

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 41 OF 2019

PATRICK ASATSA.....PETITIONER

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 petition herein, undated, but filed herein on 1st April 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 applicant seeks review of his sentence, where he had been convicted of murder, under section 203 and 204 of the Penal Code, in Kakamega HCCRC No. 46 of 2008, and was sentenced to twenty years imprisonment, even though the law provided for mandatory death, with the court saying that the Court of Appeal had held that the death sentence was inhuman and degrading. That was in 2013, before *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ). He filed an appeal in Kisumu CACRA No. 5 of 2013, the outcome of the appeal is unclear from the record before me.

3. The offence, the subject of the instant proceedings, is murder, and the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, applies to it. However, although the decision was pre-*Francis Karioko Muruatetu & another vs. Republic*; [2017] (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Ibrahim, Wanjala, Njoki & Lenaola SSJJ), the trial court applied the principles stated in *Francis Karioko Muruatetu & another vs. Republic*; [2017] ((Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Ibrahim, Wanjala, Njoki & Lenaola SSJJ) in imposing the sentence of twenty years imprisonment instead of mandatory death. If the petitioner was dissatisfied with the sentence imposed, he should have canvassed the issue on appeal in Kisumu CACRA No. 5 of 2013. The High Court is *functus officio* so far as the issue of sentence is concerned. I have no jurisdiction on my part to entertain the petition as a result, I shall strike it out, for it is incompetent. The said file shall be closed.

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

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

W MUSYOKA

JUDGE