



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CRIMINAL APPLICATION NO. E015 OF 2021**

**AGGREY MANG'ONG'O AMUGUNE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Aggrey Mang'ong'o Amugune**, the Applicant herein, was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**.

The particulars of the offence in Count I are that:

***“ On the 24<sup>th</sup> October, 2011 at South C Estate within Nairobi County jointly with others not before court murdered AMINA FALZADIN”.***

The particulars of the offence in Count II are that:

***“ On the 24<sup>th</sup> October, 2011 at South C Estate within Nairobi County jointly with others not before court murdered MOHAMED AFZAL RASPOT”.***

2. He was tried and convicted at the Nairobi High Court in **Criminal Case No. 21 of 2013** and was sentenced to death as prescribed by law.
3. The Applicant was dissatisfied with his conviction and sentence. He appealed to the Court of Appeal, which appeal was dismissed in its entirety and the High Court's conviction and sentence affirmed.
4. The Applicant is now back in the High Court with an application seeking for orders of a rehearing so as to be given an opportunity to mitigate and thereafter resentenced pursuant to the Supreme Court's decision in the matter of **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**.
5. The parties opted to canvass the application orally with the Applicant submitting that he is seeking a resentence. He submitted that he had appealed to the Court of Appeal which sent him back for resentencing.
6. The learned prosecution counsel, **Ms. Joy** for the Respondent opposed the application wherein she submitted that the Court of Appeal dismissed the Applicant's appeal. She went on to submit that while dismissing his appeal, the Court of Appeal relied on the case of **Muruatetu** and noted that the applicant herein gave express instructions to his advocate not to mitigate and he also did not mitigate. Therefore, it was her submission that this court lacks jurisdiction to entertain the application while relying on the **Muruatetu case**. She thus urged the court to dismiss the application.
7. In a rejoinder, the applicant sought for forgiveness and prayed that he be heard by the court.
8. I have considered the application herein alongside the oral submissions by the parties before the court. It is my considered view that the issue for determination is whether the application for the Applicant to mitigate and be resentenced is merited.
9. Before addressing the main issue in the application, I will first address the applicant's claim that the Court of Appeal sent him back to the High Court for resentencing. I have perused the Court of Appeal's Judgment and as indicated by the Respondent's counsel, find that the Applicant's appeal was dismissed and his conviction and sentence affirmed.

10. The Applicant is now back in the High Court with an application that the case be re-heard and he be resented by the court.

11. Re-sentencing is neither a hearing *de novo* nor an appeal. It is a proceeding undertaken within the court's power to review sentence only. In doing so, the court will ordinarily check the legality or propriety or regularity of the sentence that was passed against a person. The relevant considerations in the proceeding *inter alia*, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue for consideration.

12. However, a challenge to the jurisdiction of this court to conduct a re-sentencing has been raised by the Respondent's counsel whose argument is that the Applicant's appeal to the Court of Appeal was dismissed on the ground that the Applicant had given his advocate express instructions not to mitigate and he also did not mitigate. That in dismissing his appeal, the Court of Appeal relied on the **Muruatetu** case.

13. Jurisdiction is the judicial power given to the court to adjudicate upon a dispute. Without jurisdiction, a court cannot adjudicate the case before it. Jurisdiction is therefore everything and is of such preliminary importance, so that once a court finds it has no jurisdiction to adjudicate a matter, it should down its tools. In the case of **The Owners of Motor Vessel Lilian "S" –vs- Caltex Oil (Kenya) Ltd [1989]KLR 1** at page 14, Nyarangi, J.A held as follows,

*“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

14. The Supreme Court of Kenya buttressed this question in the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011**, where it pronounced that:

*“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”*

15. In the present application, it is clear to this court that **Ms. Joy**, the learned prosecutor has a point when she submits that this court lacks the jurisdiction to relook into the issue of the sentence that was meted against the Applicant when the Court of Appeal has pronounced itself of the issue. The Court of Appeal, being a court superior to the High Court, cannot have its decision subjected to review by an inferior court.

16. In my view, the Applicant **should** have raised the issue of his sentence when he presented the appeal before the Court of Appeal. It was evident that the Applicant **did not** raise the issue of the suitability of his sentence in light of the Supreme Court's decision in the **Muruatetu** case.

17. That being the case, I agree with **Ms. Joy** learned counsel for the prosecution that this court lacks jurisdiction to entertain the application since it has been filed before a court that lacks the requisite jurisdiction to consider his plea to be resented considering that the applicant was aware that he could invoke the **Muruatetu** case before the Court of Appeal with a view to have his sentence re-looked at.

18. In conclusion, as it is trite, a court of law ought to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. I hence proceed to do so in this matter and dismiss the **Chamber Summons** application filed on **19<sup>th</sup> January, 2021** for want of merit.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>th</sup> DAY OF APRIL, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**Applicant in person – present**

**M/S Joy counsel for Respondent**

**Court Assistant - Gitonga**