



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**MISC. CRIMINAL APPLICATION NO. 154 OF 2019**

**DAVID WAKOLI WALUBENGO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, David Wakoli Walubengo was convicted of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The trial Magistrate court found that the prosecution had established, to the required standard of proof, that the Applicant, with another, while armed with dangerous weapons namely a rifle and a panga , robbed Ezekiel Wanyonyi Khaemba of a Motorcycle registration No. KMCX 260N make TVS Star, a mobile phone and Kshs 3000/= and immediately after the time of such robbery injured the said Ezekiel Wanyonyi Khaemba. The Applicant was sentenced to death. He was aggrieved by his conviction and sentence. He filed an appeal to this court. His appeal against conviction was dismissed. However, the death sentence that was imposed on him was set aside and substituted by a custodial sentence of ten (10) years imprisonment. The court directed that the sentence would take effect from 23<sup>rd</sup> May 2019.

That would have been the end of the matter but for the widow opened by the Supreme Court's decision of **Francis Karioko Muruatetu Vs Republic [2017] eKLR**. In that case, the court declared mandatory death sentences to be unconstitutional as it deprived an accused the chance to mitigate his sentence and further that it deprived the court sentencing discretion. Although the Court of Appeal extended this principle to affect **Robbery with Violence** and **Sexual Offences cases**, the Supreme Court in a later decision in **Francis Karioko Muruatetu V- Republic [2021] eKLR** clarified that the decision only applied to those convicted of Murder and not any other offence. Unfortunately for the Applicant, his case falls within the category of cases excluded by the Supreme Court from the application of the above decision.

In the premises therefore, the only remedy available to the Applicant is to file an appropriate appeal to the Court of Appeal. This court lacks jurisdiction to re-hear the question regarding the sentence of the Applicant because that issue was determined by a court of concurrent jurisdiction. The Application

lacks merit and is hereby dismissed.

**DATED AT KITALE THIS 16TH DAY OF DECEMBER 2021.**

**L. KIMARU**

**JUDGE**