

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCCR.PETITION NO.004 OF 2021

CHARLES AMODOI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

[1] The record in this matter is incomplete due to the non-availability of the original file or proper and accurate copies of the proceedings. Nonetheless, what this court can gather from the incomplete record is that in the year 2003, the first applicant **Charles Amodoi Murunga** and the second applicant, **Peter Okee Omukaga**, appeared before the Principal Magistrate at Busia facing one count of robbery with violence, contrary to **S.296 (2)** of the Penal Code and three counts of assault, contrary to **S.251** of the **Penal Code**. After a full trial, they were convicted on all the counts and sentenced to death in count one and to a one-year concurrent sentence in counts two, three and four. However, being dissatisfied with the outcome, they preferred a first appeal to the High Court, but this was dismissed and so was a second appeal at the Court of Appeal sitting in Eldoret or Kisumu. Later, the death sentence was commuted to life imprisonment by dint of a presidential decree issued in the year 2009.

[2] Having exhausted the entire appeal process, the applicants filed the present application/petition on the 9th June 2021, essentially for the review of the death sentence imposed upon them in favour of a reducible term of imprisonment now that the death sentence was commuted to life imprisonment. They urged this court to re-hear the matter on sentencing and impose a sentence other than a death sentence. They clearly indicated that this petition/application is anchored on the decision of the Supreme Court of Kenya in the famous case of **Muruatetu & Another Vs. Republic – Petition No.15 of 2015** which according to them declared the death sentence unconstitutional.

[3] The hearing of the application proceeded virtually with the applicants being video linked with the Court from Nyeri and Kibos prisons, respectively.

The learned prosecution counsel, **Mr. Mayaba**, appeared on behalf of the state/respondent and opposed the application and its supporting grounds and submissions.

The first applicant argued the application by way of written submissions and orally responded briefly to the State's oral submissions. The second applicant "rode" on the back of the first applicant and associated with all his arguments in favour of the application.

[4] Having considered the application or petition on the basis of the supporting grounds and the rival submissions, this court may state that the applicants clearly misapprehended the purport of the Muruatetu decision which in actual sense did not invalidate or outlaw the death sentence but only its mandatory nature such that depending on the circumstances of each case and perhaps the mitigating factors that may be presented by the convicted person, a court could impose other lawful sentence and not necessarily the death sentence.

The Supreme Court indeed stated that:-

“For the avoidance of doubt this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

[5] In its direction on the Muruatetu decision, the Supreme Court recently on the 6th July 2021, said that:-

“To clear the confusion that exists with regard to the mandatory death sentence in offence, other than murder we direct in respect of other capital offences such as treason under section 40 (3) robbery with violence under s.296 (2), and attempted robbery with violence under s.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] Clearly, this direction divests this Court's jurisdiction to hear and determine the present application which was meant to pave way for a re-hearing on sentence in relation to a robbery with violence case under **s.296 (2)** of the **Penal Code** for which the applicants were convicted and sentenced to death by the lower court in Busia.

In the upshot, the application must and is hereby dismissed.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 29TH DAY OF JULY 2021]