

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL PETITION NO.16 OF 2018

MAURICE ODHIAMBO WASONGAPETITIONER

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

1] Application considered in the light of the supporting grounds as fortified by the averments contained in the supporting affidavit dated 28th May 2018, deponed by the Petitioner/applicant and since it is not opposed by the state/Respondent, it ought to be allowed and is hereby allowed on the basis of the recent decision of the Supreme Court of Kenya (SCOK) in the case of **FRANCIS K. MURUATETU & ANOTHER –VS- REPUBLIC – Petition No.15 of 2015** in which it was held that:-

“... Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

(See also **GODFREY NGOTHO MUTISO –VS- REPUBLIC – CRIMINAL APPEAL NO.17 OF 2008 at Nairobi** and **WILLIAM OKUNGU KITTINY – CRIMINAL APPEAL NO.56 OF 2013 at Nairobi**, both being decisions of the Court of Appeal)

2] The position taken by both the Supreme Court and the Court of Appeal would apply **“mutatis mutandis”** to any other provision of the Penal Code providing for a mandatory death sentence including **Section 296 (2)**.

3] Accordingly, the original lower court file be returned to the Senior Principal Magistrate’s Court at Homa Bay for re-hearing on sentence and variation of the death sentence if necessary by any magistrate with competent jurisdiction.

4] However, since the original file was not availed at the hearing of this application, the same be availed on 28/6/18 when this matter shall be mentioned to confirm compliance.

5] Ordered accordingly.

J.R. KARANJAH

JUDGE

21.06.2018