

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 71 OF 2016

PAUL WAFULA FOMBO.....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, dated 28th November 2016, was filed herein on even date, and it is not 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 does not seek 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. 42 of 2000, and was sentenced to death. He filed an appeal at the Court of Appeal at Kisumu, being Kisumu CACRA No. 39 of 2004, which was dismissed.

3. What the applicant seeks is a retrial on grounds that he was not given adequate time and facilities to prepare a defence. He had appealed, and the issue of not being afforded time and facilities to prepare defence ought to have been canvassed in the appeal. He says that he has new and compelling evidence. He has not disclosed that new evidence in the supporting affidavit, and he has made no effort to demonstrate how the evidence, if available at all, would change the course of things. I see not basis at all for ordering a retrial, and I hereby summarily dismiss the Motion dated 29th November 2016. The file herein shall be closed.

4. 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