

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPLICATION NO. 85 OF 2019

MUSYA MULYUNGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was charged with murder and after hearing he was convicted and sentenced to death on 19/12/2018.
2. The trial court after considering mitigations sentenced the applicant to suffer death.
3. He has now moved this court for re-sentencing. The applicant relied on the case of Supreme Court *Francis Karioko Muruatetu & Another vs Republic [2017] eKLR*.
4. The essence of the *Muruatetu case* was that death sentence is not illegal but only mandatory aspect which may make trial court not to consider mitigation as tendered. The Supreme Court in the *Muruatetu case (Supra)* held that although the mandatory death penalty having been declared unconstitutional, the death penalty still exists as the maximum sentence for murder under Section 203 and 204 of the Penal Code.
5. In the instant case the trial court was alive to that fact thus held that, *"I have considered that the accused has no record of previous conviction as thus a first offender. Also the mitigations highlighted by his advocate.... However.....accused used knife knowingly full well deceased was unarmed.....This was a care free attitude....."* Then sentenced the applicant to death. The sentence awarded was maximum penalty after considering mitigations.
6. This above order was made not based on mandatory aspect of death sentence but the circumstances of murder. This order ought to have been challenged in the Court of Appeal.
7. This court has no jurisdiction to deal with the instant matter. The applicant can seek leave and appeal against death sentence in Court of Appeal.
8. **Thus, application is dismissed.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 27TH DAY OF MAY, 2020.

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C. KARIUKI

JUDGE