



**Irungu v Republic (Criminal Petition 4 of 2023)
[2023] KEHC 25903 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL PETITION 4 OF 2023
AK NDUNG’U, J
NOVEMBER 30, 2023**

BETWEEN

JOHN NDERITU IRUNGU PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner herein, John Nderitu Irungu, was convicted of robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to death *vide* Nanyuki CM Criminal Case No 957 of 2014. He appealed to this court *vide* Criminal Appeal No. 59 of 2015 against both conviction and sentence. His appeal was dismissed in a judgment delivered on 28/09/2016 (Kasango J).
2. He claimed that his second appeal to the Court of Appeal at Nyeri (Criminal Appeal No 106 of 2016) was also dismissed. The Court of Appeal judgment is not on the record so this court cannot establish that fact.
3. In his undated Chamber summons, the petition is premised on the directions given by the Supreme Court on 06/07/2021 in *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR and seeks for sentence hearing and interpretation of mandatory application of the death sentence for robbery with violence cases. The petition is brought under Article 22(1), 23(1), 25(c), 27, 28, 50(2) (p)(q), 159(2) 160(1) and 165 of the *Constitution*, Clause 7(1) of the Transitional and Consequential Provisions and sections 216, 329 and 333(2) of the *Criminal Procedure Code*.
4. It is the Petitioners case that the Supreme Court order of 06/07/2021 left it open for the High Court to hear any petition that maybe brought challenging mandatory minimum sentences and did not hold that the High Court should not apply the previous reasoning in *Muruatetu 1*.



5. He therefore seeks review of the sentence to a definite and lenient sentence based on his mitigation and the circumstances of the case and the period spent in remand be computed into eventual sentence to be awarded. There is no affidavit attached to his chamber summons.
6. The application is opposed. Counsel for the Respondent argued orally that this court is functus officio since this court and the Court of Appeal pronounced themselves on the matter and cannot therefore revisit the matter. The Petitioner in response stated that it is against the law for someone to serve an indefinite sentence.
7. I have considered the rival arguments by the parties. Following the declaration by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR that the mandatory nature of the death sentence under section 204 of the *Penal Code* for the offence of murder contrary to section 203 of the *Penal Code* was unconstitutional, courts applied in equal measure the reasoning of the apex court in the mandatory nature of the death sentence under section 296(2) of the *Penal Code* for the offence of robbery with violence.
8. However, on 06/07/2021, the Supreme Court made it clear that the *Francis Muruatetu* decision was only applicable in Murder cases and inapplicable to other cases where the law provides for mandatory sentences. The Supreme Court stated *inter alia*:

“To clear the confusion in regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason and robbery with violence, that a challenge of those sentences should be properly filed in court”.
9. The court further said that the cases filed should be presented and fully argued before the High Court and escalated to the Court of Appeal if necessary at which a similar outcome as *Muruatetu* may be reached. It stated:

“Muruatetu cannot be the authority for stating that all the provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *constitution*,”
10. That new development effectively locked out all other petitioners including the applicant herein. However, the Petitioner has petitioned this court by parity of the directives given on 06/07/2021 in *Muruatetu case* as seen above that a challenge on sentences in robbery with violence should be properly filed in court.
11. The Petitioner has now filed this constitutional petition but it lacks in form as provided under Rule 10 (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 which states that;
 - (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;



- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
12. More importantly, it is not legally tenable for the applicant to approach this court by way of a constitutional petition seeking to overturn the decision of a court of concurrent jurisdiction.
13. Filing the current application clothed as a constitutional petition is an impropriety as was held in *Civicon Limited vs. Kenya Revenue Authority & Another* [2014] eKLR, where the learned judge expressed himself quite strongly on the impropriety of parties attempting to reopen and relitigate decided issues in original form by clothing them as a constitutional petition by stating that;

“I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-*Peter Ng’ang’a Muiruri v Credit Bank Ltd & Anor*, Court of Appeal Civil Appeal No. 203 of 2006 and *Ventaglio International SA and Anor v. The Registrar of Companies and Anor*, Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the *Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 Others*. Nairobi HC Petition No. 125 of 2010 (per Majanja, J.)”

14. This court therefore lacks the requisite jurisdiction to entertain the application. The same is improperly before the court and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH OF NOVEMBER 2023

A.K. NDUNG’U

JUDGE

