



**Ndungu & another v Republic (Miscellaneous Criminal Application
E192 & 193 of 2021 (Consolidated)) [2023] KEHC 857 (KLR) (4 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E192 & 193 OF 2021 (CONSOLIDATED)**

GL NZIOKA, J

JANUARY 4, 2023

BETWEEN

SIMON WAMBUGU NDUNGU 1ST APPLICANT

FRANCIS MAINA MACHARIA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants filed two similar chamber summons applications on the November 30, 2011 seeking for review of the sentence meted out against them *vide* Criminal Case No 512 of 2017, at the Chief Magistrate's Court at Naivasha.
2. The applicants were arraigned before the Chief Magistrate's Court charged in two (2) counts with of the offences of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#). The applicant was charged with a further offence in the 3rd count the offence of sexual assault contrary to section 5(1)(a)(i)(2) of the [Sexual Offences Act](#). The applicants were subsequently convicted with robbery with violence and sentenced to suffer death.
3. The applicants argue that the mandatory death sentence deprive the court legitimate jurisdiction to exercise discretion during sentencing and renders mitigation under section 216 of the [Criminal Procedure Code](#) ineffective. As such, the court be pleased to revise the sentence, and take into account the provisions of section 333(2) of the [Criminal Procedure Code](#).
4. The applications were served but no response was filed. However, I note from the materials placed before the court that, subsequent to the decision of the trial court, the applicants appealed against the decision *vide* High Court criminal appeal No 37 and 38 of 2019, but the appeals were dismissed in their entirety (December 16, 2020). The 1st applicant then moved to the Court of Appeal, but, according to him, he withdrew the appeal.



5. In my considered opinion, this court once heard the appeal in this matter and rendered a final decision, this court became *functus officio*. The principle of *functus officio* is a latin expression that translates to; “having performed the function of his or her office, the decision maker has no power to re-open the matter”
6. In that regard even plea to review the sentence herein based on the provision of section 333 (2) of the [Criminal Procedure Code](#) is not tenable, Therefore I strike out the application herein accordingly for want of jurisdiction and/or for being an abuse of the court process.
7. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 4TH DAY OF JANUARY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr. Ndiema for the Respondent

Ms. Ogutu Court Assistant

