



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL MISCELLANEOUS APPLICATION NUMBER E013 OF 2020**

**JAMES MUNGAI NGUGI ..... APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**R U L I N G**

1. The applicant vide a Notice of Motion undated and filed on 19<sup>th</sup> October 2020 brought under **Articles 22(1), 27(1), 28, 29, 50, 159, 165, 163(7) of the Constitution Section 39 of the Sexual Offences Act**, seeking orders;

*That he be granted a re-hearing of the sentence in the Chief Magistrate's Nakuru Criminal Case Number 50 of 2011, the sentence be reviewed and an appropriate sentence devoid of mandatory life sentence which has since been declared unconstitutional be considered.*

2. In the affidavit of support the applicant depones that he was found guilty of defilement and sentenced to life imprisonment on 2<sup>nd</sup> August 2011

3. That in view of the judgment in the **Francis Karioko Muruatetu and Wilson Turumbu Mwangi, Supreme Court Petition Number 15 of 2015** the mandatory nature of the sentence was declared unconstitutional.

4. He relied on the cases of **Guyo Jarso Guyo vs Republic Marsabit Criminal Petition Number 6 of 2018 Nyahururu, Francis Mwangi Njoki vs Republic Miscellaneous Application Number 2018.**

5. At the hearing of the application the applicant relied on his pleadings. The application was opposed by the prosecutor through Ms. Murunga. She submitted that the applicant had received a lawful sentence, that the case involved a ten (10) year old minor who was brutally defiled by the applicant and who suffered trauma the scars of which she would suffer for the rest of her life.

6. The applicant submitted that he had come before this court to speak his truth, that he was a 1<sup>st</sup> offender who was seeking the mercy of this court. He submitted that he had accepted he had "done this thing", that he had reformed, and if released he would be able to take care of himself and not be a burden to the state; further that he suffered from Asthma and could get better treatment outside.

7. From the record the applicant's appeal to the **High Court (HCRA 199 of 2011)** was dismissed on 6<sup>th</sup> October 2017. Subsequently on the strength of the holding in **Francis Karioko Muruatetu** he filed this application and withdrew his appeal number 10 of 2019 at the Court of Appeal.

8. The only issue for determination is whether the applicant's application for resentencing is tenable.

9. Following the directions of the Supreme Court that it was never intended that the re-sentence hearing be applicable to sexual offences, the only avenue available to the applicant is to seek the reinstatement of his appeal at the Court of Appeal.

10. In any event I have held the view in other similar applications that the avenue available for applicants seeking review of their sentences, after an unsuccessful appeal in the High Court is not resentencing at the same High Court, but an appeal at the Court of Appeal, as the High Court cannot apply **Article 165 (7) of the Constitution** upon itself, that provision applies to the supervisory powers of the High Court over subordinate courts at tribunals. Further **Article 50 (2) (q)** clearly states that if convicted, an accused person has the right of appeal to, or apply for review by, a higher court as prescribed by law.

11. The applicant exercised his right of appeal to a superior court when he filed the appeal before this court. *M. Odero J* having pronounced herself in upholding the judgment of the Subordinate Court, the recourse available to the accused is an appeal in the Court of Appeal.

12. In the circumstances the Notice of Motion is dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JANUARY 2022.**

**MUMBUA T MATHEKA**

**Judge**

**In the presence of:-**

Edna Court Assistant

Applicant

Ms. Murunga for state Notified N/A