

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

PETITION NO. 63 OF 2019

SALEH NICOLE MAKOKHA.....PETITIONER

VERSUS

REPUBLICRESPONDENT

RULING

1. The petitioner herein was convicted in Kakamega CMCCRC No. 2447 of 2004, of attempted robbery with violence, contrary to section 297(2) of the Penal Code, Cap 63, Laws of Kenya, and robbery with violence contrary to section 296(2) of the Penal Code, and was sentenced to death. He filed an appeal at the High Court, being Kakamega HCCRA No. 140 of 2010, which was consolidated with other appeals of his co-accused in the trial court, and the conviction upheld and sentence confirmed in a judgment delivered on 8th March 2012. He filed a second appeal at the Court of Appeal, being Kisumu CACRA No. 45 of 2013, jointly with his co-accused at the trial court, where the conviction and sentence were affirmed.

2. The decision of the Supreme Court, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ, Mwilu DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA), was regarded, by the superior courts, as jurisprudence which did away with all mandatory sentences, or, at any rate, gave the courts discretion to override all such mandatory sentences. It is from that background that the petitioner has moved this court in the instant cause, through his petition. He principally seeks re-sentencing, in view of the developments that I have referred to hereabove.

3. However, the Supreme Court has revisited the matter to hold, in a decision in *Francis Karioko Muruatetu & another vs. Republic ; Katiba Institute & 5 others (Amicus Curiae)*[2021] eKLR (Koome CJ & P, Mwilu DCJ & VP, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA), that the interpretation and application given by the superior courts of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ & VP, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA), to cover all mandatory sentences, went far beyond what the Supreme Court intended in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ, Mwilu DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA). It was held that *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ, Mwilu DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA) was of application only to convictions for murder under section 204 of the Penal Code, and that it did not cover any other offence.

4. Consequently, and in view of that, the High Court has no jurisdiction to review the sentence imposed on the petitioner, convicted of robbery with violence and attempted robbery with violence, contrary to sections 296(2) and 297(2) of the Penal Code, based on *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ, Mwilu DCJ, Ojwang, Wanjala, Ndung'u and Lenaola SCJJA), in Kakamega CMCCRC No. 2447 of 2004, and affirmed in Kakamega HCCRA No. 140 of 2010 and Kisumu CACRA No. 45 of 2013. The petition before me has no merit, and it is hereby struck out. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26TH DAY OF AUGUST, 2021

W MUSYOKA

JUDGE