REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC. APPLICATION NO. E009 OF 2021

NICKSON KANDAGOR CHESIRE *ALIAS* KIBET ALLAN.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. Through an undated application lodged on 8th April, 2021, the Applicant, Nickson Kandagor Chesire alias Kibet Laban, moved this Court for sentence rehearing. The facts as contained in the application indicate that the Applicant was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act in Kabarnet CM Court Criminal Case No. 893 of 2017. Thereafter, he lodged an appeal at Kabarnet High Court against both sentence and conviction through Criminal Appeal No. 144 of 2017. His appeal was partially successful as his sentence was reduced from life imprisonment to 20 years' imprisonment. The Applicant never appealed to the Court of Appeal.

2. Through the instant application, the Applicant seeks a review of the sentence imposed by this Court (E. M. Muriithi, J). He argues that this Court has jurisdiction under Article 165(3)(b) of the Constitution to hear and determine his application. The Applicant relies on the decision in **Bernard Mulwa Musyoka v Republic, Criminal Case No. 25 of 2016** in support of his argument that this Court is empowered to hear this application for sentence re-hearing.

3. The parties filed written submissions which they opted to fully rely upon in support of their positions.

4. In his submissions, the Applicant stated that his application is premised and based on the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR.** It was the Applicant's submission that in the said case, the Supreme Court declared minimum sentences illegal. He further contended that statutory provisions which provide mandatory sentences limit the discretion of judicial officers. The Applicant cited the South African cases of **S. v Mchunu & Another (AR24/11) (2012) ZAKZPHC 56 Kwa Zulu Natal; S. v Toms 1990 (2) SA 802, S. v Mofokeng 1991(1) SACR 502(w); and S. v Janesen 1990 (2) SACR 368** to argue that the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** applies to all provisions of the law with mandatory minimum sentences.

5. The Applicant further submitted that courts are free to impose sentences that deviate from those provided under Section 8 of the Sexual Offences Act. In this regard, he relied on the case of ***Dismas Wafula Kilweke* v *Republic* [2018] eKLR**. The Applicant additionally relied on decisions in **Evans Wanjala Wanyonyi v R, HCCRA No. 174 of 2015; Paul Ngei v Republic [2019] eKLR; Dennis Kibaara v Republic [2019] eKLR; and George Mutai v Republic [2018] eKLR** to argue that this Court can indeed deviate from the mandatory minimum sentences provided in Section 8 of the Sexual Offences Act.

6. Finally, the Applicant submitted that during his time in prison he has embraced rehabilitative programs and he has obtained several certificates confirming this fact. The Applicant also pointed out that he is in his late twenties and that he was convicted while he was 20 years. Further, that he is remorseful and that he was a first offender and therefore prays that this Court reduces his sentence to the term already served in prison.

7. On its part, the Respondent through submissions filed on 6th December, 2021 argued that since the Applicant's right to appeal on both conviction and sentence before the High Court are already spent, the only recourse available to him is to appeal to the Court of Appeal. According to the Respondent, this Court is *functus officio* because it had rendered itself on this matter. The Respondent relied on the cases of **Kiwala v Uganda [1967] EA 758** and **Republic v Sironga and Minde [1918] 7 KLR 148** to argue that once a court has rendered its verdict it becomes *functus officio* and cannot revise its own orders. The Court is therefore urged to down its tools for want of jurisdiction and dismiss the application.

8. The Respondent has challenged the jurisdiction of this Court to hear and determine the instant application. In the circumstances, I need to

address this issue first as it will determine whether or not I will delve into the merits of the application.

9. The issue of this Court's jurisdiction has been raised and addressed by both parties. The Applicant argues that this Court has jurisdiction under Article 165(3)(b) of the Constitution to hear and determine his application for sentence review. The Respondent on the other hand contends that this Court is *functus officio* and therefore bereft of jurisdiction.

10. The law on jurisdiction was stated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others, Application No. 2 of 2011** thus:

> **"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…"**

11. It is not disputed that the Applicant had his appeal in Criminal Appeal No. 144 of 2017 heard and determined by this Court. It is on this fact that the jurisdiction of this Court is being questioned by the Respondent. The Applicant having appealed to this Court and his appeal determined did not pursue further appeal to the Court of Appeal. The issue is whether this Court is indeed possessed of jurisdiction to review its own order and sentence. It is my opinion that allowing this application will result in this Court reviewing its previous sentence. The Supreme Court considered the issue of review of judgements and orders in **Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR** and held that:

> **"…we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:**
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> **(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;**
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> **(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;**
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> **(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;**
>
> **(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."**

12. Therefore, in order for a party to successfully move a court to review its own decision or that of a court with coordinate jurisdiction, the party is required to meet certain conditions as established in the just cited case. The Applicant has not demonstrated that any of the grounds set by the Supreme Court has been established in his case. There is therefore no ground that allows this Court to re-engineer the judgement of Muriithi, J.

13. The Applicant has also submitted that minimum or mandatory sentences are unconstitutional and were done away by the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR.** The Supreme Court has, however, clarified the applicability of its decision to offences other than murder in **Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** by stating that:

> **"[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;**
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> **"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right".**
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> **Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".**
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> **[11] The ratio decidendi in the decision was summarized as follows;**
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> **"69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".**

We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute."

[Emphasis supplied]

14. A reading of the Supreme Court judgement therefore shows that the mandatory minimum sentences provided under Section 8 of the Sexual Offences Act remain the statutory and legal sentences for persons found guilty of the offence of defilement. The Appellant is lucky that he had his sentence reduced before the Supreme Court clarified its decision, otherwise he would be serving life imprisonment. Even if the Supreme Court had indeed done away with minimum sentences in **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** the Applicant had already benefited from that decision when his sentence was reduced to 20 years' imprisonment from life imprisonment. He cannot therefore again ask this Court to resentence him in line with a decision he had already benefited from.

15. Considering what has been stated in this decision, I come to the conclusion that the Respondent is correct that this Court is *functus officio* and lacks jurisdiction to entertain the Applicant's application. The application dated 8th April, 2021 is therefore dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 24TH DAY OF FEBRUARY, 2022.

W. Korir,

Judge of the High Court