



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL MISC. APPLICATION NO. 51 OF 2018

MATHEW MAKAU MUNYITHYA.....1ST APPLICANT

SALIM NGUTHU MULWA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. On the 11th day of **January, 2017** the Applicants herein were found guilty of the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.
2. Aggrieved, they exercised their right of Appeal and the matter is pending hearing.
3. On the 30th day of **July, 2018** the Applicants approached this Court by way of Chamber Summons seeking re-sentencing. The Application is supported by an affidavit deposed jointly by both Applicants where they deposed that: They are Appellants in the Court of Appeal, a matter that is pending hearing and determination; they were convicted of murder and sentenced to suffer death; the Application is solely based on the decision of **SC Petition No. 15 of 2015, Francis Karioko Muruatetu & Wilson Thirimbi Mwangi**, seeking exercise of judicial authority on the matter pursuant to **Article 165(3)(a)** of the **Constitution** therefore this Court has jurisdiction to determine and impose an appropriate sentence.
4. The State did not file any response to the Application. The Applicants canvassed the Application by way of written submissions where they urged that they did not deny the fact of death having occurred but invited the Court to consider the events that led to the death of the Deceased as the death was not premeditated but accidental majorly by mob justice.
5. Further they urged the Court to reach a finding that the offence was not murder but manslaughter and invoke powers conferred upon it by **Section 179** of the **Criminal Procedure Code** and also take into consideration the provisions of **Section 333(2)** of the **Criminal Procedure Code** by considering the time they spent in remand custody and the fact of having been first offenders.
6. In mitigation they beseeched the Court to find that the decision in the matter of **Francis Karioko Muruatetu & Another; Petition No. 15 & 16 of 2015** was applicable in this matter and also consider the fact that the Applicants have reformed after acquiring knowledge in alternative to violence, restorative justice and theology.
7. As correctly put, the Applicants herein instructed the firm of **M. M. Kimuli & Co. Advocates** who filed a Notice of Appeal dated 25th day of **January, 2017** pursuant to the provision of **Rule 59** of the **Court of Appeal Rules, 2010**. This was as a result of being aggrieved by the decision of this Court.
8. In the case of **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR** the Supreme Court found that the mandatory nature of the death sentence as provided for under **Section 204** of the **Penal Code** was unconstitutional. Consequently, the matter as remitted to the High Court for re-hearing on sentence. Therefore, this Court has the jurisdiction of re-hearing the Applicant on sentence.
9. However, the peculiar nature of the instant matter is that the Applicants are not only seeking re-hearing in respect of the sentence imposed but they fault this Court for reaching a decision other than what they (Applicants) expected. They are of the view that I fell into error by reaching a decision to convict them for murder instead of reaching a finding that the Deceased was killed by a disorderly crowd of people that had gathered. And, further, that I should have acted pursuant to **Section 179** of the **Criminal Procedure Code** and reduced the charge to a minor cognate offence of manslaughter.

10. These issues raised by the Applicants can only be addressed by the Court of Appeal which handles appeals arising over decisions of the High Court, a Court to whose jurisdiction the Applicants have subjected themselves to.

11. In the premises I decline to grant the orders sought. The Applicants shall await the decision of the Court of Appeal.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of March, 2019.

L. N. MUTENDE

JUDGE