

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO 67 OF 2020

KEVIN OMONDI OYARE.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Petitioner herein was tried and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to death.
2. Being dissatisfied with the said decision, he lodged an Appeal in the High Court being, **HCCRA No 21 of 2011** which was dismissed in its entirety. He did not appeal to the Court of Appeal.
3. On 20th August 2020, the Petitioner filed this Petition for review of the sentence. The said application was supported by his Affidavit in which he stated that the mandatory death sentence that was imposed on him was unconstitutional and inhumane.
4. In his Written Submissions, he relied on the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** where the court held that mandatory sentences deprive courts their legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to relevant aspects of character and record of each accused person.
5. He pleaded with this court to consider that he was arrested at the age of twenty five (25) years and was the sole bread winner of his young family. He added that he had so far spent twelve (12) years in custody and was now thirty seven (37) years of age. He urged the court to consider granting him an opportunity of shaping up his future which would otherwise be ruined by the long incarceration. He asserted that he was a first offender and very remorseful for having engaged in a criminal activity.
6. He submitted that while he was in prison, he had maintained high level discipline and had undergone various transformation programs and attained Grade I, II and III in upholstery and had been tested by the government testing agency, NITA. It was his submission that having gained the skills, he was able to get a legal earning and ready to be integrated back into the society.
7. The State opposed his Petition for review of sentence for the reason that the July 2021 directions from the High Court (**sic**) did not apply to robbery with violence cases. It thus urged this court to dismiss the Petition herein.
8. On 6th July 2021, the Supreme Court gave guidelines in the case of **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR** to the effect that the said decision and those guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.
9. It was emphatic that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was not applicable to capital offences other than murder, 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. It pointed out that the petitioners in the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) had approached the court for specific reliefs. It clarified that with regard to the mandatory death sentence in capital offences other than murder, 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 and directed that a challenge on the constitutional validity of the mandatory death penalty be heard and determined in the High Court and then by the Court of Appeal, if necessary, whereafter a similar outcome as that the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) may be reached.
10. Notably, the fact that the Petitioner was remorseful and had undergone various rehabilitation programs could not assist him for the reason that he had been charged and convicted of the offence of robbery with violence and not murder and as the Supreme Court decreed in its guidelines on 6th July 2021, the case of **Francis Karioko Muruatetu & Another vs Republic** (Supra) was inapplicable herein. His prayer that the court reviews his sentence thus fell by the wayside.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition for review of sentence that was lodged on 20th August 2020 was not merited and the same be and is hereby dismissed.
12. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF DECEMBER 2021

J. KAMAU

JUDGE