



**Mwita & another v Republic (Petition E009 & E017 of 2022
(Consolidated)) [2023] KEHC 2035 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION E009 & E017 OF 2022 (CONSOLIDATED)**

RPV WENDOH, J

MARCH 9, 2023

BETWEEN

ROSELYNE ROBI MWITA 1ST APPLICANT

JOSEPH MANYAKI MWITA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

- 1 Roselyne Robi Mwita and Joseph Manyaki Mwita (Petitioners) were convicted for the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#) by Justice Majanja on October 22, 2015. They were sentenced to death.
- 2 The petitioners appealed to the Court of Appeal Kisumu vide Criminal Appeal No 7 of 2016. The appeal was heard by J Asike Makhandia, J Kiage and J Odek and dismissed and the said court affirmed the death sentence on 3/7/2020.
- 3 The petitioners have now moved this court by this petition under Articles 25, 27(1)(2), 28, 50(2) alleging violation of their constitutional rights and specifically relied on the famous Supreme Court case of Muruatetu where the court pronounced the mandatory 'death sentence to be unconstitutional. The petitions E09 of 2022 and E017 of 2022 were consolidated to proceed as E009 of 2022.
- 4 The Office of Director of Public Prosecution (ODPP) filed a notice of Preliminary Objection to the petitions on the following grounds:-
 1. That this court lacks jurisdiction to entertain the Notice of Motion and Petition.
 2. That this court is funtucs officio.
 3. That the petition is against the doctrine of Res judicata.



4. That the petition is bad in law and vexatious.
- 5 The prosecution counsel Mr. Mulama filed written submission through which he addressed the grounds of objection.
- 6 In the submissions filed by Roselyne Mwita, she referred to some cases where the High Court applied the Muruatetu case ie. Petition No 47 of 2020 [*William Obonda Ocbola v Republic*](#) 45 of 2020 [*Kenneth Opiyo Gilo v Republic*](#). The other submissions are mere mitigating factors that the court should consider and interfere with the sentence i.e, her age, the fact that she is remorseful, has children and the time spent in remand.
- 7 The second Petitioner Joseph Manyaki did not file any submissions.
- 8 Mr. Mulama, in opposing the petition urged that this court lacks jurisdiction to entertain the petitions and that without jurisdiction which flows from [*the Constitution*](#) or other written law, this court cannot handle these proceedings. Counsel relied on the decision of [*Samuel Kamau Macharia & Another v KCB Ltd*](#) (2012) eKLR where the court confirmed the fact that a court’s jurisdiction flows, from [*the Constitution*](#) or Legislation i.e. Article 165 (3) (a)(b) of [*the Constitution*](#) and Section 3 of the [*Judicature Act*](#).
- 9 Counsel went on to argue that this court is Functus Officio the issues raised because this matter was heard by the High Court and later an appeal preferred to the Court of Appeal and the only forum available to the petitioners is appeal to the Apex court. Counsel relied on the decision of [*Jane Nambuye Manyonge v Republic*](#) (2021) eKLR where the High Court dismissed a similar matter. Counsel also relied on the case of [*Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai*](#) (2007) eKLR where the court explained that the doctrine of *functus officio* is to enable courts to bring litigation to an end, regardless of what the parties think.
- 10 Counsel also argued that the petitions are res judicata which is another common law principle enacted in the Civil Procedure Code which seeks to bring matters to finality where the same parties have litigated over same issue, and a final determination made. Counsel cited the case of [*John Florence Maritime Services Ltd & Another v Cabinet Secretary for transport and Infrastructure & 3 Others*](#) (2021) eKLR where the Court of Appeal held that the doctrine of Res judicate is applicable to Constitutional petitions.
- 11 Counsel submitted that the grounds raised herein were considered by the other courts; that the Court of Appeal in affirming the sentence said that the manner in which the murder was committed was deserving of a death sentence and hence the constitutionality of the death sentence cannot arise. Counsel urged the court to dismiss the petitions.
- 12 The petitioners invoked the following provisions of [*the Constitution*](#); Article 25 which provides for fundamental rights and freedoms that may not be limited. The petitioners did not however plead with specificity how the said rights under the said Article 27 were breached. Article provides for equality and freedom from discrimination. Article 27 (1) (2) that was referred to does not exist. Article 28 provides that every person has inherent dignity and right to have their dignity respected and protected. The petitioners did not plead or explain how their dignity had been lowered because of the conviction and sentence. Article 50 (2)(p) provides for fair trial before a court of law and that a person is entitled to benefit from the least severe of the prescribed punishments of an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time for sentencing.



- 13 By the above provision, the petitioners are seeking to benefit from the Supreme Court decision in the Muruatetu case.
- 14 The first question that I need to deal with is whether this court has jurisdiction to hear this petition. Jurisdiction in law is the authority of a court to hear and determine cases. The court draws its jurisdiction from *the Constitution* or Legislation. The court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited* (supra) observed as follows:-
- 15 A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issues as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in , in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
- 16 Also see *Owners of Motor Vessel “Lilians” v Caltex Oil (K) Ltd* (1989) KLR, without jurisdiction, this court should not make another move.
- 17 Firstly, I observe that the petitioners appealed the judgment of J. Majanja. In that appeal they should have included all the grounds of appeal they intended to raise. Having gone to the Court of Appeal, a Court of higher jurisdiction than this court, this court has no jurisdiction to touch a matter already determined by the Court of Appeal. The petitioner’s recourse should have been to the Supreme Court.
- 18 The first trial in this matter was conducted by a court of concurrent jurisdiction i.e J. Majanja. This court cannot go to undo what that court finalized. This court is *Functus Officio*. I do agree with the Respondents submissions on this issue. The term *Functus officio* was aptly defined in Jane Nambuye case (supra) where the Court held:
- 19 The moment the matter was heard and determined by the High Court, the court became *functus officio*. The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. That once such a decision has been given, it is subject to any right of appeal to a superior body or functionary) final and conclusive, as stated in the “Application in Administrative Law,” (2005) 122 SALJ 832.”
- 20 See also Jasbir case. The Forum available to the petitioners would have been Apex Court.
- 21 As to whether the matter is *Res judicata*; this is a constitutional Petition. The principle of *Res judicata* is provided for under Section 7 of the Civil Procedure Code. I agree with the decision in John Florence case supra, that *res judicata* is applicable to Constitutional Petitions. *Res judicata* prevents causes of action or issues already litigated upon between the same parties or their representatives from being relitigated. In this case, the main ground relied upon is the supreme court decision of Muruatetu where the Court found the ‘mandatory’ death sentence in murder cases to be unconstitutional. That court did not however outlaw the death sentence. The High court has the discretion to sentence one to death for murder if the circumstances allow.



22 The Court of Appeal did consider whether or not to interfere with J. Majanja’s decision on sentence and found the sentence was proper. The court said at paragraph 30;

On sentence, the trial court sentenced the appellants to death. We are cognizant of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR where it was held that the mandatory nature of the death sentence is unconstitutional. We have considered the mitigation on record.

23. The offence was committed in a gruesome, callous and heart wrenching manner. It was a total repudiation of marital and familial care. It was committed by a mother (1st appellant) in the presence of her daughter (PW1). We cannot fathom what permanent psychological trauma and damage has been caused to the daughter as she witnessed the death of her loving father by the dastardly and unbundled violence of her mother. After killing the deceased, the appellants hang his body on a tree to give the impression of suicide. Dragging a body and hanging it on a tree was grossly inhuman and degrading. The conduct of the appellants in concocting the theory of suicide is abhorrent. One of the goals of sentencing is retribution. It is stated an eye for eye and a tooth for a tooth. We state blood for blood. This is one case in which we find no good reason to interfere with the death sentence meted out upon the appellants. We uphold the conviction of the appellants for the offence of murder. We affirm and uphold the death sentence imposed on the appellants as well. It is the ultimate temporal sentence that can be imposed on them deserving though they are of something worse.”

24 Clearly, the Court of Appeal dealt with the application of Muruatetu case. It cannot be revisited. What the petitioners are doing is trying to have a second bite at the cherry which is an abuse of the Court process and are vexatious. If they wish to continue litigating, they can only go higher, to the Supreme Court. In the end, the petition is dismissed and I hope the petitioners have heard this court loud and clear as to what their recourse is.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 9TH DAY OF MARCH, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of:

Present Petitioners - virtually

Mr. Owuor for the Republic

Ms. Nyauke court assistant

