



**John & 2 others v State (Constitutional Petition 85 of 2019)  
[2024] KEHC 2559 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CONSTITUTIONAL PETITION 85 OF 2019**

**TA ODERA, J**

**MARCH 7, 2024**

**BETWEEN**

**FRED OSEKO JOHN ..... 1<sup>ST</sup> APPLICANT**

**BEN BICHANGA ..... 2<sup>ND</sup> APPLICANT**

**AMOS BICHANGA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**STATE ..... RESPONDENT**

**RULING**

1. Fred Oseko John, Ben Bichanga and Amos Bichanga the applicants herein were charged with Murder in Kisii High Court Criminal Case No. 31 of 2014. They were convicted and sentenced to death. They were dissatisfied with the said decision of the High Court and they moved the Court of Appeal in criminal appeal no. 127 of 2016 Kisumu. The Appeal was heard and dismissed. The applicants have now moved this court vide the Constitutional Petition No. 85 of 2019 Kisii seeking a declaration that their constitutional rights were violated as the sentence meted out was unlawful. The learned prosecutor did not oppose the same and urged the court to consider the Muruatetu case in determining the application. I have seen the decision of the court appeal in this case i.e;
2. *Bichanga & 3 others v Republic* (Criminal Appeal 127 of 2016) [2022] KECA 1365 (KLR) (2 December 2022) (Judgment) Where the court of appeal held that

“It is trite that sentencing is a judicial function at the discretion of the court per the now notorious decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic & 4 Others* (supra). The Supreme Court brought to light the unconstitutionality of the mandatory nature of the death sentence as it impedes judicial discretion in the determination of sentences. However, it does not prohibit, deter or limit the imposition



of the sentence in deserving cases. And if ever a case deserved the pronouncement of the sentence of death, this one does.

- 3.. The manner in which the crime was committed is a study in rank malice, premeditation and murderous intent. The appellants worked the mob into a frenzy in an orgy of incendiary violence. They violently attacked the hapless duo without a drop of human kindness or pity. They subjected the victims to torturous and traumatic torture. They also repulsed with the thread of violence any attempt by PW3 to rescue the deceased. Such bold and impetuous conduct threatens the very safety of every member of society. They had no regard for the life of the two women whom they made a bonfire of in the helpless presence of their children. Courts of law must never be seen to condone such a descent to Hobbesian chaos.
4. We therefore affirm the death sentence. We direct further that in the event that sentence is by common practice commuted to life imprisonment, the appellants must never be released to blight the safety of the happy and the free. They should be held for the remainder of the natural lives with no possibility of parole.
5. The appeal is devoid of merit and is dismissed in its entirety. Orders accordingly.”

I have also seen the [Re-sentencing Guidelines 2023](#) which provide that the resentencing court is the court which last sentenced the convict. paragraph 4.8.18 of the said guidelines provides that “ Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”

6. It is thus clear to me that this court lacks jurisdiction on the matter as the court of appeal has already declared itself on the same and in case the applicants have any issue with the sentencing they ought to move the same court.
7. The application is struck out for want of jurisdiction.

**T.A ODERA**

**JUDGE**

**MARCH 7, 2024**

Delivered virtually via team’s platform in the presence of;

Applicants in person

Koima for prosecution

Court Assistant – Oigo

