



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

MISC.APPLICATION NO.E050 OF 2021

IN THE MATTER OF: ARTICLE 21(1),22(1)23(1)25(C) 27(1)(2),50(2)(Q)

159(2) AND 165(3) OF THE CONSTITUTION OF KENYA (2010)

IN THE MATTER OF: SECTION 216, 329 AND 333(2) OF THE

CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA

IN THE MATTER OF: SUPREME COURT RULING IN PETITION

NO.15AND 16 OF 2015 OF FRANCIS KARIOKO MURUATETU AND WILSON THIRIMBU MWANGI

IN THE MATTER OF: CRIMINAL APPEAL NO .248 OF 2012 NAIROBI

ARISING FROM CASE NO.896 OF 2011 AT GITHUGURI LAW COURTS

SAMUEL NGARUIYA MUCHINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was originally charged vide Criminal Case No.896 of 2011 before Githunguri magistrate's court for the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. In the alternative, he was charged of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. Having pleaded not guilty, trial proceeded to its logical conclusion. At the close of the hearing, the trial magistrate found him guilty, convicted and sentenced him to life imprisonment.

2. Aggrieved by the said conviction and sentence, the applicant lodged an appeal vide Nairobi Criminal Appeal No. 248 of 2012. During the hearing of the appeal, the applicant abandoned the grounds challenging conviction and instead pursued those touching on sentence hence pleading for leniency. After hearing the appeal, Kimaru J upheld both the conviction and sentence and finally dismissed the appeal for lack of merit on 22nd July 2015. From the record, no second appeal was preferred to the court of appeal.

3. Subsequently, following the famous Muruatetu case by the supreme court, the applicant lodged the instant application/petition seeking review or resentencing so as to be released from jail. When the matter came up for hearing, Mr.Chirchir for the ODPP submitted that they were not opposed to the application. The applicant on his part submitted that he was remorseful and has been in custody for 10 years hence urged the court to substitute the sentence by releasing him from custody

4. I have considered the application and the submissions thereof. I have also considered the position taken by the prosecution in not opposing the application. There is no doubt, the applicant lost the first appeal way back 2015. He was only woken up by the supreme court decision in Muruatetu case which opened a flood gate on resentencing thus opening a multiplicity of applications seeking similar orders. Unfortunately, many convicts serving long sentences as well as death penalty benefitted. However, I am not lost in my mind that the objective of sentence still remains with or without Muruatetu case.

5. The Judiciary Sentencing Policy Guidelines on objectives of sentencing is very clear on the subject of sentencing thus providing that;
"Sentences are imposed to meet the following objectives:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.

2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.

4. **Restorative justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. **Community protection:** To protect the community by incapacitating the offender.

6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.”

6. In the case of **Josiah Mutua Mutunga & another v Republic [2019] eKLR** the court with approval quoted the case of **R vs. Scott (2005) NSWCCA 152** where Howie, Grove and Barr JJ stated thus:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

7. Whereas an accused person has a constitutional right to exhaust his or legal rights including lodging an appeal and or review of sentence, in some cases, justice must not only be done but be seen to be done by rejecting such attempts to tinker with appropriate sentences in offences such as defilement. I can only imagine the devastating effect and trauma caused to the minor of 8yrs who was defiled by an adult who was expected to protect her. To interfere with the said sentence through the platform of Muruatetu case will amount to a mockery of justice.

8. Nevertheless, my finding notwithstanding, the Supreme Court having realized the confusion Muruatetu decision had caused in the aspect of sentencing and resentencing in the criminal justice system recently clarified on the applicability of the principle espoused in the said case by giving clear guidelines thus limiting the application of muruatetu case sentencing principle as only applicable in murder cases and not any other criminal case. See **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021]e KLR in which the Supreme court stated;**

“The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.”

9. The appellant in this case was charged with defilement with the alternative count of indecent act which offences are not murder. In the circumstances, Muruatetu sentencing principle cannot apply. The only recourse the applicant had was to appeal to the court of appeal which opportunity is now spent.

10. **The upshot of the above is that this court has no jurisdiction to entertain the application/petition. Accordingly, it is my finding that the petition has no merit hence dismissed in its entirety.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT VOI THIS 26TH DAY OF JANUARY 2022

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J.N.ONYIEGO

JUDGE