

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

PETITION NO. 61 OF 2018

(From original conviction and sentence in Criminal Case No. 62 of 2011 Kitala High Court)

REUBEN MULONGO NYONGESA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant **Reuben Mulongo Nyongesa**, was convicted of the charge of **Murder contrary to Section 203 as read with Section 204** of the **Penal Code**. The court found as a fact that the Applicant had on the night of 5th December, 2011 at Mbai Farm, Kiminini Village in Trans Nzoia County killed **Peter Kiprotich** with malice aforethought. From the evidence adduced, it was apparent that the motive the crime was robbery. Some of the items robbed from the deceased's house were found in the Applicant's possession. The Applicant was sentenced to death. The sentence was however commuted to life imprisonment by presidential exercise of the Power of Mercy.

The Applicant has applied to this court for resentencing pursuant to the Supreme Court's decision of **Francis Karioko Muruatetu & Another Vs Republic [2017] eKLR** which outlawed mandatory death sentences. The Supreme Court held that the mandatory death sentences deprived the convict an opportunity to mitigate the sentence. It further deprived the sentencing court discretion to mete out appropriate sentences in the circumstances of each case.

During the hearing of the application, the Applicant conceded that he has a pending Appeal before the Court of Appeal. The Appeal is yet to be heard and determined. Mr Omooria for the Prosecution urged the court to disallow the application since the Applicant had not exhausted his appeals.

This court agrees that when an Applicant has a pending appeal, he cannot apply to this court to be resentenced. The reason for this is straightforward; Resentencing is available those convicts who no longer challenge their conviction or where the final court has found as a fact that the Applicant committed the offence. In the present application, the Applicant still does not admit that he committed the offence. He cannot therefore mitigate on a conviction that he is challenging. The decision in **Francis Karioko Muruatetu** (Supra) is clear; An opportunity is given to those convicts who have exhausted their appeals and therefore the only avenue available to them is through an application for resentencing where they will be given an opportunity to mitigate their sentence.

That being the case here, the Application herein was prematurely brought to this court. This court lacks jurisdiction to entertain the same when there is a pending Appeal before the Court of Appeal. The application is therefore dismissed.

DATED AT KITALE THIS 10TH DAY OF MAY 2021

L. KIMARU

JUDGE