



**Wekesa v Republic (Miscellaneous Criminal Application  
91 of 2019) [2024] KEHC 6180 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6180 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS CRIMINAL APPLICATION 91 OF 2019**

**DK KEMEL, J**

**MAY 30, 2024**

**BETWEEN**

**MOSES SIRENGO WEKESA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Applicant brought the instant application wherein he seeks for a resentence hearing. It is his case that he was charged and convicted for the offence of murder contrary to section 203 and read with section 204 of the *Penal Code* in Bungoma High Court Criminal Case No. 21 of 2012 and sentenced to death. That he appealed to the Court of Appeal at Nakuru but that the same was never heard and determined thus his application for re-sentencing vide Embu High Court Criminal Appeal No. 181 of 2009 and which appeal was dismissed. The Applicant invoked the Supreme Court's decision in *Francis Karioko Muruatetu -vs- Republic* Petition No. 15 of 2015 and as was applied in *Douglas Muthaura Ntoribi* Misc. App. No. 4 of 2015 at Meru.
2. At the hearing of the application, the Court vide directions issued on 12<sup>th</sup> May 2023, directed that the application be canvassed by way of written submissions. The applicant relied on the submissions in advancing his case. He submitted that the 12 years he has been in custody has served the purposes of sentencing as it has given him an opportunity to transform his entire life. He urged this Court to consider the current circumstances from being a young man with a young family, provocation, his lack of a past criminal record and his desire for the Court to comprehend his change, master of self-control and remorse.
3. The Respondent through its counsel Mr. Tarus did not oppose the application for reduction of the sentence but invited this Court to consider all the circumstances of the case. Mr. Tarus further submitted that the Applicant's sentence was prior to the Francis Muruatetu case but that the death



of the deceased was not justified. He urged this Court to commute the Applicant's death sentence to life imprisonment.

4. I have considered the application herein and the response by the Respondent. I have perused the Court record and as the Applicant correctly put, he was convicted by the this Court for the offence of murder and sentenced to death. He appealed to the Court of Appeal at Nakuru but the same was never heard and determined. As such, the judgment and the sentence which is in force and the one the Applicant herein is serving is the one imposed by this Court. It therefore means that the Applicant wants this Court to review the decision of a Court of concurrent jurisdiction and in so doing apply the dictum in *Muruatetu case*. The question in my view which ought to be answered is whether this Court can resentence the applicant and in doing so review a decision of a court of concurrent jurisdiction.
5. The jurisdiction of the High Court is provided for under Article 165 of the [Constitution](#) of Kenya 2010 and it includes unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; any other jurisdiction, original or appellate conferred on it by legislation and supervisory jurisdiction. The supervisory jurisdiction in criminal matters is expounded under section 362 and 364 of the [Criminal Procedure Code](#). Under the said sections, this court has jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court. It is therefore clear that this Court cannot and does not have jurisdiction to review the decision of a Court of concurrent jurisdiction. Once this Court delivered its judgment on trial (though differently constituted), it became functus officio over the matter herein.
6. The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This is because the rule of thumb is that superior Courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those Courts higher than themselves. The Court which ought to deal with an issue arising out of the decision of this Court is the Court of Appeal as it is the one with jurisdiction under Article 164(3) of the [Constitution](#) and section 379(1) of the [Criminal Procedure Code](#). This is in appreciating the provisions of Article 50(2) (q) of the [Constitution](#) of Kenya 2010 which guarantees the right of a person if convicted, to appeal to, or apply for review by, a higher Court as prescribed by the law. (See [Daniel Otieno Oracha –vs- Republic](#) [2019] eKLR).
7. As such, this Court does not have jurisdiction over the revision application herein. The right forum would be the Court of Appeal.
8. However, there is a not so recent jurisprudence which was developed by the Supreme Court in [Muruatetu case](#) (supra), wherein the Supreme Court found that the mandatory death sentence under section 204 of the [Penal Code](#) is unconstitutional as it takes away the discretion of the Court while sentencing. The Supreme Court gave this Court (being the trial Court in murder charges) a special jurisdiction to hear a party on resentencing where an accused person was sentenced under the mandatory section 204 of the [Penal Code](#). (See paragraphs 110 and 111 of the said decision).
9. It is imperative to remind myself that the Applicant indicated that he has a pending appeal in the Court of Appeal. I believe, in efforts to avoid conflicting decisions, when the Court of Appeal finally deliberates on the Applicant's appeal it would be wise of him to pursue the said appeal.
10. I think I have said enough to prove that the application herein is wrongly before this Court. This Court does not have jurisdiction over the matter. It is trite that where a Court is bereft of jurisdiction, it should down its tools the moment it holds the opinion that it is without jurisdiction. (See [the Owners](#)



*of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR). The only avenue for the applicant is to pursue his pending appeal at the Court of Appeal.

11. Considering all the above, this Court is bereft of jurisdiction to issue the orders sought by the applicant and ought to down its tools. As such, I find the application herein lacks merit and is dismissed.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 30<sup>TH</sup> DAY OF MAY 2024**

**D.KEMEI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

Moses Sirengo Wekesa Applicant

Miss Kibet for Respondent

Kizito Court Assistant

