



**Mustuni & another v Republic (Criminal Petition 81 of 2019)  
[2024] KEHC 681 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL PETITION 81 OF 2019  
DK KEMEL, J  
JANUARY 31, 2024**

**BETWEEN**

**ANDREW KIPROTICH MUSTUNI ..... 1<sup>ST</sup> PETITIONER**

**TITUS CHEPREY MONGOTI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioners herein have filed the present Petition on August 1, 2020 seeking for a re- sentencing in respect of Bungoma High Court Criminal case (Murder) No. 48 of 2008. Their gravamen is that they were convicted and sentenced to life imprisonment. They later lodged an appeal to the Court of Appeal at Eldoret vide Criminal Appeal number 232 of 2011 which was dismissed on March 28, 2012. It is further their case that they are remorseful and regret having participated in the crime. They maintain that they have since reformed and have undergone numerous rehabilitation programs in line with the aims of sentencing. They have relied on the authority of the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & 2 Others v R* (2011) eKLR. Finally, they averred that they have since reformed and acquired several certificates.
2. Miss Mwaniki for the Respondent opposed the application for re- sentencing. She submitted that the court has no jurisdiction under Article 165 (b) of the *constitution* since this court is already functus officio. She added that the petitioners' appeal to the Court of Appeal was dismissed. It was finally submitted that the Petitioners mitigation were duly considered during their sentencing. Learned counsel sought for the dismissal of the application.
3. I have given due consideration to the Petition and the oral submissions. It is not in dispute that the Petitioners have since exhausted their appeal processes after the Court of Appeal dismissed their appeal. It is also not in dispute that the decision of the Supreme Court of Kenya in the *Muruatetu* case (



*Supra* ) declared the mandatory nature of death sentence as unconditional and that the courts were not harmstrung as they had power to consider mitigating circumstances of offenders before passing an appropriate sentence. It is not in dispute that at the time of the sentence in 2011, the mandatory sentence for murder was death. It is also not in dispute that the mitigation of the accused persons was duly considered by the court which thereafter sentenced them to life imprisonment. It is also not in dispute that the offence herein was committed during the uprising by the Sabaot Land Defence Forces, a ragtag army of locals within Mt Elgon who were opposed to their land being taken away by non-locals. It is also not in dispute that the said ragtag army caused a lot of untold suffering to the residents of Mt. Elgon before the Government unleashed the army which finally annihilated the ragtag group. The court had considered all these factors as well as the mitigation of the petitioners before it came to the sentence of life imprisonment. It is my considered view that once the mitigation by the petitioners have been duly considered by the court, they are barred from seeking to rely on the *Muruatetu* case (*Supra*) for a second bite at the cherry. This court is already functus officio.

4. In view of the foregoing observations, it is my finding that the Petition lacks merit. The same is dismissed.

**DATED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF JANUARY 2024**

**D. KEMEI**

**JUDGE**

**In the presence of :-**

Andrew K Mustuni 1<sup>st</sup> Petitioner

Titus C Mongoti 2<sup>nd</sup> Petitioner

Miss Kibet for Respondent

Kizito Court Assistant

