



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL PETITION NO. E002 OF 2020

**BERNARD MBINDYO KITHEKA..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RESENTENCING**

1. **Bernard Mbindyo Kitheka**, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to serve 15 years' imprisonment.

3. The Applicant was aggrieved by the conviction and sentence and filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard by this court and it found no merit in it and dismissed it. The court upheld both the conviction and sentence. The applicant did not appeal against the decision of this court to the Court of Appeal but has opted to file the present application in which he seeks a resentencing pursuant to the Court of appeal decision in **Evans Wanjala Wanyonyi v R (2019) eKLR**.

4. Article 50(2)(p) of the constitution provides that an accused person has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. From the import of Article 50(2) (p) of the constitution, the applicant is not entitled to resentencing as no law has been made warranting a change of fortunes for the applicant as he might wish this court to have. The above cited case was in relation to the Supreme Court decision in **Francis Karioko Muruatetu and others vs R (2017) eKLR** where death sentence was declared to be unconstitutional in that trial courts were not granted the opportunity to receive mitigation and mete out appropriate sentences on offenders. The Applicant herein was duly given an opportunity to mitigate before he was sentenced by the trial court. This court considered the appeal and found no merit. The applicant should thus proceed to the Court of Appeal for redress if need be.

5. Further as pointed out by the state, this is an inappropriate application as the court is functus officio. Such an application can only be entertained by a higher Court – the Court of Appeal. The Supreme Court in the case of **Raila Odinga & 2 Others VS I.E.B.C & 3 Others (2013) eKLR** held as follows regarding the doctrine of functus officio:-

*“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”*

6. Being guided by the above authority, I must find that the applicant's application for resentencing unmeritorious. The same is dismissed. The applicant is advised to proceed to the Court of Appeal for redress if need be.

It is so ordered.

**Dated and delivered at Machakos this 19<sup>th</sup> day of January, 2021.**

**D. K. Kemei**

**Judge**