

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E007 OF 2021

MARTIN KWAERA.....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 Motion dated 4th January 2021, does not appear to be based on *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ). The applicant had lodged an appeal against his conviction by the trial court, in Kakamega HCCRA No. 100 of 2009. It would appear that the appeal was dismissed.

3. What he seeks by the undated Motion, but filed herein on 6th January 2021, is for an order that his sentence ought to run from the date of his arrest. The applicant had an opportunity to appeal. The issue he raises now ought to have been placed before the appellate court for consideration. He is in effect asking this court to hear him a second time on issues he should have canvassed during the hearing of his appeal. It is what taking a second bite at the cherry is about. That is not available now. I have no jurisdiction to sit on the matter for a second time. The file to be closed.

4. The Deputy Registrar to cause copies of this ruling to be availed to the applicant and the office of the Director of Public Prosecutions.

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

W MUSYOKA

JUDGE