

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTION PETITION NO. 15 OF 2020

JOSEPH ONDIEKI SIMION.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Joseph Ondieki Simion** the petitioner/applicant herein filed a petition on 21st May 2020 seeking that he be re-sentenced in view of the Supreme Court's decision in *Francis Karioko Muratetu & Another v Republic Petition No. 15 & 16 of 2015 [2017]eKLR*. He was charged and sentenced to death for the offence of murder vide Kisii HCCR No. 48 of 2005. His death sentence was later commuted to life imprisonment by the President. He states that he has been in custody since 2005 when he was arrested. He urges the court to lift the death penalty imposed upon him and award him a definite sentence
2. Mr. Otieno for the State did not oppose the petitioner's application. He submitted that the Court can resentence the applicant.
3. The Supreme Court in the celebrated case of *Francis Karoki Muruatetu (supra)* held that the mandatory death penalty was arbitrary and unconstitutional as it did not take into consideration mitigation and varying degrees of gravity and culpability.
4. I have read the judgment dated 26th May 2009. The petitioner was convicted on circumstantial evidence. The body of the deceased was found dead in the room he shared with the applicant. Prior to his death, the deceased and the applicant had had a disagreement. The petitioner informed this court that he has been in custody since 2005. **Section 333 (1) & (2)** of the **Criminal Procedure Code** provides that where a person is convicted, any period spent in custody prior to sentencing shall be taken into consideration.
5. I have considered the period the petitioner has been in jail. He was charged on 24th August 2005. He was sentenced by the High Court on 26th May 2009. He was in custody for more than 3 ½ years before he was sentenced. Considering the circumstances of the case, the fact that a life was lost, the period he has served, I set aside the death sentence and the order commuting his sentence to a life sentence and sentence **Joseph Ondieki Simion** to a period of **25 years' imprisonment** to run from **24th August 2005**.

Dated, signed and delivered at KISII this 17th day of December 2020.

R.E OUGO

JUDGE

In the Presence of;

Petitioner In person

Mr. Otieno Senior Prosecution Counsel Office of the DPP

Ms. Rael Court Assistant