

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PETITION NO.E009 OF 2021

DISMAS ETYANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

[1] This is essentially a petition for re-sentencing of the applicant on the basis of the decision of the Supreme Court of Kenya in the famous case of **Francis Karioko Murvatetu & Another vs Republic Petition No.15 OF 2015**, which in effect did not outlaw the death penalty but only the mandatory nature of the sentence.

The applicant therefore prays for review of the death sentence imposed upon him by the principal magistrate Court at Busia on the **8th July 2009**.

The appeal made to the High Court at Busia against the applicant's conviction and sentence was successful on sentence to the extent that the death sentence imposed on the applicant was set aside and substituted for a life imprisonment. This was done on 10th November 2011 almost two (2) years after the original death sentence was passed.

[2] By this petition, the applicant beseeches this court to also review the sentence of life imprisonment and reduce it to a shorter period preferably to a term equivalent to the number of years that he has been in prison which translates to over eleven or so years. His submissions filed herein on 12th May 2021 amount to a cry for forgiveness and leniency of the court for his "sins". He indicates that his stay in prison though undeserved has been beneficial to him in as much as it has since transformed him into a law abiding citizen and enabled him to undertake training in carpentry and a course in biblical studies.

[3] Indeed, it is gratifying to know that the applicant has reformed or is on the path to complete and total transformation to enable his community and family to accept him back and aid in his recovery. However, the offence for which he was convicted and sentenced involved robbery with violence. Those were very serious offences as reflected in the mandatory nature of the death sentence for those found guilty at the time. The ultimate salvation for such people came in the year 2015 with the case of **Muravatetu (supra)**.

[4] The applicant and his comrades in crime executed that criminal mission with extreme violence meted out against the victims. Although, no human life was lost in the process, the degree of violence clearly attracted a charge under the relevant capital provisions in the penal code.

Nonetheless, the court would like to believe and trust that the applicant has learnt his lesson and that the passage of time has probably consoled the victims.

This court's review of the death sentence for life imprisonment in the year 2011 occurred before the **Murvatetu** case. This occurred on appeal and based on the provision of the current Constitution, the appellate court substituted the death sentence for life imprisonment. This further review sought by the applicant is accordingly grounded on the current constitution as was interpreted by the Supreme court with regard to mandatory death sentence. But, the applicant is not seeking for review of the death sentence but the life imprisonment sentence based on the many years he has so far served in prison and still serving.

[5] The application cannot however succeed on the basic ground that it is a second bite of the cherry amounting to an abuse of the criminal justice process as the applicant had previously made a similar application vide Busia High Court **Petition No.16 of 2019**, which was considered by a court of concurrent and equal jurisdiction and was dismissed on the merits. Accordingly, this court cannot purport to sit an appeal against the decision of a court of similar and equal jurisdiction. Having exhausted all the legal channels in his quest to have the sentence reviewed the applicant should attempt alternative channels under the Prisons Act. Otherwise, this application/petition is devoid of merit and is hereby dismissed.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 10TH DAY OF JUNE 2021]

[Through video link with the applicant in prison]