

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 78 OF 2019

BENSON MANDILI MASHEMO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The application herein, the undated Motion filed herein on 30th September 2019, principally rides on the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the petitioner seeks review of his sentence, where he had been convicted of robbery with violence, under section 296(2) of the Penal Code, Cap 63, Laws of Kenya, in Butere SRMCCRC No. 292 of 2010, and was sentenced to death. He filed appeal in Kakamega HCCRA No. 157 of 2010 and Kisumu CACRA No. 77 of 2014, where both appellate courts affirmed the conviction in Butere SRMCCRC No. 292 of 2010, and confirmed the sentence.

3. The offence, the subject of the instant proceedings, is not murder, but robbery with violence, as defined in section 296(2) of the Penal Code, the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, does not apply to it. As a consequence, the High Court has no jurisdiction to review the sentence that was imposed by the trial court, based on the decision in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ). Since there is no jurisdiction on my part to entertain the application, I shall strike it out, for it is incompetent. The said file shall be closed.

4. The Deputy Registrar shall cause copies of this ruling to be availed to the petitioner and the office of Director of Public Prosecutions, Kakamega.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE