



REPUBLIC OF KENYA



**Matanda v Republic (Criminal Petition 79 of 2019)
[2024] KEHC 677 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL PETITION 79 OF 2019**

DK KEMEL, J

JANUARY 31, 2024

BETWEEN

WYCLIFFE WAFULA MATANDA PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner herein Wycliffe Wafula Mutanda filed the present Petition seeking re – sentencing in respect of Webuye Principal Magistrate’s court in Criminal Case No. 1903 of 2009. His gravamen is that he was convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. He later lodged an appeal vide Bungoma High Court Criminal Appeal No. 76 of 2011 which was dismissed. He later lodged an appeal to the Court of Appeal which is yet to be determined. He sought to withdraw the said appeal on 24.11.2023 but the same is yet to be endorsed by the Court of Appeal. He has however, opted to prosecute his petition despite the pendency of his appeal at the Court of Appeal. The Petitioner submitted that he has since reformed while in custody and seeks to be given a second chance.
2. Miss Mwaniki, for the Respondent submitted that the Petition should be dismissed since the Petitioner’s appeal to this court vide HCRA No. 76 of 2011 was dismissed. Learned counsel contended that this court is already *functus officio*.
3. I have given due consideration to the application and the submissions presented. It is not in dispute that the Petitioner was sentenced to death vide Webuye PMC CR No. 1903 of 2009. It is also not in dispute that the Petitioner lodged an appeal to this court vide HCRA No. 76 of 2011 which was later dismissed. It is also not in dispute that the Petitioner has preferred an appeal to the Court of Appeal whose determination is yet to be known. It is also not in dispute that the Petitioner had presented his wish to withdraw his appeal at the Court of Appeal but at the time of canvassing the application, no evidence was availed to the effect that the notice of withdrawal of appeal has been accepted by the



court of appeal. That being the position, i find the present application is an abuse of the court process. The Petitioner should have exhausted all his appeal process before coming back to this court. It is my considered view that this court lacks jurisdiction to entertain the matter in view of the fact that a court of similar jurisdiction heard the petitioner's appeal and dismissed it . This court is *functus officio*.

4. It is noted that the Petitioner has sought reliance on the case of *Francis Karioko Muruatetu and 2 Others v R* (2017) eKLR wherein the Supreme Court held that the mandatory nature of death sentence is unconditional and that courts have discretion to receive mitigation of offenders before passing an appropriate sentence. It is common knowledge that all offenders who had been sentenced to death have had their sentences commuted to life imprisonment through the requisite presidential clemency. In fact, the petitioner herein is currently serving a life imprisonment after the death sentence was commuted through a presidential decree.
5. The Supreme Court vide guidelines dated 6/7/2021 directed that the decisional law in the Muruatetu case (*Supra*) is not an authority to declare minimum sentences as unconstitutional and that the decision was only in regard to murder cases falling within its scope. The Petitioner's case being one of robbery with violence, the request for review of sentence on the basis of the Muruatetu case (*Supra*) is without merit. The Petitioner whose appeal has been determined by this court ought to move to the Court of Appeal for redress as this court has become functus officio. In any case, the Petitioner's appeal is still pending before the Court of Appeal and hence he should proceed and exhaust his appeal there.
6. In the result, it is my finding that the Petition lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI,

JUDGE

In the presence of:-

Wycliff Wafula Matanda Petitioner

Miss Kibet for Respondent

Kizito Court Assistant

