



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 205 OF 2018

IN THE MATTER OF ALLEDGED DENIAL, VIOLATION,

INFRINGEMENT OF AND/OR THREAT TO THE

PROTECTION AND EQUAL BENEFIT OF THE LAW

AND

IN THE MATTER OF ARTICLES 23,

165 (3) (A) (B), 2 (3), 2 (5), 10, 19, 20,

21, 22, 24, 25 (9), 26, 27 (1) 28, 35 (1) (A) (B), 50 (2) (E) (Q), 3 OF

THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES 2013

BETWEEN

MOHAMMED NOOR HUSSEIN.....PETITIONER

VS

REPUBLIC.....RESPONDENT

R U L I N G

1. The petitioner was arraigned in the Senior Principal Magistrate's Court, Garissa on 21st October, 2003 in **Garissa SPMCr Case No 804 of 2003**, charged with the offence of robbery with violence contrary **to section 296 of the Penal Code**. After trial, he was on 22nd April, 2004 convicted and sentenced to death. He lodged an appeal at the Meru High Court in **HCCRA No.62 of 2004** but the same was summarily dismissed by Emukule J on 12th May, 2008.

2. By his petition lodged in court on 12th October, 2018, the petitioner alleged that; aggrieved by the decision of the High Court rejecting his appeal summarily, he has been unable to appeal to the Court of Appeal for lack of the original record from Garissa. That the said continued lack of original record has led to the infringement of his constitutional rights under **Article 50(2) (q) of the Constitution**. He further alleged that his right to expeditious, efficient, reasonable and fair administrative action under **Article 47 of the Constitution** has been infringed.

3. In the premises, the petitioner has prayed that this court does rehear his case on the issue of sentence only and for a declaration that his right to equal protection and benefit of the law, the right to inherent dignity of human person, the right to freedom from torture and cruel,

inhuman and degrading treatment or punishment, the right to fair trial and access to justice as well as the right to fair administrative action have been infringed.

4. Accompanying the petition was a Motion on Notice seeking orders that the petitioner be resentenced afresh in terms of the now famous **Murutetu Case ie. Consolidated Petition No. 15 and 16 of 2015 Francis Karioko Muruatetu and Another v. Republic.**

5. The respondent opposed the petition through a Preliminary Objection dated 18th December 2018 to the effect that the matter is sub-judice as the Court of Appeal is already seized of the matter.

6. At the hearing, the petitioner submitted that he was convicted in 2004 a decision he appealed against. That he has never been heard since. On his part, Mr. Gitonga for the respondent that since the matter is in the Court of Appeal, it would be a duplicity for the Court to hear this matter.

7. I have considered the entire record. There was no evidence that the petitioner had filed his petition of appeal against the summary dismissal of his appeal in 2008. Indeed, he never even alluded to the fact that he ever gave notice of appeal so that the Court of Appeal could allocate him an appeal number.

8. Further to the foregoing, on record is a skeleton file prepared by the Deputy Registrar of this court. In it, all the proceedings of the trial court are available as well as the order that dismissed the petitioner's appeal to this court. To my mind, all material required are available to enable him lodge a Notice of appeal against the summary dismissal of his appeal by this court.

9. Regarding the original lower court record, the same is said to have been sent back to Garissa Law Courts on 25th April, 2012. There is no evidence to show that the Deputy Registrar of this court has called for the same and the same has not been availed. The last correspondence to that court was in January, 2014.

10. In my view, let the petitioner apply for leave to lodge an appeal out of time. Once an appeal to the Court of Appeal has been lodged, then the issue of the alleged missing court file can be addressed. As of now, my view is that parties are acting on the presumption that there are no records available for purposes of mounting an appeal against the decision sought to be appealed against, which is not the case.

11. In this regard, I am unable to make any orders on the petition as that may prejudice the petitioner in future. The order that commends itself to me is to strike out the petition so that the petitioner may make a similar petition, if necessary, in future if need arise.

Orders accordingly.

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE