



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**PETITION NO. 15 OF 2019**

**BENRODGERS MUTUI KIILU.....1<sup>ST</sup> PETITIONER**

**FRANCIS KINYUA IRERI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling is for the undated petition filed on the 31<sup>st</sup> May 2019 in which the petitioner seeks for resentencing in light of the Supreme Court in the case of **Francis Karioko Muruatetu and Another v R. [2017] eKLR** that made the death sentence unconstitutional.
2. The petitioners were charged, convicted and sentenced to death for the offence of robbery with violence in Embu CM Criminal Case 1429 of 2006. It is the applicant's case that the findings of the Supreme Court in the case of **Francis Karioko Muruatetu and Another v R. [2017] eKLR** made the mandatory nature of death sentence unconstitutional and thus this court ought to resentence them.
3. In mitigation, the 1<sup>st</sup> petitioner submitted he was arrested 13 years ago at the age of 29 years and has since been engaged various vocational trainings namely; alternative to violence and bible courses which he has gained certificates and should be granted a second chance in life. The 2<sup>nd</sup> petitioner similarly submitted the same in mitigation.
4. The respondent opposed the petition on the grounds that it is res judicata the same issues having been raised in Criminal Application No. 39 of 2018 and if the petitioners were not satisfied they ought to appeal the same.

**Analysis of Law & Issues**

5. The prosecution contention that this petition is *res judicata* ought to be addressed first. The principle of *res judicata* revolves around the fact that where a suit with similar issues and between the same parties has been decided by a court of competent jurisdiction cannot be entertained by the court again.
6. I have perused the records in the court registry regarding the two petitioners herein. I came across another Misc. Application No. 39 of 2018 with No. 6 of 2018 being the lead file.
7. The petitioners herein had filed the separate miscellaneous applications seeking for orders for re-sentencing having been jointly convicted by trial court in Embu Criminal Case No. 1429 of 2006 of several counts of robbery with violence contrary to Section 296(2) of the Penal Code. The applications were heard as consolidated and dismissed for lack of merit. It was a reasoned ruling that outlined the circumstances of the offence which were characterised by rape of one of the complainants in the case as well as brutality and violence against others.
8. The 1<sup>st</sup> petitioner admitted in his submissions that he was approaching the court for the second time on the same issues that were in application No. 6 of 2018 when he stated: -

*“My Lordship, although this court was not convinced that the petitioner required a substitute sentence in Petition No. 6 of 2018 at Embu....”*

9. I need not belabour further on the issue of res judicata for I has been admitted.

10. I reach a conclusion that the issues in this petition were decided by a court of competent jurisdiction between the same parties being the two petitions and the Director of Public Prosecutions.

11. I therefore find this petition incompetent and improperly before this court and hereby order that it be struck out.

12. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for State/Respondent**

**Both petitioners**