**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 2 OF 2018**

**JOSEPH AKWEYWA INDECHE.....1ST PETITIONER**

**JOSHUA MBOYA ASHIKANGA.....2ND PETITIONER**

**PIUS MOTUKA LUMUMBA.....3RD PETITIONER**

**PATRICK SHIKANGA LIKHOTIO .....4TH PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Arising from Court of Appeal judgment in Criminal appeal No. 371 of 2012. From the Original High Court Criminal Case No. 7 of 2005.)*

**RULING**

**INTRODUCTION.**

1. On 13th April, 2010 the High Court sitting at Kakamega (Lenaola, J) sentenced the petitioners to death. In that regard he expressed himself as follows:-

> *"I have considered the mitigations and the circumstances of the case. The accused persons, jointly set out to harm a family by burning and ended up killing innocent 8 year old. They deserve no mercy and are each sentenced to death as by law established.*
>
> *Orders accordingly.*
>
> *Rights of appeal explained."*

2. The order sentencing the petitioners to death was made after the petitioners had tendered their mitigation in court through their counsel.

3. The petitioners appealed against their conviction and sentence to the Court of appeal sitting at Kisumu in Criminal Appeal No. 371 of 2012. The Court of appeal dismissed their appeals in their entirety on 20th December, 2013.

**THE CASE FOR THE PETITIONERS.**

4. Following the decision of the Supreme Court in **Francis Kariokor Muruatetu & Another (2017) eKLR,** the petitioners applied to this court for re-sentencing. In that decision, the Supreme Court held that a trial court had a discretion to impose a sentence of death or any appropriate sentence including a sentence of imprisonment even if the Penal Statute mandatorily directed the imposition of a death sentence. In other words trial courts now have discretion to impose a non-death penalty sentence if the circumstances warranted. Before this decision, trial courts automatically imposed a sentence of death following the conviction for murder or capital robbery.

5. The thrust of the petitioners' case is that they were not allowed to mitigate before the death sentence was imposed. This comes out clearly in the petition of Pius Mutoka Lumumba. The petitioners further submit that even if they had mitigated this would not have made any difference since the imposition of the death sentence was automatic upon conviction.

6. The 2nd thrust of the petitioners' cases is that they have learnt certain skills in prison including carpentry and acquisition of knowledge in respect of biblical studies and family matters. And since they have been in prison since 2013, they have served sufficient sentence imprisonment to entitle them to be set free. This they argued will enable them to be set free and join in supporting their families in matters of

education and related familial support.

7. The 3rd thrust of the case of petitioners is that the decision of **Francis Kariokor Muruatetu & Another Vs. Republic (2017) eKLR**, supra declared the sentence of death penalty unconstitutional.

8. The 4th thrust of their case is that they have exhausted the judicial remedies following the dismissal of their appeals to the Court of appeal.

9. They have therefore urged the court to exercise its supervisory powers under Article 165 (6) of the 2010 constitution in addition to invoking the provisions of Article 50 (2) of the 2010 Constitution.

**THE CASE FOR THE RESPONDENT**.

10. Ms. Rotich for the state opposed the petitions of the petitioners in the strongest terms. She submitted that sentencing is a matter of discretion of the trial court. She further submitted that the trial court considered the mitigating factors of the petitioners and proceeded to impose the sentence of death. Additionally, she submitted the following as aggravating factors. The deceased was a minor aged 8 years, who died under brutal circumstances. She also submitted that the petitioners wanted to burn to death the entire family of the deceased. In furtherance to their objective they petrol-bombed the house of the family of the deceased.

11. Furthermore, she also submitted that members of the family of the deceased suffered physical and emotional injuries. She therefore submitted that the trial court exercised its discretion properly in sentencing the petitioners to death.

**ISSUES FOR DETERMIANTION**

12. I have considered the affidavit evidence, the grounds in the notices of motion and the submissions of all the petitioners including the authorities which they cited.

13. As a result, I find the following to be the issues of determination.

**ISSUE 1.**

1. Whether or not the Supreme Court decision in Francis Kariokor Muruatetu & Another vs. Republic (Supra), declared the death penalty unconstitutional.

**ISSUE 2.**

1. Whether or not this court has jurisdiction to hear and determine this petition.

**ISSUE 3.**

1. Whether or not this court has jurisdiction to review the commutation of the death penalty to life imprisonment by His Excellency The President, Mr. Uhuru Kenyatta.

**ISSUED 4.**

1. What are the appropriate orders to be made?

**ISSUE 1.**

14. The Supreme court in **Francis Kariokor Muruatetu & Another vs. Republic** did not declare the death penalty unconstitutional. It only outlawed its automatic imposition on capital offences (murder, robbery with violence and treason), upon conviction in respect of those offences. As a result, trial courts now have discretion to impose a death penalty in deserving cases. They also have discretion to impose other forms of sentences including imprisonment and monetary fines in appropriate cases. I therefore answer the first issue in negative.

**ISSUE 2.**

15. I find from the petition of the petitioners and the respondent, that the Court of Appeal heard and determined the appeals of the petitioners in Criminal Case No. 371 of 2012 on 20th December, 2013. It dismissed the appeal by the petitioners in its entirety. In doing so, its decision is binding on the High Court in terms of judicial precedent because, it is superior in rank to the High Court. The binding nature of the Court of Appeal decision is a cornerstone in the administration of justice in this country. It is therefore follows by virtue of the practice of the courts that the High Court has no jurisdiction to hear and determine the petition.

16. However, there are exceptions to the binding nature of the decisions of the Court of Appeal. One such exception is found in Article 50 (6) of the 2010 constitution. In terms of the provisions of that rticle, the High court is empowered upon petition by a petitioner to order for a new trial if the following conditions have been met. The 1st condition is that the petitioner must show that his appeal has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal. In the instant petition, the petitioners did not appeal to the Supreme Court within the prescribed period. On this limb of the provisions of that article they qualify as persons who did not appeal within the prescribed period.

17. Furthermore, the petitioners are required to show that there is new and compelling evidence, which has become available. They must demonstrate that they exercised due diligence during trial and the new proposed evidence was not available then. In this regard the decision of the Supreme Court in **Tom Martins Kibisu vs. Republic (2014) eKLR** is instructive. In that case the court held that the proposed new evidence must be relevant, and must be probative value. Additionally, such evidence must have a decisive effect on the judgment or ruling petitioned against.

18. In the circumstances of this petition, I find that the petitioners have not produced any new evidence of a compelling nature to warrant an order of this court to re-open their trial afresh. In the circumstances, I find that this court has no jurisdiction to entertain and determine their petition in terms of re-opening it..

**ISSUE 3.**

19. In 2016, the State President commuted the death penalty of the petitioners to life imprisonment in terms of Article 133 (1) (c) of the 2010 Constitution of Kenya. By virtue of that commutation, the petitioners are now serving a sentence of life imprisonment. It is therefore a moot point or an academic issue to consider the sentence of the death penalty imposed by the High Court (Lenaola, J) on 13th April, 2013 upon the petitioners. Courts exist to resolve controversies between the parties. In this regard, I refer to the case of **Attorney General vs. Ally Kleist Sykes (1957) EA 257, i**n which the High Court of Tanganyika pronounced itself on the issue of mootness in the following terms:

> "The attorney-General applied for a case stated, which was done, and a number of questions have been submitted for the opinion of this court. Most of these questions are of an academic nature, and it is no part of the duty of this court to answer academic questions. As learned counsel appearing for the Attorney-General said, the only real question that arises is whether, the main witness not being shown to be an accomplice, the magistrate was entitled on a preliminary assessment of credibility made at the conclusion of the crown case to say that the respondent had no case to answer, and it is with that question only that I intend to deal."

20. In the light of the foregoing considerations, I find that the sentence of the death penalty imposed on the petitioners is a moot points, which I find unnecessary to deal with.

21. Under Article 165 (6) of the 2010 Constitution of Kenya, the High Court has supervisory jurisdiction which is expressed in the following terms: ***"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."***

22. It is clear from the provisions of that Article that this court has supervisory jurisdiction to hear and determine any issue arising out of the Presidential exercise of his powers of mercy in appropriate cases. The reason is that it is the province of the court to interpret disputes that touch on the interpretation constitution: **Marbury vs. Madison 5 US 137 (1803).**

23. In the circumstance of this case, what is challenged is the death penalty imposed by the High Court and the exercise of the Presidential powers of mercy. The imposition of the death penalty on the High court is moot. The petitioners have failed to demonstrate that the exercise of the Presidential power of mercy should have resulted in their release, since they have been in prison since 13th April, 2010. No material has been placed before me to warrant review of that presidential power.

**ISSUE 4.**

24. In the light of the foregoing considerations, I find that the petitioners have not raised issues that warrant resolution by this court. As a result, this court declines to grant the prayers sought in the petition. The skills that the petitioners have acquired in prison which they may use to earn a living and support their families if released are matters for the Presidential Advisory committee to consider and advice the President appropriately.

25. The upshot of the foregoing is that the petition of the petitioners is hereby dismissed in its entirety.

**Judgment signed, dated and delivered in open court at Kakamega this 6th day of September, 2019.**

In the presence of all the petitioners and Ms. Rotich for the State.

**J.M. BWONWONG'A**

**JUDGE**