REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 10 OF 2020

JAMES MUTWIRI MOSES.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. ent contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 in Runyenjes Criminal Case No. 13 of 2018 and sentenced to twenty years' imprisonment. That, he appealed to the High Court at Embu vide HC CRA No. 30 of 2016 but the same was dismissed and sentence upheld. He then appealed to the Court of Appeal at Nyeri vide Criminal Appeal No. 172 of 2017. He thus moved this court in respect of Supreme Court's decision in **Muruatetu's case (Francis Karioko Muruatetu & Another v Republic [2017] eKLR)** and sThis court was moved by way of a petition dated 07/01/2020 wherein the petitioner averred that he was convicted of the offence of defilemubstantively prayed for resentencing.

2. At the hearing of the appeal, the petitioner relied on his written submissions in support of the petition. Miss Mati, learned counsel for the State made oral submissions wherein she submitted that she is not opposed to the petition but urged the court to consider the circumstances under which the offence was committed and the fact that the trial court did not consider the latest jurisprudence in Muruatetu { **Francis Karioko Muruatetu & Another v Republic (supra)}.**

3. I have considered the petition herein and the submissions by the parties in relation to the same.

4. As I have pointed out, the main relief sought by the petitioner is resentencing pursuant to the Supreme Court's decision in **Francis Krioko Muruatetu & Another –vs- Republic (supra)**. In the said case, the Judges of the Supreme Court held that (paragraph 69) Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provided for the mandatory death sentence for murder. The dictum in the said decision has been applied to mandatory minimum sentences provided under the Sexual Offences Act wherein it was held that mandatory minimum sentence is unconstitutional and an appellate court is bound to interfere with it. {See **Dismas Wafula Kilwake vs Republic [2018] eKLR, B W v Republic [2019] eKLR**, **Christopher Ochieng v Republic [2018] eKLR** and **Evans Wanjala Wanyonyi v Republic (supra)**}. As such, it is my view that this court has jurisdiction to resentence someone who approaches the court and wherein such person was convicted and compulsory minimum sentence meted.

5. However, the petitioner averred in his petition that he appealed the trial court's decision to the High Court at Embu *vide* HC CRA No. 30 of 2016 but the same was dismissed and sentence upheld. He then appealed to the Court of Appeal at Nyeri vide Criminal Appeal No. 172 of 2017. In the course of this petition, the petitioner indicated to this court that his appeal is still pending. He filed in this court a request for withdrawal of the said appeal (letter dated 27/05/2020 and received at the Court of Appeal's registry on 23/06/2020). There is no order served upon this court withdrawing the said appeal.

6. In my view, this court is bereft of jurisdiction to entertain the petition herein whereas there is a pending appeal in the Court of Appeal. The hierarchy of courts under the Constitution of Kenya is that the Court of Appeal is superior to this Court and its decisions bind this Court. Once a litigant files an appeal to the Court of Appeal, this court ought not to sit and adjudicate on a matter related to the one pending before the court of appeal. Doing so would lead to chaos and conflicting orders being made.

7. Taking into consideration the above, it is my view that this court does not have jurisdiction to hear the petition herein. The court ought to down its tools. (See **the owners of *Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd [1989] eKLR).*** As such the application herein is struck out.

8. It is so ordered.

Delivered, dated and **signed** at **Embu** this **20th** day of **January, 2021.**

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent