REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO. 115 OF 2019

STEPHEN MUTETI MBULI.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING ON RESENTENCING

1. **Stephen Muteti Mbuli**, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(2) 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 life 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 and that the appeal was dismissed with the result that the conviction and sentence was affirmed. 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 resentensing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR** which declared the mandatory death sentence unconstitutional.

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.

5. The cited case has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. The applicant was not sentenced to death but to life imprisonment.

6. 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 judgement of this court was delivered on the 28.9.2012 and it seems the applicant has not lodged an appeal to the Court of Appeal. The applicant is advised to present his appeal to the said court since this court is already functus officio having heard the applicant's appeal and rendered a judgement. The applicant should now proceed to the higher court for redress if need be. In the case of **Raila Odinga & 2 Others Vs. I.E.B.C. & 3 Others (2013) eKLR** the Supreme Court held that :

> ***"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.''***

It is noted that the applicant still has a right of appeal to the Court of Appeal and is yet to exercise the same. He should now seize the opportunity by approaching the said higher court.

7. In the result, it is my finding that the Applicant's application filed on 31.7.2019 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 19th day of January, 2021.

D. K. Kemei

Judge