



**Ikul & another v Republic (Criminal Application 164 of 2017)  
[2022] KECA 492 (KLR) (25 March 2022) (Ruling)**

Neutral citation: [2022] KECA 492 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPLICATION 164 OF 2017  
PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA  
MARCH 25, 2022**

**BETWEEN**

**EKIRU IKUL ALIAS ENGURANGOR ..... 1<sup>ST</sup> APPLICANT**

**EKURE NAPETET ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Lodwar  
(Riechi, J) dated 25th November, 2016 in HCCR NO. 2 OF 2015)*

**RULING**

1. The two applicants Ekiru Ikul alias Engurangor and Ekure Napetet are held in custody on a sentence of death imposed by the High Court of Kenya at Lodwar upon being convicted of the offence of murder contrary to section 203 of the *Penal Code*. Their appeal against both conviction and sentence was dismissed by this Court (Githinji, Okwengu and J. Mohammed, JJA.) on 28<sup>th</sup> June, 2019.
2. That should have been the end of the matter but, alas, by an application by motion on notice dated 3<sup>rd</sup> September, 2019 and filed by their advocate Kaira Nabasenge, they pray in the main, for an order that;

“3.The Honourable Court be pleased to certify the intended appeal to the Supreme Court against the death sentence meted against the Applicants by the Court of Appeal at Eldoret on 28<sup>th</sup> June, 2019 in Criminal Appeal No. 164 of 2017; Ekiru Ikul alias Engurangor and Ekure Napetet -vs- Republic as a matter of point of law of general public importance.” (sic)



The motion lists on its face some 9 grounds which are of doubtful relevance save, perhaps, No. 5 which states;

“5. That despite the death sentence not being mandatory pursuant to the holding by the Supreme Court in Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR, the Court of Appeal meted death sentence against the applicants.”

3. The supporting affidavit purported to be sworn by the applicants jointly is no more than a repetition of the said grounds. At paragraphs 9 and 10 they depose as follows;

“9. That we are advised by our advocate on record which advice we verily believe to be true that the said death sentence meted against us is a matter of point of law of general public importance in view of the decision of the Supreme Court that outlawed mandatory death sentence in Muruatetu case. (Our emphasis)

10. That in light of the decision by the Supreme Court in Muruatetu case, we intend to Appeal against the death sentence meted against us to the Supreme Court.”

4. We must confess to having difficulty comprehending the exact nature of the “point of law of general public importance” that the applicants hope to mount at the Supreme Court. We did not find much illumination in the written submissions filed by their advocate, either. After referring to Supreme Court jurisprudence that has delineated the contours of what amounts to matters of general public importance, such as *Hermanus Phillipus Steyn -vs- Giovanni Givecchi Ruscone* [2019] eKLR, *Malcom Bell -vs Daniel Toroitich Arap Moi & Another* [2013] eKLR and *Town Council of Awendo -vs- Nelson Oduor Onyango & 13 Others* [2015] eKLR, it is contended in the submissions, in what comes closest to identifying the alleged matter of general importance as follows;

According to the holding of the Superior Court, the learned judges of this Honourable Court E. M. Githinji, H. Okwengu, J. Mohammed, JJA. appear to justify death sentence meted against the Applicants at paragraph 19 of the holding by stating that there were four lives lost and hence the death sentence imposed upon each of the Appellants/Applicants is merited. (See a copy of the judgment delivered on 28<sup>th</sup> June, 2019, at pg. 89 to 116 of the record of the application)

In view of the foregoing, it is apparently clear that the reasoning of the Court of Appeal is to the effect that the Appellants having murdered four people they deserve a death penalty despite the fact that death penalty in a murder charge is not mandatory. Why the question of four losing lives being the benchmark for a death penalty herein and yet the Appellants/Applicants were charged with murder which in any case ought not to be duplicated as per the number of deaths occurred in view of the principles of criminal law?

Your Lordships, it is our humble submissions therefore that the salient questions and/or the major issues of general public importance that the Supreme Court should settle are; One; Whether death sentence should be paged (sic) on a number of lives lost in respect of a charge of murder and Two; Whether the Court of Appeal in alluding to number of lives lost in a murder charge violated the criminal law principles that prohibits duplication of charges?

In view of the foregoing issues we humbly further submit that this matter is of public importance for the reason that murder cases are frequently handled by our courts and there are many pending for determinations.



5. In written submissions filed by Ms. Emma Mkok, learned prosecution counsel for the Director of Public Prosecutions, the motion is expressly “conceded on grounds that it is merited.” The submissions also cite the Hermannus Steyn (*Supra*) and Malcolm Bell (*Supra*) cases for the applicable principles. At the hearing of the motion, Mr. Nabasenge did not highlight his submissions. Ms. Okok on the other hand repeated the concession and went on to address us thus;

“The death penalty is a matter of general public importance. We want the Supreme Court to consider whether the number of lives lost should justify the death sentence.”

So, there, it seems, is the quest that counsel before us wish to have the Supreme Court pronounce itself on.

6. Does the death sentence per se, without any indication of what of, and what about, it, in and of itself, without more, amount to a matter of general public importance properly-understood and as “identified in their essence” by the Supreme Court in Phillips Steyn (*supra*)? With respect to both counsel who appeared before us, we do not think so. The Supreme Court in Malcolm Bell (*supra*) reiterated what had been distilled in the previous cases thus;

“(i) For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;

iii. Such question or questions of law must have arisen in the Courts or courts below, and must have been the subject of judicial determination;

iv. Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the court of Appeal for its determination;

v. Mere apprehension of miscarriage of justice, a matter most apt for resolution {at earlier levels of the} superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court, the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of *the Constitution*;

vi. The intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;

vii. Determination of fact in contests between parties are not, by {and of} themselves, a basis for granting certification for an appeal before the Supreme Court;

viii. Issues of law of repealed occurrence in the general course of litigation may, in proper context, become “matters of general public importance”, so as to be a basis for appeal to the Supreme Court;

ix. Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;



x. Questions of law that are destined to continually engage the workings of the judicial organs, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court;

xi. Questions with a bearing on the proper conduct of the administration of justice, may become “matters of general public importance, “justifying final appeal in the Supreme Court.

7. Viewed against that template from the apex court, we have no hesitation finding that this motion fails the test, and spectacularly so. We see in the application no more than a bit of legal adventurism devoid of substance.

8. Other than the patent lack of precision and specificity on what exactly the applicants wish the Supreme Court to explore regarding the death sentence, it is clear that the question in all its lack of clarity, was never raised and answered at the High Court and before this Court at the hearing of the appeal so as to warrant the input of the Supreme Court. It is worth restating that the apex court itself stated in [\*Peter Ngoge -vs- Francis Ole Kaparo & 5 others \[2012\] eKLR\*](#),

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court”

9. We are not persuaded that there is anything novel or of jurisprudential moment emanating from the Courts’ *dicta* on this applicants’ appeal that four people lost their lives. That was an established fact and the Courts’ consideration of it, alongside other matters, in affirming the death sentence meted on the applicants, was a proper consideration of the principles of sentencing which require no further elucidation by the Supreme Court.

10. We recall that the apex court had already engaged with the limited and specific question of the constitutionality of the mandatory nature of the death sentence in *Muruatetu* (supra). That court did not therein proscribe the death sentence per se.

11. All said, and notwithstanding the respondents’ concession in this matter, which is not binding on us, and which we think in the present case to be misconceived, we find the motion before us to be devoid of merit. It is accordingly dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF MARCH, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**M. MBOGHOLI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**



*I hereby certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

