

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E056 OF 2021

EZEKIEL JUMA BARAZA.....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, was filed herein on 22nd April 2021, and it is principally 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 applicant seeks review of his sentence, where he had been convicted of murder, contrary to section 203, as read with section 204, of the Penal Code, in Kakamega HCCRC No. 17 of 2009, and was sentenced to serve twenty-five years in prison. He filed an appeal at the Court of Appeal at Kisumu, being Kisumu CACRA No. 252 of 2012, which was dismissed.

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, does apply to it, 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). The applicant benefitted from *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), since the trial court sentenced him to imprisonment, rather than condemning him to death, which is the penalty prescribed for the offence of murder under section 204 of the Penal Code. *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) can only apply where the applicant had been sentenced to death by the trial court.

4. The petition is, therefore, incompetent, for the trial court did exercise the discretion envisaged in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), and I cannot exercise the same discretion for a second time. In any event, if there was any need to interfere with the sentence imposed by the High Court, the Court of Appeal would have done so in Kisumu CACRA No. 252 of 2012. Since the matter was before the Court of Appeal in Kisumu CACRA No. 252 of 2012, I doubt whether there would even be any jurisdiction on my part to reconsider a sentence that the appellate court had occasion to consider. The file herein shall be closed.

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

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER 2021

W MUSYOKA

JUDGE