IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. 111 OF 2018

FREDRICK OTIENO ODHIAMBO.....1ST APPLICANT

VICTOR OUMA ODHIAMBO.....2ND APPLICANT

ADONIJA ODHIAMBO OPIYO.....3RD APPLICANT

VERSUS

REPUBLIC.....STATE

RULING

1. The three Applicants were convicted of murder by the High Court in a judgment delivered on 27/06/2014. In a ruling dated 10/10/2014, after holding a sentence hearing and considering the mitigation pleas by the Accused Persons, the Learned Trial Judge sentenced each of the Accused Persons to imprisonment for twenty-five (25) years.

2. In imposing this sentence, the Learned Trial Judge reasoned as follows:

> *The punishment for the offence of murder is provided for in section 204 of the Penal Code. Any person convicted of the offence of murder is liable to be sentenced to death. However, Article 26 of the Constitution of Kenya, 2010 guarantees the right to life and Article 24 thereof enjoins the Court in construing the Bill of rights to give an interpretation which enhances such rights, and not to diminish them.*
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> *The Accused were not only foolhardy but also reckless in their behavior and were it not for the provisions of Article 26 of the Constitution, they deserve to be sentenced to death. They are young people. One young life lost is too many. I will give them a chance to reform. They have basically no skills. A long prison term will enable them to learn some useful industrial skills which if they survive the rigours of prison regime, they will apply once they have served their term of imprisonment.*

3. It is not clear if the Applicants have appealed to the Court of Appeal against the conviction and sentence. However, they filed the present application seeking a review of their sentence under the Muruatetu doctrine. This is derived fom the Supreme Court decision in ***Francis Karioko Muruatetu & Another v Republic [2017] Eklr***. In the ***Muruatetu Case***, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder.

4. In ***Benson Ochieng & Another v Republic (Nakuru High Court Misc. Application No. 45 of 2018)***, I reached the conclusion that the High Court can invoke its original jurisdiction bequeathed to it in Article 165(3)(a) of the Constitution to re-sentence persons on death row who were sentenced pursuant to the mandatory death penalty provisions which have been declared unconstitutional. Addressing the advisory by the Supreme Court to those on death row pursuant to the mandatory death penalty provisions the Supreme Court had just declared unconstitutional that they should await a Taskforce ordered by the Supreme Court and not approach the Supreme Court with individual petitions, I had this to say:

> *As I understand it, this Application is pivoted on Article 165(3)(a) of the Constitution. That clause gives the High Court unlimited original jurisdiction in criminal and civil matters. On the other hand, the Supreme Court adviced similarly-positioned would-be Petitioners to await the formation of the Taskforce which will recommend the way forward for the thousands of prisoners presently serving the death sentence. However, the position of the Supreme Court was quite specific: it indicated that it will not consider individual Petitions presented to it by the prisoners after enunciating the constitutionality of the mandatory death sentence.*
>
> *I have taken the position that the Supreme Court neither intended nor achieved the purpose of limiting the jurisdiction of this Court to consider applications for re-sentencing by individuals such as the Applicants who were sentenced to death under the then mandatory provisions of the Penal Code. A progressive and purposive reading of the constitutional provisions relied on by the Supreme Court to reach its outcome in the **Muruatetu Case** would lead us to this conclusion. The Court, may, of course, determine*

for prudential reasons, to await the work of the Taskforce or other docket management considerations.

5. Even though I have taken the position that this Court has jurisdiction to re-sentence prisoners who were sentenced to death before the ***Muruatetu Case***, the Applicants do not fall into this category. As reproduced above, in their case, the High Court considered the death penalty to be inappropriate in the circumstances of the case. The Court specifically addressed the circumstances of the offence and the offenders and proncounced sentence based on the individual circumstances of the case.

6. Consequently, the reasoning in Muruatetu Case does not apply to the Applicants case: they were not sentenced pursuant to the mandatory death penalty provisions of the law. The sentencing Court considered their specific circumstances and the circumstances of the case in pronouncing their sentences – and then pronounced the sentence of imprisonment for twenty-five (25) years. This sentence is lower than the death sentence. It is not open to this Court to review the exercise of discretion of my fellow High Court Judge.

7. Consequently, I reach the conclusion that the Applicants cannot, in the circumstances of this case, benefit from the doctrine propounded in ***Muruatetu Case***. I therefore dismiss their application for re-sentencing as unmeritorious.

8. Orders accordingly.

Dated and delivered in Nakuru this 17th day of July, 2019

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JOEL NGUGI

JUDGE