



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 16 OF 2018**

**JOHN NJERU IRERI.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner, John Njeru Ireri, through the instant petition seeks resentencing in line with the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**. The Respondent through the Director of Public Prosecutions filed a preliminary objection on 13<sup>th</sup> July, 2018 opposing the application for being premature.
2. When the matter came up for hearing on 27<sup>th</sup> September, 2018, arguments were made on the preliminary objection. Counsel for the Respondent urged the court to find that by virtue of order (c) of the Orders issued by the Supreme Court in **Francis Karioko Muruatetu**, the Petitioner's prayer for sentence rehearing is premature.
3. Opposing the preliminary objection, the Petitioner submitted that in **Michael Kathewa Laichena & another v Republic [2018] eKLR**, this Court (Majanja, J) had resented the petitioners who were in a similar position like him. He also referred this Court to the decision of the Court of Appeal in **William Okungu Kittiny v Republic, Criminal Appeal No. 56 of 2013 (Kisumu)** where the Court had directed the trial court to resentence the appellant.
4. The Petitioner cited other decisions in which the Court of Appeal resented the appellants. The decisions cited are **Mulamba Ali Mabanda v Republic, Criminal Appeal No. 12 of 2013 (Mombasa)** and **Sammy Konde Tuva v Republic, Criminal Appeal No. 25 of 2016**.
5. Another case referred to by the Petitioner is that of **Douglas Muthaura Ntoribi v Republic, Meru Misc. Criminal Appeal No. 4 of 2015**.
6. The Petitioner urges this Court to find the preliminary objection without merit and proceed to resentence him.
7. The question is whether the Petitioner's application for sentence rehearing is premature. In **William Okungu Kittiny** (supra) the appellant's constitutional petition challenging the constitutionality of the death sentence had been dismissed by this Court (Chimitei, J). As his appeal was pending at the Court of Appeal, the Supreme Court pronounced its judgement in the **Francis Karioko Muruatetu** case. Relying on the decision of the Supreme Court, the Court of Appeal remitted the matter to the Chief Magistrate's Court at Kisumu for sentence rehearing and sentencing.
8. In the Petitioner's view, **William Okungu Kittiny's** case was similar to his case. A perusal, of the **William Okungu Kittiny** case will show that the Court of Appeal explained why it had ordered resentencing as follows:

**"[11] Although the appellants' appeal was dismissed by the Court of Appeal on 20<sup>th</sup> June, 2008, which was then the last appellate court, the constitutional petition filed in the High Court revived the case and by the time the Supreme Court rendered its decision, this appeal was still pending.**

**The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."**

[Emphasis supplied].

9. The same logic can be applied to the decision of Chitembwe, J in **Douglas Muthaura Ntoribi** (supra). Both cases were already in the courts conveyor belt by the time the decision in **Francis Karioko Muruatetu** was being made by the Supreme Court.

10. As for the decisions in **Mulamba Ali Mbanda** and **Sammy Konde Tuva**, it is clear that these are matters that were still progressing through the court system when the decision in **Francis Karioko Muruatetu** was made. They are therefore distinguishable from the Petitioner's case.

11. I have perused the decision of Majanja, J in **Michael Katewa Laichena & another** (supra) and I must, with utmost respect to my brother, state that sentence rehearing should await a framework from the Attorney General and his team or further directions from the Supreme Court.

12. Order (c) of the decision in **Francis Karioko Muruatetu** states that:

**“The Attorney General, the Director of Public Prosecutions and any other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.”**

My understanding of the decision of the Supreme Court is that all those who had exhausted the appellate ladder were to await a framework on sentence re-hearing to be prepared by a team led by the Attorney General. The team was given twelve months from the date of judgement to prepare the framework. The Supreme Court made its decision on **14<sup>th</sup> December, 2017** and twelve months have not lapsed from that date.

13. Another issue is whether those who have exhausted the appellate process and wish to be resentenced should move this court by way of constitutional petition or approach the trial court. My concern is that the Petitioner herein has moved this court for resentencing yet he was tried and convicted by a magistrate's court. In **William Okungu Kittiny**, the appellant was sent to the court which had convicted him for sentence re-hearing. In my view these are some of the issues to be addressed by the awaited guidelines and the more reason why those guidelines are necessary before sentence re-hearing can be done.

14. In my view, the Respondent is correct that the instant petition is premature. The Petitioner must wait for the guidelines on sentence re-hearing to be unveiled before he can approach this court for re-sentencing. In the circumstances I find the preliminary objection has merit. I uphold the preliminary objection and dismiss the petition.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of October, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**