



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CONSTITUTIONAL PETITION NO. 91 OF 2019

JOSEPH LESIRE CHEGEM.....PETITIONER

VERSUS

REPUBLIC through ODPP.....RESPONDENT

RULING

1. Joseph Lesire Chegem (hereinafter, the petitioner) moved this court vide a petition undated but filed in court on 17/9/2019 for orders that;

i. This court be pleased to grant orders for revision of sentence in respect of murder contrary to section 203 as read with section 204 of the Criminal Procedure Code in High Court Criminal Case No. 65/2004 at High Court Kisii.

ii. While effecting the above order, consider the period spent in custody since the time of arrest.

2. The petition is premised on grounds that the death sentence imposed on him is unconstitutional and that his right under **Article 27(1)(2)(5)** of the **Constitution** was violated.

3. At the hearing of the petition, the petitioner relied entirely on the grounds raised in the petition. Ms Kibungi for the DPP left the matter for the court to decide.

4. The background to the petition is as follows. The petitioner was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars were that on the 9/8/2004 at about 11.30 pm, the petitioner murdered Alois Gachau Maichuhie.

5. He was tried and found guilty and convicted of the offence and sentenced to death.

6. He subsequently lodged an appeal at the Court of Appeal and in a judgement dated 22/2/2018, the said appeal was dismissed in its entirety.

7. The petition herein is anchored on the decision of the Supreme Court in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** where the court in declaring the mandatory death sentence unconstitutional held, inter alia;

“(51) The dignity of the person is ignored if the death sentence, which is final and irrevocable, is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.”

8. The court proceeded to make a finding that mandatory sentences deprive the courts the opportunity of issuing sentences depending on the peculiar circumstances if each case which goes to the very core of a fair trial whose outcome will be just.

9. The court is thus enjoined to, in exercising its discretion on the appropriate sentence, look at the circumstances of the case.

10. There has been some discernable misapprehension by parties of the application and the import of the Muruatetu case.

11. The petition before me is a good example of such a misapprehension.

12. The petitioner in this case appealed against conviction and sentence at the Court of Appeal. The judgement of the court is clear that the

Court of Appeal addressed both limbs of the appeal.

13. Of importance and relevant to this petition is that the Court of Appeal was alive to and applied the decision in Muruatetu case in this matter but found no ground upon which to interfere with the sentence meted out by the High Court.

14. At paragraph 28 of the judgement, the Court of Appeal rendered itself thus;

*“28. As regards the sentence, the learned judge took into account the mitigating circumstances put forward by the appellant’s advocate but nonetheless found that the circumstances were such that the accused was not deserving of leniency, and accordingly sentenced the accused to death as lawfully provided. We are aware of the Supreme Court’s decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR** in which the Supreme Court were in agreement with this court’s decision in **Godfrey Ngotho Mutiso v Republic Criminal Appeal No. 17 of 2008** that, although the Constitution recognizes the death penalty as being lawful it does not provide that when a conviction for murder is recorded only the death sentence shall be imposed. However, we appreciate as the Supreme Court did in the Muruatetu decision that sentencing is the exercise of judicial discretion. In this case, the trial judge having exercised her discretion. We find no reason to interfere.”*

15. In view of the foregoing, the petition before this court is improperly before court as the same seeks to regurgitate an issue that has already been determined by a higher court.

16. Consequently, the petition before court is without merit and is dismissed.

Dated, Signed and delivered at Kisii this 18th day of February, 2020.

A.K NDUNG’U

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Applicant in person.