

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 5 OF 2020

DANIEL ONYANGO OMOTO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The petition herein, undated and filed herein on an unknown date, principally rides on the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the petitioner seeks review of his sentence, where he had been convicted of murder, under section 203 and 204 of the Penal Code, in Kakamega HCCCRC No. 2 of 2012 ON 29th September 2015, and was sentenced to mandatory death. He filed an appeal in Kisumu CACRA No. 74 of 2016, the appellate court affirmed the conviction and dismissed the appeal on 31st October 2019. The decision of the Court of Appeal was made post-*Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), and the court did consider *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), but declined to exercise the discretion provided in that decision, on grounds that the offence had been committed in the most gruesome and heinous manner. The petitioner had chopped off the hand of the deceased, strangled her and mutilated her genital organs.

3. The offence, the subject of the instant proceedings is murder, and the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), applies to it. As a consequence, the High Court has jurisdiction to review the sentence that was imposed by the trial court, based on the decision in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ). However, the matter of review of the sentence was before the Court of Appeal in Kisumu CACRA No. 74 of 2016, where the said court declined to exercise discretion under *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), on the basis of manner in which the petitioner killed the deceased. The Court of Appeal is higher in hierarchy to the High Court, if it declined to exercise that discretion in 2019, I do not see the basis upon which a lower court would purport to exercise the same discretion that the higher court had declined. Even if I were to purport to have discretion, the petitioner has not demonstrated what has happened between 2019 and now to warrant the review sought.

4. There is absolutely no basis upon which I can review the sentence that was imposed by the High Court and confirmed by the Court of Appeal, even after considering *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ). The petition herein cannot stand. It is declined. File to be closed.

5. The Deputy Registrar shall cause a copy of this ruling to be availed to the petitioner and the office of Director of Public Prosecutions, Kakamega.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE