



REPUBLIC OF KENYA



**Munyekenye v Republic (Miscellaneous Criminal Application  
E003 of 2023) [2024] KEHC 6219 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6219 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MISCELLANEOUS CRIMINAL APPLICATION E003 OF 2023**

**WM MUSYOKA, J**

**MAY 31, 2024**

**BETWEEN**

**RODGERS MBEMBE MUNYEKENYE ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The petition and application, dated 21<sup>st</sup> August 2023, principally seek re-sentencing. The petitioner had been convicted, in Busia HCCRC No. 14 of 2006, of murder, contrary to section 203, as read with section 204, of the *Penal Code*, Cap 63, Laws of Kenya, which attracts, upon conviction, the death penalty, and the trial court had imposed that sentence, on 7<sup>th</sup> May 2009. He avers that he had appealed to the Court of Appeal, but the appeal never saw the light of day, for he has never been assigned an appeal number. He would like the sentence re-visited on the basis of *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) and section 333 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya.
2. The application rides on the decision in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where the court appeared to lay down a general principle, that all mandatory sentences are unconstitutional, and to allow trial and appellate courts discretion to re-visit cases where mandatory sentences had been imposed, with a view to revising or reviewing them. The Supreme Court re-visited the issue, in *Francis Karioko Muruatetu & another v. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), and clarified that its decision, in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), was of application only in murder cases.
3. The current jurisprudence points to entertainment and tolerance of applications for review of sentence, where the trial court imposed a mandatory sentence, in circumstances where the law did



not allow any discretion. The trend is, no doubt, in line with the very progressive provisions of the *Constitution of Kenya* of 2010. The offence, that the applicant herein was convicted in respect of, attracts a mandatory sentence. The principle laid out in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), declaring mandatory sentences unconstitutional, was boosted by that of the Court of Appeal, in *Julius Kitsao Manyeso v. Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), with respect to the unconstitutionality of the life sentence. Recently, it was held, in *Evans Nyamari Ayako v. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported), that life imprisonment translates to 30 years.

4. The applicant has not indicated whether his death sentence was ever commuted to life imprisonment. Either way, he should benefit from *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), *Julius Kitsao Manyeso v. Republic* Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA) and *Evans Nyamari Ayako v. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA) (unreported). If the death sentence is still in place, the same is hereby commuted to life imprisonment, and the said sentence of life imprisonment is hereby reduced to a sentence of 30 years, in line with *Evans Nyamari Ayako v. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA)(unreported).
5. Should I reduce the 30 years to something lower, or even a lesser sentence, inclusive of considering applying section 333 of the *Criminal Procedure Code*? The applicant invites me to consider probation. I do not think the circumstances of the crime would merit any form of non-custodial measure. The appellant was allegedly disciplining the deceased, a child. He beat him so badly that he fractured his head, and tore his ear. The child died as he was being taken to hospital. The applicant, no doubt, deserves the maximum sentence available, which, in this case, would be 30 years, without any form of tempering, including by application of section 333 of the *Criminal Procedure Code*.
6. The application herein is disposed of in the terms spelt out in paragraph 4} of this ruling. This file shall hereafter be closed. Orders accordingly.

**RULING IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 31<sup>ST</sup> DAY OF MAY 2024**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Rodgers Mbembe Munyekenye, the applicant, in person.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

