

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL REVISION NO. E053 OF 2021

MARK ONGURU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae [2021])* (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The application herein, undated, filed herein on 30th November 2021, is principally founded on the decision, in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the applicant seeks revision of his sentence, where he had been convicted of rape, contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act, No. 3 of 2006, in Kakamega SRMCCRC No. 150 of 20183, and was sentenced to seven years' imprisonment. His appeal in Kakamega HCCRA No. 5 of 2020, was dismissed on 18th March 2021.

3. The offence, the subject of the instant proceedings, is not murder, but rape, as defined in section 3(1)(a)(b)(3) of the Sexual Offences Act, the decision in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, does not apply to it. As a consequence, the High Court has no jurisdiction to review the sentence that was imposed by the trial court, in view of the directions given in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae [2021])* (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ). The application is incompetent. The file herein is to be closed.

4. The applicant's appeal was dismissed in March 2021, and he was back, in court, in November 2021, seeking revision of sentence. A party cannot enjoy appeal and revision at the same time. After conviction and sentence, the convict should elect between appeal and revision, and once he opts for one, he cannot later approach the court on the other. He cannot have it both ways. The issues that he raises in the revision application ought to have been raised in the appeal. Revision addresses regularity or propriety of proceedings, while an appeal is broader, and deals with, among other things, the issues that are to be dealt with in revision proceedings.

5. The application before me is about sentence, and, in dismissing the appeal in Kakamega HCCRA No. 5 of 2020, the Judge remarked that the sentence of seven years was appropriate, although it was, according to the court, on the lenient side. I cannot revisit the sentence, after a fellow Judge, exercising concurrent jurisdiction, has already dealt with it, and, in any event, the revision application is incompetent for the applicant had already proffered an appeal which has since been disposed of. The application is expressed to be seeking revision of the judgment of the Judge of 18th March 2021. Revision is only available and exercisable by the High Court against decisions of the magistrate's court but not of the High Court. The applicant ought to have filed a second appeal, if he was unhappy with the judgment of 18th March 2021.

6. The Deputy Registrar shall cause copies of this ruling to be availed to the applicant and the office of Director of Public Prosecutions, Kakamega.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 14TH DAY OF JANUARY 2022

W MUSYOKA

JUDGE