

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 93 OF 2019

SAMUEL MALOVA OBUYA.....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 Motion herein, undated, but filed herein on 22nd November 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 in Kakamega HCCRC No. 38 of 2006, of murder contrary to sections 203 and 204 of the Penal Code. He lodged appeal in Kisumu CACRA No. 138 of 2016, which he avers to be still pending, and, therefore, he has not exhausted his appeals.

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. The High Court does have jurisdiction to review the sentence that was imposed by it, 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). However, the appeal against the conviction is still pending at the Court of Appeal, where the issue of review of sentence can quite properly be canvassed and addressed. The higher court is seized of the matter and the applicant ought to pursue that option to its logical conclusion. It is not open to the applicant to seek both options, for there is risk that the two courts could come to conflicting determinations. The Court of Appeal got seized of the matter earlier and I should leave it to the Court of Appeal to deal with it, should the applicant be wise enough to urge it there. The current proceedings were, therefore, initiated in abuse of court process and should be struck out, and I hereby do the same. The file shall be closed.

4. The Deputy Registrar shall cause copies 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 15TH DAY OF NOVEMBER, 2021

W MUSYOKA

JUDGE