



**Nyongesa v Republic (Miscellaneous Criminal Application  
E096 of 2021) [2023] KEHC 24644 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24644 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E096 OF 2021**

**PJO OTIENO, J**

**OCTOBER 27, 2023**

**BETWEEN**

**NGONGO NYONGESA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By a Notice of Motion filed in court on the December 9, 2021, the applicant seeks from court an order that the court re-considers the sentence of twenty (20) years imposed by the trial court and affirmed by the High Court on appeal. His grounds for seeking re-sentence is that he should be considered a first offender, he has a family who entirely depend on him; that he is sickly; that he has been in custody since 2011 and the period served in custody before conviction and sentence was not reckoned with.
2. The prosecution opposes the request on the two points; that there is no jurisdiction in the court pursuant to the directions of the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) and secondly, that the sentence having been confirmed by the High Court in Kakamega HCCR. Appeal No. 19 of 2015 the court has become *functus officio*.
3. The law settled by the Supreme Court in *Muruatetu Case (supra)* deserve no reiteration. It is settled that only murder convicts are expected to seek re-sentencing and not all offences attracting mandatory sentences.



4. Secondly, there was filed before this court an appeal as aforesaid which appeal was determined on the merits by a Judgment dated December 3, 2018. In that Judgment, the court concluded:-

“The appeal before me is not merited. I shall accordingly disallow the same. I hereby dismiss the same and uphold the conviction of the appellant by the trial Court in Butali SRMCC No. 40 of 2021 and confirm the sentence of twenty (20) years imprisonment.”

5. It is the finding by this court that it lacks jurisdiction to entertain the application and that on account of the Judgment on appeal by the same court it has become functus officio in matters sentence.

6. There is however the claim of the period served in custody not having been addressed by the initial sentence.

7. The court concurs that the trial court did not reckon with the pre-conviction passed and the matter was indeed not canvassed before the appellate court. However, the records at trial show that the Accused was granted bond and was actually released pending trial. That ground equally fails.

8. In totality the application fails and is dismissed. Let the court file be closed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF OCTOBER 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

Applicant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

