



**Nyanje & 2 others v Republic (Miscellaneous Criminal Application 28 of 2015 & Criminal Petition 09, 23 & 52 of 2018 & Criminal Miscellaneous Application 60 of 2016 (Consolidated)) [2023] KEHC 1763 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1763 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KAKAMEGA**  
**MISCELLANEOUS CRIMINAL APPLICATION 28 OF 2015**  
**& CRIMINAL PETITION 09, 23 & 52 OF 2018 & CRIMINAL**  
**MISCELLANEOUS APPLICATION 60 OF 2016 (CONSOLIDATED)**

**PJO OTIENO, J**

**MARCH 10, 2023**

**BETWEEN**

**FREDRICK NYANJE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH**  
**CRIMINAL PETITION 09 OF 2018**

**BETWEEN**

**WYCLIFFE OKELLO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH**  
**CRIMINAL PETITION 23 OF 2018**

**BETWEEN**

**WYCLIFFE OKELLO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**



**AS CONSOLIDATED WITH  
CRIMINAL PETITION 52 OF 2018**

**BETWEEN**

**FREDRICK NYANJE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL MISCELLANEOUS APPLICATION 60 OF 2016**

**BETWEEN**

**DAVID ONYANGO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioners herein, Wycliffe Okello, Fredrick Nyanje and David OnyangO, were jointly charged with others, before the Magistrate’s Court at Mumias with the offence of robbery with violence. The five were tried and convicted as charged on April 20, 2005.
2. All felt aggrieved by the conviction and sentence and therefore filed Kakamega HCCR. Appeals No 36-41 all of 2005. The appeals by the three Petitioners seems to have been dealt with by different benches but with the same outcome that all were dismissed. Wycliffe Okello then lodged CA.CR. Appeal No 2018 of 2009 which was never heard because the original trial Court records and the records of the appeal to the High Court could not be traced. Fredrick Nyanje also says that his appeal to the Court of Appeal cannot be heard owing to unavailability of the records of the trial Court and High Court on appeal. He however does not disclose the number of the Appeal to the Court of Appeal. David Ochieng also alleges to have filed CA.CR.A No. 218 of 2009 which was stalled due to unavailability of the records of the two Courts below.
3. Before the Court and subject to this determination are five matters as shown in the title above.
4. The applications and petitions aggregate to five but the Applicants are three seeking different and varied orders whose effect however is one; the upsetting of the conviction in whole, for Miscellaneous Application No. 60 of 2016, No. 28 of 2015 and Petition No. 23 of 2018 while Petition Number 52 of 2018, seek either retrial or resentencing with Petition umber 09 of 2018 limiting its prayer to resentencing.
5. All however, cite the decision in *Muruatetu -vs- Republic* [2017] eKLR and violation of right to fair trial as the foundation. That foundation is itself built on the allegations that the three are unable to have their appeal to the Court of Appeal heard for lack of records of the two Courts below.



6. When the matter came up for mention on November 16, 2022 the three Applicants attended Court accompanied by one Samuel Ochieng Daddi who sought time of two days to file his application for resentencing. He once again attended Court on December 15, 2022 and requested for time to file Submissions. On that day even the prosecution sought to file Submissions having been served by Submissions on behalf of Wycliffe Okello filed by the firm of Malala & Co. Advocates. As at 5.40 p.m. on March 9, 2023 as I sit in Chambers preparing this determination, there is no copy of any application or submissions by Samuel Ochieng Daddi just like the Prosecutor has also not filed Submissions. The record only bears the submissions filed by Fredrick Nyanje on March 21, 2022 and those on behalf of Wycliffe Okello.
7. I have had the benefit of reading those Submissions as well as the record of the Petitions and applications filed. Three issues isolate for determination:-
  1. Whether this Court has the jurisdiction to reverse a conviction of the lower Court in a Miscellaneous application subsequent to an unsuccessful appeal?
  2. Whether this Court has the jurisdiction to declare the failure of the Court of Appeal to hear and determine appeals filed before that Court as a contravention of right to access justice?
  3. Whether on the facts presented the threshold for resentencing under the Muruatetu principles has been met?
8. The established position of the law is that a trial Court's determination is only capable of disturbance by this Court by way of a revision, where no appeal lies or where none is preferred; and short of that by an appeal.
9. In this matter, it is common place that appeals were preferred to the High Court, were urged and determined on the merits by dismissal. Once that event took place, the Petitioners only avenue was an appeal to the Court of Appeal as they say, they did. Once they exercised that election no recourse is available before this Court; not by revision or resentencing as is attempted here. To this Court, failure to have the appeal before the Court of Appeal finalized in time or in accordance within the time the Petitioners consider reasonable is a matter that must be addressed and resolved before this Court.
10. That articles 23, 165(3), 159(2) and 163(7), worded as they are, are no prohibitions for such matters of denial of rights to be addressed before the Court were the alleged violation takes place. There is no exclusive jurisdiction in the High Court on the interpretation and enforcement of the Constitutional principles and values in that every Court, including the Magistracy have the duty and obligation, as an agency of the State, to respect, uphold and defend the Constitution. It is therefore the determination of this Court that the request to upset the conviction of the Appellant, whose consequence would be to equally reverse the decisions of the High Court in Criminal Appeals No. 36-41 of 2005 is untenable and incapable of grant. It is equally the finding of the Court that this Court cannot purport to supervise the Court of Appeal under the guise of alleged violation of rights. In any event the decision in Muruatetu's case guides that where there is an appeal pending it must be left to be determined or the appellant chooses to withdraw it.
11. That leaves the Court with the last issue, whether the threshold for resentencing have been met. A reading of the decision of Muruatetu's case, reveal the overriding consideration to be that an Applicant must have exhausted all avenues and rights of appeal before seeking resentencing.
12. In this matter, when it is alleged, and not contested, that there is an appeal or appeals stalled before the Court of Appeal, it is the Court's finding that the Petitioners are yet to exhaust their appellate avenues in full. Their rights to seek resentencing has not accrued. They must choose to either do with what will



enable the appeals be heard or just withdraw them all together in line with *Muruatetu –vs- Republic* [2021] eKLR where the Court said:-

“Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.”

13. More compelling is the fact that the apex Court did revisit its Judgment and issued the directions dated June 6, 2021 to unequivocal guide and reiterate that the Judgment only related to the issue in the appeal and did not affect or apply to other offences attracting death penalties. The Court said at paragraph 15:-

“ 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

14. That decision binds the Court and can never be sidestepped. It is the finding of the Court that there is no jurisdiction upon this Court to purport to engage in resentence hearing where the Petitioner was charged and convicted of the offence of robbery with violence.

15. In conclusion, the Court finds that all the matters subject to this ruling are bereft of merits. The same are hereby dismissed. Let the files be closed forthwith.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 10<sup>TH</sup> DAY OF MARCH 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Ms. Mburu for the Applicant

Ms. Chala for the Respondent

Court Assistant: Polycap

