



**Ouma v Republic (Criminal Petition E011 of 2021)  
[2023] KEHC 17238 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL PETITION E011 OF 2021  
WM MUSYOKA, J  
MAY 12, 2023**

**BETWEEN**

**DAVID OUMA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The undated petition herein, filed on March 10, 2020, seeks review of sentence. The petitioner had been convicted in Busia PMCCRC No 882 of 2008, on 2 counts of robbery with violence, and was given the mandatory death penalty on July 8, 2009, which was reduced to life imprisonment in Busia HCCRA No 39 of 2009 on November 10, 2011. An appeal to the Court of Appeal, in Kisumu CACRA Nos 15 & 141 of 2012 (Consolidated) (*Dismus Etyang v David Ouma* [2016] eKLR (Maraga, Musinga & Gatembu, JJA)), was dismissed. He avers that the death penalty was commuted to life imprisonment by Presidential Order in 2009.
2. The petition was canvassed by way of written submissions, based on directions given on December 15, 2020. Both sides filed written submissions. The petitioner invites me to consider his mitigation and the time that he spent in custody, and the fact that he has learned some skills while in prison. The respondent submits that the petitioner was seeking to overturn a sentence of life imprisonment, yet the Supreme Court had held, in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that the sentence was constitutional.
3. Although the petitioner has not invoked the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), there is no doubt that his petition is founded on that decision, where the court appeared to lay down a general principle, that all mandatory sentences were unconstitutional, and to allow trial and appellate



courts discretion to re-visit cases where mandatory sentences had been imposed, with a view to revising or reviewing them.

4. The Supreme Court has since re-visited the issue in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (amicus curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision, in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was of application only in murder cases, and not any other. However, that does not take away from the universal principle laid out in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that a mandatory death sentence is unconstitutional.
5. The petitioner anchors his petition on the constitutionality of the death sentence, yet he is not facing a death sentence. That sentence, according to him, for which I have seen no evidence, was commuted to life imprisonment by the President of the Republic in 2009. Subsequently, no doubt, in ignorance of that Presidential act of 2009, the High Court, in Busia HCCRA No 39 of 2009, wrote that into a judgment, when it commuted the death sentence into life imprisonment in 2011. So, to that extent the petition has no basis. I feel fortified in taking that position by the argument by the respondent, anchored on *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), that life imprisonment, which the petitioner now serves, is not an unconstitutional sentence.
6. The other thing for me to consider is the application of section 333(2) of the *Criminal Procedure Code*, cap 75, Laws of Kenya, which allows the trial court to consider the time spent in remand custody while sentencing. Unfortunately for the petitioner, that can only be relevant with respect to a definite prison sentence. That would not apply here, for the prison sentence herein is not definite, and, therefore, there would be no basis for consideration of the period spent in custody.
7. The undated petition filed on March 10, 2020 is, therefore, not merited, and it is in abuse of court process. It is hereby dismissed.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 12<sup>TH</sup> DAY OF MAY 2023**

**WM MUSYOKA**

**JUDGE**

**Arthur Etyang, Court Assistant.**

Appearances

David Ouma, the petitioner, in person.

Mr. Mayaba, instructed by the Director of Public Prosecutions, for the respondent.

