



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CRIMINAL APPLICATION NO. E043 OF 2021**

**FRANKLINE MURIUKI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an application challenging the subsequent Judgment of the High Court at Meru***

***in Meru Criminal Appeal No. 115 of 2002 delivered on 8<sup>th</sup> February 2008***

***by Lenaola and Ouko JJ (as they then were)***

**RULING**

1. The Applicant, Frankline Muriuki, was charged and convicted on two counts for the offence of ‘Robbery with Violence contrary to Section 296 of the Penal Code’ in the Senior Principal Magistrate’s Court at Meru in Meru Criminal Case No. 1911 of 2001. He was then sentenced to suffer the death penalty for both counts.
2. He filed Meru Criminal Appeal No. 115 of 2002 wherein he challenged his conviction. The Court (Lenaola and Ouko JJ (as they then were) upheld the conviction, but made an order to the effect that the trial magistrate erred in sentencing the Applicant to the death penalty for both counts. They held that where a suspect is convicted on more than one corporal charge, the correct approach is to sentence him to the death penalty on only one of the counts and leave the other(s) in abeyance. They therefore upheld the sentence for the first count and suspended the one entered for the second count.
3. From his supporting affidavit, it appears that the Applicant filed a subsequent appeal at the Court of Appeal, Criminal Appeal No. 36 of 2017 which was also dismissed.
4. The Applicant has approached this Court by way of a miscellaneous application filed on 7<sup>th</sup> May 2021 seeking a reduction of his sentence. The principal ground upon which his application is premised is that the Supreme Court, in ***Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 others (Amicus Curiae)*** Petition No. 15 & 16 (Consolidated) of 2015 [2017] eKLR declared that mandatory sentences are unconstitutional. He further relies on *William Okungu Kittiny vs Republic* (2018) eKLR.
5. The Prosecution have opposed the application and they filed submissions dated 29<sup>th</sup> October 2021. They urge that the offence was gruesome as the Applicant and his other assailants were armed with crude weapons namely axe, panga and rungu. They urge that the Applicant did not express remorse and that in any event, the direction issues by the Supreme Court on 6<sup>th</sup> July 2021 in ***Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 others (Amicus Curiae)*** Petition No. 15 & 16 (Consolidated) of 2015 [2021] eKLR are not applicable for the offence of robbery with violence. They urge for the Court to dismiss the application.

***Determination***

6. This Court has considered his application and observes that the Supreme Court’s finding in ***Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)*** Petition No. 15 & 16 (Consolidated) of 2015 [2017] eKLR, declared that the mandatory nature of the death penalty for the offence of murder contrary to section 203 as read with 204 is unconstitutional but retained the death sentence as a constitutional penalty.

***“a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under***

**Article 26(3) of the Constitution.**

7. The Court has also considered that the Supreme Court, on 6<sup>th</sup> July 2021, issued directions clarifying that the ratio in *Francis Karioko Muruatetu & Another vs Republic; Katiba Institute & 5 Others (Amicus Curiae)*, Petition No. 15 & 16 (Consolidated) of 2015 (2017) eKLR is only applicable to cases of murder contrary to Section 204 of the Penal Code, and not to all other offences. The Supreme Court held as follows: -

**“[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”**

8. These Directions are binding on this Court by virtue of Article 163(7) of the Constitution of Kenya which provides that **‘all courts, other than the Supreme Court are bound by the decisions of the Supreme Court.’**

9. The Court, therefore, declines the Applicant’s application for a reduction in his sentence.

10. The Applicant also prayed that the Court orders that the period of pre-trial detention that he spent in custody be taken into account, in accordance with Section 333 (2) of the Penal Code. The Court considers that since the sentence of death penalty against him remains undisturbed, a consideration of Section 333 (2) of the Penal Code will be inconsequential. The Court will thus not make an order for the same.

**ORDERS**

11. Accordingly, for the reasons set out above, the Court makes the following orders: -

***i) The Applicant’s application for a reduction in his sentence is declined.***

***ii) For avoidance of doubt, the Applicant is at liberty, as counselled by the Supreme Court in Muruatetu Directions of 6<sup>th</sup> July 2021 to file a petition on “a challenge on the constitutional validity of the mandatory death penalty for cases of ‘Robbery with Violence contrary to Section 296 (2) of the Penal Code’ before the High Court and [thereafter] escalated to the Court of Appeal, if necessary.”***

Order accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**Frankline Muriuki, the Appellant in person.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**