



**Ikol & another v Republic (Miscellaneous Criminal Application
E127 of 2023) [2024] KEHC 10035 (KLR) (8 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPLICATION E127 OF 2023
RN NYAKUNDI, J
AUGUST 8, 2024**

BETWEEN

EKIRU IKOL ALIAS EMGURANGOR APPELLANT

AND

EKIRU NAPETET APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants together with another were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* in High Court Criminal Case No, 2 of 2015 at Lodwar. The accused persons were both found guilty, convicted and sentenced to suffer death by this court.
2. That the Applicants filed a notice of motion seeking the following orders based on the *Constitution* under article 27, 28, 29 & 48:-
 - a. That the petitioners are seeking for sentence review in accordance to article 50(2)(p)(q) of the *Constitution of Kenya* 2010.
 - b. That the applicant be certified urgent and service thereof be dispensed with it to be heard in the first instance.
 - c. That we the petitioners prays for sentence Review under section 50(2)(p)(q) of the C. ok 2010 in reliance to section 213, 216, 329 & 365 of the *CPC*
 - d. We beg to be present during hearing thereof.



3. Dissatisfied with the conviction and sentence, the applicants filed an appeal to the Court of Appeal being Eldoret Criminal Appeal No. 164 of 2017; *Ekiru Ikol alias Emgurangor and Ekure Napetetu -vs- Republic*. In a judgment dated 25th day of June, 2019 the Court of Appeal pronounced itself as follows;
 - (9) In regard to sentence the court was urged to follow the Supreme court's decision in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, set aside the death sentence and order that the Appellant be subjected to a re-sentencing hearing so that their mitigation can be considered
 - (19) Accordingly, we are satisfied that the charge in regard to count 1,2 and 3 were proved against the 1st Appellant to the required standard. As regards the sentence, the appellants advocated made submissions in mitigation for the sentence and the learned judge properly exercised his discretion in sentencing taking into account the circumstances before him. Four lives were lost mercilessly and, in our view, the sentence of death imposed upon each applicant was merited. There is therefore no justification for our intervention.
4. Despite the directions issued by the Court of Appeal, the applicants filed an application before this court for re-sentencing, which application was dismissed by this court. This court stated as follows:

Having had the benefit of the Muruatetu case considered before the Court of Appeal as regards the sentence passed against the Applicants and being alive to the Court of Appeal's finding that four people lost their lives as a result of the actions of the Applicants, I hereby find and hold that the Application herein lacked merit and is hereby dismissed.
5. This court presided over by Justice Wakiaga further noted that the applicants are no longer serving death sentence, the same having been committed to life imprisonment, which is not what the Court of Appeal had confirmed and grounded the doctrine of stare decisis and this court was of the view that any other sentence given by this court would amount to revision of the court of Appeals decision on sentence having taken into account the Muruatetu case.
6. The applicant, Ekiru Ikol Engurangor has filed yet another application for sentence review and that he may benefit from section 333(2).
7. This court heard the applicant's application on resentencing, which application was dismissed by this court for lack of merit. This court cannot again consider a similar application and much more, a review of the Court of Appeal's decision.
8. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of the thumb that superior courts cannot sit in review/ appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves. The only time that this court can review a sentence imposed upon by a court is where such sentence was imposed by a subordinate court (as per section 362 of the *Criminal Procedure Code*)
9. In *Samuel Kamau Macharia & another v KCB & 2 others* App. No. 2/2011, the Supreme Court of Kenya made it clear that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that a court cannot expand its jurisdiction through judicial craft. And as it is trite, a court of law ought to down its tools in respect of the matter when it holds the opinion that it is without jurisdiction.
10. In the circumstances of this case, the applicant is clearly engaging in abuse of the court process. Consequently, the Applicant cannot approach the High Court again for a review of the sentence,



which has already been reviewed by this court. His only recourse is to file an appeal to the Supreme Court, having lost at the Court of Appeal. The Provisions under Article 50 (6) (a) & (b) are very fundamental to the smooth operation of the justice machinery. In this note I present the criteria applicable to demonstrate what constitutes new and compelling evidence. In *Tom Marins Kibisu - vs- Republic*, supreme court Petition No. 3 of 2014 (eKLR), the learned judges of appeal 3expressed themselves as follows:

- (a) “ Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a atrial entails a res-constitution of the High Court forum, to admit the charges and conduct a re-hearing based on the new evidence, the window of opportunity for such a new trial I subject to two conditions. (ephasis mine) First a person must have exhausted the course of appeal to the highest court with jurisdiction to try the matter. Secondly, there must be “new and compelling evidence.”
- (b) We are in agreement with the court of Appeal that under Article 50(6) “new evidence” means” evidence which was not available at the time trial and which despite exercise of due diligence could not have been availed at the trial. And “compelling evidence” implies “evidence that would have been admissible at the trial of high probative value and capable of belief and which if adduced at the trial would probably have led to a different verdict. A court considering whether evidence is new and compelling for a given case, must ascertain that it is prima facie material to or capable of effecting or varying the subject charges, the criminal trial process, the conviction entered or the sentence passed against an accused person.

11. In the end, the Application filed on July 1, 2023 lacks merit and is hereby dismissed.

12. Orders accordingly

DATED AND SIGNED AT LODWAR THIS 8TH DAY OF AUGUST, 2024

IN THE PRESENCE OF

MR. KAKOI FOR THE STATE

R. NYAKUNDI

JUDGE

