

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E019 OF 2021

FRANCIS JUMA ODUOR.....1ST APPLICANT

JOHN NYONGESA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The Motion herein, undated, filed herein on an unknown date, is founded on the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the applicants seek reviews of his sentence, where he had been convicted of murder, contrary to section 203, as read with section 204, of the Penal Code, in Busia HCCRC No. 7 of 2008, and were sentenced to serve forty and fifty years in prison, respectively. They filed an appeal in Kisumu CACRA No. 95 of 2014, where the conviction was upheld, but the sentence was found to be illegal, and was substituted with mandatory death.

3. The offence, the subject of the instant proceedings, is murder, the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, applies to it. As a consequence, the High Court has jurisdiction to review the sentence that was imposed by the trial court, in view of the directions given in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ).

4. However, the High Court, as trial court, had imposed sentence in the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), even before the said decision had been made, but the Court of Appeal found that the sentence imposed to be illegal, for the High Court had exercised a discretion it did not have, and substituted the imprisonment imposed with the mandatory death penalty. As the death penalty was imposed by the Court of Appeal, and not the High Court, the High Court has no jurisdiction to review sentence imposed by the Court of Appeal. Consequently, the application before me is incompetent, and I hereby strike the same out. The file shall be closed.

5. The Deputy Registrar shall cause copies of this ruling to be availed to the applicants and the office of Director of Public Prosecutions, Kakamega.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 14TH DAY OF JANUARY 2022

W MUSYOKA

JUDGE