



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL PETITION NO. E001 OF 2020

JOSEPH WAITITU KAGOTHO.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This undated petition was filed on 3rd December 2020 and seeks orders for review of sentence based on the **Supreme Court, Petition No. 15 of 2015 Francis Karioko Muruatetu vs Republic** where the court declared the mandatory nature of the death sentence as unconstitutional. The petitioner also seeks for orders that the sentence this court may impose be ordered to run from the date of arrest arguing that the trial court did not consider the period he spent in custody because he was sentenced to death.

2. The background facts are that the petitioner was convicted of the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and sentenced to death. He was dissatisfied with both the conviction and sentence and he appealed to the Court of Appeal which court dismissed his appeal.

3. The petitioner filed Petition No. 1 of 2019 in Nyeri High Court seeking review of the sentence under the principles laid down by the Supreme Court in the **Francis Karioko Muruatetu** petition. The petition was heard and determined by Judge Ngaah. The petition was dismissed on ground that the death sentence imposed by the High Court on 18/12/2002 and upheld by the Court of Appeal had been commuted to life imprisonment by His Excellency the President and as such, the petitioner was not entitled to review of sentence under the **Muruatetu** principles.

4. The issues for determination in this petition are two fold:-

a) Whether this court has jurisdiction to review the orders of a court of equal status which dismissed the petitioner's petition on 13/3/2020.

b) If the court finds it is possessed of the jurisdiction to hear this petition, it will proceed to determine whether the petitioner is entitled to the orders sought.

5. In regard to jurisdiction, a court of law derives the power to hear and determine the case from the Constitution or from the Statute. If a court finds that it lacks jurisdiction, then it ought to down its tools in any matter before it.

6. The petition No. 1 of 2019 was heard and determined by a Judge of the High Court. It was dismissed for lack of merit and was based on the **Muruatetu** petition. This is the High Court which has no power to review orders issued by another judge of the same court with equal jurisdiction. Article 50(2)(q) of the Constitution provides:-

(2) Every accused person has the right to a fair trial, which includes the right-

(q) If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

7. The constitutional provision is very clear that this court cannot review the orders of Ngaah J issued on 13/3/2020. The petitioner ought to have appealed against the judgment of Ngaah J in the Court of Appeal which is a higher court in the event that he was not satisfied with the said judgment.

8. The petitioner has now filed a similar petition to the one that was dismissed. There must be an end to litigation and precious judicial time must be used economically, not in hearing cases that have been determined by other competent courts. The law provides for the principle of *res judicata* which applies to both civil and criminal cases. The essence of this principle is that a case involving the same parties and with similar facts and decided by a court of competent jurisdiction are *res judicata* and ought not to be entertained.

9. The petition No. 1 of 2019 was between the petitioner and the Republic of Kenya as the respondent. The facts of the case were similar and it was based on the Supreme Court petition of Muruatetu. It was heard and determined by a court of competent jurisdiction being the High Court. As such, this court has no business entertaining this petition which is a duplicate of Petition No. 1 of 2019.

10. The petitioner had another prayer based on **Section 333(2) of the Criminal Procedure Code**. He argued that time he spent in prison custody pending the disposal of the trial ought to be taken into consideration, should this court review his sentence. Now that this court has found it lacks jurisdiction, it would not serve any useful purpose to determine this prayer which actually depended on the positive outcome of this petition. In other words, the court must have reviewed the sentence in order for it to apply the provisions of Section 333(2) of the Criminal Procedure Code.

11. In conclusion, I find that this petition is *res judicata* and that even if it was properly before the court, I am not possessed of the requisite jurisdiction to hear and determine it.

12. For the foregoing reasons, I hereby find that this petition is incompetent and is hereby struck out.

13. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 16TH DAY OF DECEMBER, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 16th day of December, 2021.



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