, if he was not satisfied with the determination by the Court of Appeal.
5. For avoidance of doubt, the Court of Appeal said:

“ ... we are satisfied that the manner in which the deceased died was heinous. The appellant mercilessly chopped off her hand and strangled her. Thereafter he went for her genital organs which he mutilated. No human being deserves to die in this manner. As such, we are reluctant to exercise our discretion as provided for in the Muruatetu case (supra) and review the appellants’ sentence.”

6. The petition is clearly not merited, and I hereby dismiss the same. The Deputy Registrar shall cause copies of this ruling to be availed to the petitioner and the Director of Public Prosecutions.

DELIVERED, DATED AND SIGNED AT KAKAMEGA ON THIS 24TH DAY OF JUNE 2022

WM MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Daniel Onyango Omoyo, the petitioner, in person.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the respondent.

