



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CONSTITUTIONAL PETITION NO. E005 OF 2021**

**CORAM: HON. R.E. ABURILI J**

**YONA OTIENO WAUNA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Application for Sentence Review against sentence in*

*Siaya Principal Magistrate's Court in Cr. Case No. 568 of 2017)*

**RULING**

1. I have considered the application by the applicant convict herein YONA OTIENO WAUNA. From the judgment of the trial court in Siaya PM Cr. Case No. 568/2007, the accused /applicants/petitioner/convict and his co-convicts were given the opportunity to mitigate before they were sentenced to suffer death. Albeit this was prior to the 2010 Constitution and the Francis Muruatetu decision, it is clear that the accused were given the opportunity to mitigate before they were sentenced to death and they opted to say nothing in mitigation.

2. The Francis Muruatetu decision did not outlaw death sentence. In addition the Constitution does not outlaw death sentence. See Article 26(3) of the Constitution. The death sentence imposed on the convict was lawful, upon being convicted for the offence of robbery with violence, having regard to the circumstances of the case.

3. Furthermore, the said death sentence was never executed as the convict's death now was commuted to life imprisonment. That being the case, as the convict is serving life imprisonment which is a lesser severe sentence as contemplated in Article 50(2) (p) of the Constitution, there is no illegality or unconstitutionality of the sentence impugned.

4. The applicant had the opportunity to appeal to the Court of Appeal, against the sentence which right he did not utilize.

5. Accordingly, I find the application for resentencing not merited. I dismiss it.

6. File closed.

7. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2021**

**R.E. ABURILI**

**JUDGE**