

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

HCCR. PETITION NO. E001 OF 2021

FRANCIS JUMA ODUOR.....1ST PETITIONER

JOHN NYONGESA ODUOR.....2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

[1] The Petitioners/applicants, **Francis Juma Oduor** and **John Nyongesa Oduor**, were convicted on the 8th August 2013 for the offence of murder, contrary to **S.203** as read with **S.204** of the **Penal Code** and were on the 27th August 2013 sentenced to fifty (**50**) years imprisonment for the first applicant (**Francis**) and forty (**40**) years imprisonment for the second applicant (**John**). The terms were to run from the date of their arrest.

Being dissatisfied with the conviction and sentence, the applicants preferred an appeal to the Court of Appeal, but on the 26th July 2016, the appeal was dismissed and in so doing, the court stated as follows:-

“There is the matter of the sentence meted out by the High Court. This court in *Joseph Njuguna Mwaura Vs. Rep. Cr. Appeal No.5 of 2008* that reversed the earlier decision in *Godfrey Ngotho Mutiso Vs. Republic Cr. Appeal No.17 of 2008* affirmed that where, as here, a mandatory death sentence is prescribed by law, the court does not have a discretion to impose any other sentence. The custodial sentence imposed by the trial court in lieu of the death sentence is therefore illegal. See *Musyoki Lemoya Vs. Republic [2014] Eklr. We therefore substitute the illegal custodial sentence with the death sentence.*”

[2] This propositions of the Law on mandatory death sentence for the offence of murder was however, overturned by the Supreme Court of Kenya in the famous case of **Francis Karioko Muratetu & Another Vs. Republic, Petition No.15 of 2015**, which had the effect of outlawing the mandatory nature of the death sentence and not the death sentence itself. This decision paved the way or opened the floodgates of applications such as the present one for re-sentencing of persons convicted and handed out mandatory death sentence.

[3] Indeed, this application is a prayer by the applicants for re-sentencing with a view to having the mandatory death sentence imposed upon them by the Court of Appeal being set aside in favour of a non-custodial sentence and/or acquittal or discharge. The grounds in support of their application are buttressed by their written submissions laced with additional issues not relevant to the application.

The State/respondent opposed the application arguing that the sentence imposed against the applicants was lawful and that the Muruatetu case does not give them the right to be heard on sentence.

[4] Basically, having given due consideration to the application and the opposition hereto, the view of this court is first and foremost to state that the **Muruatetu case** did not outlaw the death sentence but rather its mandatory nature. Therefore, the death sentence is very much part of our law and has at no time been declared unlawful and/or unconstitutional. Secondly, the death sentence being referred herein was never imposed by this court but the Court of Appeal after it reversed the sentence imposed against the applicants of fifty (**50**) and forty (**40**) years imprisonment respectively. This court having not passed the impugned sentence would have no jurisdiction to reverse it in favour of the applicants. They should have instead moved the Court of Appeal in that regard. In any event, during sentencing in this High Court the applicants were given the opportunity to mitigate before sentence was passed. The court was quite aware and clearly appreciated the existence of the mandatory death sentence but did not impose it in favour of imprisonment terms only after hearing the applicants in mitigation.

Clearly, the present application is devoid of merit and an abuse of the criminal justice process.

[5] Further, in any event, the impugned death sentence is no longer in existence after it was commuted to life imprisonment by the President of the Republic of Kenya as indicated in grounds (1) of the applicants petition.

In sum, the applicants attempt at a third bite of the cherry has clearly been futile. This application is therefore dismissed.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[Read and signed this 28TH day of JULY 2021]