



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL PETITION NO. 13 OF 2018

JOSEPH CHEMASWET LOMULEI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Petitioner herein has filed this petition requesting this court to consider resentencing him pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another =Vs= Republic [2017] eKLR** where the court held that:

“(69) consequently, we find that section 204 of the Penal Code is inconsistent with the constitution and invalid to the extent that it provides for the mandatory death sentence for murder.”

2. The petitioner was charged, convicted and sentenced to death for the offence of murder contrary to **section 202** as read with **section 203** of the **Penal Code (Chapter 63 of the Laws of Kenya)** at a trial before the High Court at Kitale in **Criminal Case No. 42 of 2003** on **28/10/2009**. He preferred an appeal which was dismissed on 25/03/2011

3. The Petitioner now wishes to take advantage of the Supreme Court decision in Francis Karioko Muruatetu (Supra) for a re- sentencing.

4. It is worth noting that the Supreme Court in the Muruatetu case, considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable as a guide namely:-

(a) age of the offender

(b) being a first offender

(c) whether the offender pleaded guilty

(d) character and record of the offender

(e) Commission of the offence in relation to gender-based violence.

(f) remorsefulness of the offender

(g) the possibility of reform and social-re adaptation of the offender

(h) any other factor that the court considers relevant.

5. Under the **Sentencing Policy Guidelines, 2016** (“the **Guidelines**”) published by the Kenya Judiciary state (at para. 4.1), the courts are urged to consider that the sentence imposed must meet the following objectives;

- **Retribution;** To punish the offender for his/her criminal conduct in a just manner.
- **Deterrence;** To deter the offender from committing a similar offence subsequently as well as discourage other people from

committing similar offences.

- **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
- **Restorative justice:** To address the needs arising from criminal conduct such as loss and damages.
- **Community protection:** To protect the community by incapacitating the offender.
- **Denunciation:** To communicate the community's condemnation of the criminal conduct.

6. In determining this petition, it is imperative to look at the sentences which have been imposed by other Courts following the decision in the Muruatetu case in offences of this nature. The Court of Appeal decision post the Muruatetu Case provide some guidance on the appropriate sentence. In *Jonathan Lemiso Ole Keni v Republic NRB Criminal Appeal No.51 of 2016 (2018) eKLR* where the petitioner shot a person without any provocation, the court imposed a sentence of 30 years' imprisonment. In *John Ndede Ochodho alias Obago v Republic KSM CA Criminal Appeal No. 120 of 2014 (2018) eKLR*, the Court of Appeal upheld a sentence of 25 years in a case of murder where the petitioner assaulted the deceased several times causing his death.

7. From the record, the petitioner has since served 10 years of the sentence. Section 333(2) of the Criminal Procedure Code requires a sentencing court to take into account the period that a convicted person has spent in custody prior to the sentence. I note that the Petitioner remained in pre-trial custody for a period of almost 6 years from the time he was charged in 2003 upto the time he was convicted in 2009.

8. Taking into account the mitigating and aggravating factors , I have considered the entirety of the facts and therefore I hereby re-sentence the Petitioner to **Twenty five (25) years'** imprisonment commencing from 28/10/2009.

Signed, Dated and Delivered at Kitale on this 3rd day of March, 2020.

H.K. CHEMITEI

JUDGE

3/3/2020

In the presence of:-

M/s Kagai for the respondent

Applicant – present

Court Assistant – Kirong

Ruling read in open court.