

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

PETITION NO.27 OF 2018

COOPETITIONER

VERSUS

REPUBLICRESPONDENT

RULING

1. Basically, as a matter of course, the applicant/petitioner **COO**, pursuant to his Notice of Motion filed herein on 24th September, 2018, was granted an opportunity for the re-hearing of the case on sentence on the basis of the mitigating factors which may be offered herein in addition to factors (if any) of offered before the passing of the sentence by the trial court. The application is one of such many applications which, cropped up following the Supreme Court decision in the case of **Francis Karioko Murualelu & another Vs Rep[2017] eKLR**, in which the mandatory death sentence as existed in our penal statutes was declared unconstitutional. It was the mandatory nature of the sentence rather than the sentence itself which was declared unconstitutional. Therefore, the death sentence remains lawful but may be disregarded by a trial court for a non-capital sentence depending on the circumstances of each case and the mitigation factors which may be offered by the accused.

2. Herein, the applicant was charged with **murder**, contrary to **Section 203** as read with **Section 204** of the **Penal code**. He was alleged to have murdered **JAO (deceased)** on the night of 16th /17th March 2016. He pleaded not guilty but was convicted after trial and handed the then mandatory sentence of death.

Prior to the passing of the sentence the prosecution informed the court that the applicant was a first offender. When he was given an opportunity to mitigate, he started that: he had nothing to say. The opportunity has again presented itself by dint of this petition and courtesy of the **Murwatetu case (Supra)**. As such the applicant prays for this court's mercy to have the death sentence imposed upon him set aside and substituted with a term of imprisonment regard being given to the mitigation factors as may be deciphered from his written submissions.

The state respondent opposed the application on grounds that the offence was committed with the use of a dangerous weapon i.e serrated knife. That the knife was used to stab the deceased with the intention of killing her. That the deceased underwent pain and suffering in the hands of the applicant.

3. After perusing the proceedings of trial court it became apparent to this court that the offence arose from a domestic dispute putting a husband (applicant) and wife (deceased). The two appeared to have quarreled in the night in their matrimonial home and in the process the wife was stabbed on the neck with a knife by the husband. The wife suffered fatal injuries and her body was removed from the scene and dumped in a nearby forest while covered with polythene paper. The husband was thereafter arrested away from home after being rescued from a mob of area villagers who intended to lynch him.

The evidence from their relatives showed that they lived well and happy as a couple but this changed to hostility and quarrels following the fall of their business venture.

4. This court, giving regard to the foregoing circumstances of the case and the applicants mitigating factors, allows the application by setting aside the death sentence inferred upon the applicant and substituting it for a sentence of imprisonment for a period of **thirty(30) years imprisonment** from the date of sentence by the trial court i.e 25th May 2017.

Ordered accordingly.

(Delivered and signed this 26th day of November, 2020)

J.R. KARANJAH

JUDGE OF THE HIGH COURT