



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION MISC CR APPL E011 OF 2021**

**ISMAEL KALAMSHO KABIRU.....1<sup>ST</sup> APPLICANT**

**MOHAMMED KAMBICHA GAMO.....2<sup>ND</sup> APPLICANT**

**MOHAMMED ALANGO DURBU .....3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The applicants were charged alongside one; Abdi Godana Jara who died in custody on 27<sup>th</sup> November 2018, with the offence of, murder contrary to section 203 as read together with section 204 of Criminal Procedure Code (cap 75) Laws of Kenya, vide High Court Criminal Case No. 27 of 2009. They pleaded not guilty to the charge and the case was fully heard wherein they were convicted and sentenced to suffer death on; 28<sup>th</sup> January 2010.

2. Being dissatisfied with the decision on both conviction and sentence, the firm of; Asembo & Company Advocates, lodged an appeal to the Court of Appeal, vide a notice of appeal number; 79 of 2015 dated 8<sup>th</sup> February 2010. The court of Appeal heard the appeal and dismissed it in its entirety, thus upholding the conviction and sentence.

3. However, after the Supreme Court of Kenya decision in Francis Karioko Muruatetu & Another vs Republic 2017 eKLR, which apparently declared the death sentence as unconstitutional, the applicant filed, an application vide, High Court Miscellaneous Application number 76 of 2018, seeking for resentencing.

4. The application for resentencing was heard by Hon. Justice L. Kimaru who substituted the sentence which had been commuted to; life imprisonment, with a custodial period of ten (10) years imprisonment with effect of the date of his decision being; the 21<sup>st</sup> day of May 2019.

5. On 18<sup>th</sup> March 2020, the applicants filed yet another application in the Constitution and Human Rights Division of the High Court.

The application was filed in the Constitutional Petition No. 396 of 2019. Upon hearing the petition, and the notice of motion application, Hon Mr Justice W. Korir ordered the matter be transferred to the Criminal Division of the High Court. That was not done. However similar orders to that effect were made on the 17<sup>th</sup> December 2020, by Hon. Justice A C Mrima. The matter was then transferred to the Criminal Division, which is the subject of this ruling.

6. It suffices to note that, one Aloise Onyango Odhiambo, named in this matter was not an accused in the trial at the High Court that gave rise to the application herein. It is stated that, he was a paralegal at the Prisons Remand and merely assisted in drafting the application for the other applicants, wherein he included his name so that he could argue the same for them. However, at the time the matter was referred to the Criminal Division, he had been released through orders issued in Criminal Application Number 5215 of 2003.

7. However, the Respondent has opposed the application on the ground that, this court is *functus officio* as the applicants have already been re-sentenced by the High Court.

8. Be that as it were, I have considered the matter and I find that, the applicant's main concern is that, the sentence that was meted out did not take to account the period they were in custody during trial, as required under the provisions of section 333 (2) of the Criminal Procedure Code. However, first and foremost, the application and petition as filed in the Constitutional and Human Rights Division is anchored on Constitutional provisions that do not confer to this court the power to grant the orders sought for therein.

9. The jurisdiction of this court can only be invoked on appeal which is not the case herein or on supervisory and/or revisionary powers under section 362 of the Criminal Procedure Code, which have not

been invoked.

10. However, although the applicants have invoked the provisions of section 333(2) of the Criminal Procedure Code, I find that, the same were considered when the court heard the application for re-sentencing and stated that, it had considered the twelve (12) years of pre and post-trial custody.

11. In the given circumstances, the provisions of section 333(2) of Criminal Procedure Code have already been complied with and are no longer available as to the applicants' recourse for action. Therefore, the application lacks merit and is dismissed accordingly.

**DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF SEPTEMBER, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

**IN THE PRESENCE OF: -**

**ALL APPLICANTS IN PERSON**

**MS AKUNJA FOR THE RESPONDENT**

**EDWIN OMBUNA, COURT ASSISTANT**



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