



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**MISC. APPLICATION NO. 92 OF 2019**

**PETER MUTHENGI KITEMANGE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. As was well observed by the Supreme Court in the directions they issued on the 6<sup>th</sup> of July, 2021, the case of **Francis Karioko Muruatetu & Another Versus Republic, Petition No. 15 & 16 (Consolidated) of 2015** the earlier judgement of the said court appears to have created confusion or in other hands was misunderstood and misrepresented by many. In their own words.

*“(8)..... there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence on the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. Appellants whose sentences were confirmed by the High Court and the Court of Appeal have returned to the Magistrate’s Courts, where without reference to the decision of the two superior courts have had those sentences revised.....”*

*Likewise, some Appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that are pending hearing and determination, either in the High Court or Court of Appeal, have also had the sentences revised.....”*

*10. It has been argued in justifying this state of affairs, that by paragraph 48 of the judgement in this matter, or indeed the spirit of the judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions, and that although Muruatetu specifically dealt with the mandatory sentence in respect of murder, the decision’s expansive reasoning can be applied to other offences that prescribe mandatory or minimum sentences. Far from it, in that paragraph we stated categorically that;*

*“(48) Section 204 of the Penal Code deprives the court of the use of Judicial discretion in a matter of life and death.....”*

*Reading this paragraph and the judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgement is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.”*

2. The matter before this court squarely falls within parameters addressed by the Supreme Court and the court will therefore consider the same against the lengthy quote from the Supreme Court directions above.

3. The Applicant Peter Muthengi Kitemange was initially charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Kyuso Principal Magistrate’s Court, Criminal Case No. 4 of 2012 and where he was convicted and sentenced to life imprisonment on the 18<sup>th</sup> of October, 2012.

4. Dissatisfied with the judgement, he appealed to this court (differently constituted) in Garissa High Court Criminal Case No. 102 of 2012. The said Appeal was dismissed.

5. Following the judgement in the **Muruatetu case**, the Applicant moved this court on 9<sup>th</sup> November, 2019 this time seeking for resentencing.

6. The matter was canvassed by way of written submission as follows;

**Applicant's Submissions**

The application is solely based on the Supreme Court decision in the Muruatetu case. He urged the court to further consider the resentencing guidelines set out in the said case in as far as the age of the offender is concerned, remorse expressed, rehabilitation and personal family circumstances, he further prayed to be given a second chance in life.

**Respondent's Submission**

The matter was dealt by this court on appeal and therefore the court has no jurisdiction to reconsider the sentence it affirmed.

7. It is true as urged by the State that the Applicant moved this court when he was aggrieved by the judgement and this court dismissed the appeal and therefore cannot sit on appeal or reconsider matters dealt with by a court of concurrent jurisdiction.

8. The court is cognizant that both submissions were filed before the Supreme Court issued its directions on the 6<sup>th</sup> of July, 2021. The current position is that the application is misplaced as the Muruatetu case did not speak to convictions and sentences based on Section 292(2) of the Penal Code.

The accused was not charged under Section 204 of the Penal Code which the Muruatetu case was hinged on.

The Applicant therefore does not enjoy the re-sentencing as envisaged by the Muruatetu decision and based on directions of the Supreme Court referred to in paragraph one of this ruling, the application fails.

**DATED, DELIVERED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2021.**

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**ALI- ARONI**

**JUDGE**