



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**CRIMINAL REVISION NO. 31 OF 2019**

**MUTINDA NDUNDA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant herein filed a Notice of Motion filed in court on 18/10/2019 in which he sought principally for a rehearing of the sentence imposed upon him by Hon. Kisiangani (R.M) on 3/10/2015 pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR**.

2. Parties took directions to the effect that the said application be disposed of by way of written submissions. However, a perusal of the submission from both sides indicates that the parties had converted the Revision into an appeal. Indeed, the Applicant vide his handwritten submissions presented five (5) supplementary grounds of appeal and which clearly suggested that the Applicant is appealing against both conviction and sentence. Learned counsel for the Respondent appears to be reading from the same script with the Applicant since he has filed his submissions mostly dealing with the aspect of the conviction.

3. It is also noted that the Deputy Registrar has already availed the lower court record and is yet to organize for the admission of the Appeal once the Applicant files the requisite Memorandum of Appeal upon being allowed by the court to do so out of time. As at present no appeal has been preferred by the appellant and hence the submissions dwelling on both conviction and sentence on an assumed appeal which is not in existence appears to be misplaced in my view.

4. It would appear to me that the submissions filed herein and exchanged by the parties relate to an appeal which is yet to be filed. The said submissions are therefore misplaced as far as the revision sought by the Applicant is concerned. If I can read the minds of the parties herein, it is clear that according to them they are canvassing an appeal and not a revision as earlier on intimated by the Applicant. Due to this confusion, it is imperative that the Applicant clearly makes an election as to whether he shall be proceeding with the revision or an appeal once the same is admitted upon receipt of his Memorandum of Appeal out of time.

5. In view of the foregoing observations, I proceed to make the following directions namely:-

***(a) The Applicant is hereby directed to indicate to the court whether he will be prosecuting the review application or he is abandoning the same and instead pursue an appeal.***

***(b) If the Applicant elects to pursue an appeal, leave is hereby granted to him to file and serve a Memorandum of Appeal out of time within the next 7 days.***

***(c) Upon the filing of the Memorandum of Appeal by the Applicant, the Deputy Registrar to proceed to admit the appeal.***

***(d) Upon the filing of a Memorandum of Appeal out of time by the Applicant, the revision herein shall be marked as withdrawn by the Applicant.***

***(e) Mention on 21/10/2010 for further directions.***

It is so ordered.

**Dated and delivered at Machakos this 12<sup>th</sup> day of October, 2020.**

**D. K. Kemei**

**Judge**