



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICATION CASE 90 OF 2019

DANIEL NJOROGE KIMOTHO AND 4 OTHERS...APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The 5 applicants **ANN WAITHERA MACHARIA, RUTH WANJIRU MAINA, DANIEL NJOROGE KIMOTHO, JOSEPH KINYURU KIRIMBI**, and **ELIUD KIMANI MWAI** have separately moved this court by way of chamber summons applications filed on various dates. The applicants were filed as miscellaneous criminal application numbers 151/2019, 150/2019, 90/2019, 120/2019 and 91/2019, respectively. The cases of the 5 applicants being one, these applicants have been heard jointly in file number, misc. cr. No. 90/2019, Daniel Njoroge Kimotho Versus Republic.

The applicants of the 5 applicants prayed for resentencing so as to conform with the directions of the Supreme Court in Petition No. 15 of 2015, Francis Karioko Muruatetu and Another Versus Republic.

Following pleas by the applicants, the court ordered that the applicants file submissions in support of their applicants. 3 of the applicants duly complied and filed their submissions, **Joseph Kinyuru Kirimbi, Daniel Njoroge Kimotho**, and **Eliud Kimani Mwai**. In the said submissions, the applicants have raised varied mitigations and pleaded to be re-sentenced.

The prosecution has objected to these applications basically that this court lacks jurisdiction to entertain these applications as the matters raised therein had been dealt with finality by the Court of Appeal in ***Ann Waithera Macharia and 5 others Versus republic (2019)eKLR***.

I have considered the applications of the applicants and the objection raised by the prosecution to the same. I have also carefully considered the decision of the Court of Appeal in the above appeal filed thereat by the applicants. The appeal was filed as criminal appeal No. 178 of 2016, and reported in (2019)eKLR. To be specific to the relevant issues raised in these applicants, the Court of Appeal (**Justices Waki, Nambuye and Kiage**) held as follows amongst others;

- i. **“We are now guided by the Supreme Court’s decision in Francis Karioko Muruatetu Versus Republic (2017)eKLR, that mandatory death sentence is unconstitutional. That is not to say that there are no instances when the sentence is merited.”**
- ii. **“Because the full mitigations is on record, we do not accede to the request that the file be remitted to the High Court for a sentence rehearing.**
- iii. **“Unless the Courts stand firmly against offences such as has happened herein, they will be contributing to the descent of humanity into the dark pit of hellish degradation.”**
- iv. **“It is for such cold hearted killers that the penalty of death was legislated and for who the courts must declare it. The same was properly imposed and we have no reason to disturb it. We confirm and uphold it.”**

The said Judgement of the Court of Appeal was delivered on 8.2.2019, way after the Supreme Court decision in the Muruatetu case. In the said Judgment, the Court of Appeal, while dismissing the appeal of the applicants, and confirming the death sentence of the High Court, clearly noted that it was keenly aware of the jurisprudence out of the Muruatetu case. The Court of Appeal went further to reject the request of the appellants (Applicants) to have their case remitted back to the High Court for sentence rehearing.

It is for these reasons that I find in favour of the Respondent that this court lacks the jurisdiction to issue the orders prayed for in these application. The fact that the Court of Appeal dealt with finality all the issues or prayers sought in these application, makes these applications

of the applicants' incompetent as much as they are also an abuse of the process of this court. I accordingly wholly dismiss these applications (Nos 1512/2019, 150/2019, 90/2019, 120/2019 and 91/2019). Orders accordingly

D. O. OGEMBO

JUDGE

8.2.2022.

Court:

Ruling read out (on-line) in presence of all the 5 applicants and Ms. Akunja for the state.

D. O. OGEMBO

JUDGE

8.2.2022