



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

MISC CRIMINAL APPLICATION NO 15 OF 2020

EDWARD WAFULA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application from the judgement and sentence of Hon. E.M.Muriithi, J in Kabarnet High Court Criminal Appeal No 70 of 2017, dated 11th February 2019, Edward Wafula v Republic)

RULING

The case for the applicant.

1. The applicant has applied for re-hearing and determination of his sentence of life imprisonment in respect of the offence of defilement contrary to section 8 (2) of the Sexual Offences Act; following the dismissal of his appeal by the High Court (Muriithi, J) on 11/2/2019
2. The applicant's application is that he appealed to the Court of Appeal; and his appeal has not been heard and determined. It is on this basis that he applied for a re-hearing of his sentence pursuant to article 165 () (b) of the 2010 Constitution of Kenya.
3. Furthermore, the applicant has cited the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] e-KLR*, in which that court held that courts below it are not bound to impose an automatic sentence of death upon conviction for the offence of murder.
4. The applicant has submitted that the Supreme Court in the above decision did not prohibit courts below it from entertaining and determining a proper sentence to be imposed in cases pending before them.
5. The applicant has therefore urged this court to invoke the provisions of section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya; and then proceed to take into account the period he now has been in pre-trial remand and imprisonment in determining the proper sentence to be imposed.

The case for the respondent

6. Mr. Mong'are, counsel for the respondent has opposed the application by filing eight (8) grounds of opposition. The major grounds are as follows.
7. The decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic, supra*, is not in favour of the applicant. Second, the applicant's first appeal in Kabarnet High Court Criminal Appeal No 70 of 2017, dated 11TH February 2019, Edward Wafula v Republic, formerly Eldoret High Court, Criminal Appeal No. 109 of 2015, Edward Wafula v Republic, was dismissed by this court (Muriithi, J).
8. Furthermore, the applicant's appeal to the Court of Appeal is still pending for hearing and determination in that superior court. Third, the only window open to the applicant in respect of this application is either to proceed with the appeal in the Court of Appeal, or withdraw the same, in order to be accorded a right of audience in this court in respect of his application for re-sentencing.
9. Fourth, counsel has drawn the attention of this court to the sentencing guidelines that are set out in the case of *Francis Karioko Muruatetu & Another v Republic, supra*.
10. Fifth, counsel has further pointed out that the court is bound to take into account the gravity of the offence that the applicant is convicted of, in a re-hearing on sentence.

11. Sixth, counsel has also pointed out that the review of a sentence is a constitutional right.

Issues for determination.

12. I have considered the grounds in support of the application and those in opposition to the application. As a result, I find the following to be the issues for determination. 1) Whether this court has jurisdiction to entertain and determine the application.

Issue 1

13. This court (Muriithi, J) differently constituted dismissed the applicant's appeal in respect of both conviction and sentence on 11th February 2019. In dismissing the appeal, the court confirmed the sentence of life imprisonment that was imposed upon the applicant. It is the same sentence that the applicant now wants to be reviewed by way of a re-hearing. In simple terms, the applicant wants me to sit as an appeal court over the judgement of my brother judge. In principle, this is not sound and is unconstitutional. And that is precisely, the reason why the applicant appealed to the Court of Appeal; which appeal is still pending for hearing and determination in that court.

14. In the circumstances, I find that this court has no jurisdiction to entertain and determine the instant application.

15. It is important to point out that the prosecution counsel is not right in stating that if the applicant wants to be heard by this court, he has first to withdraw his appeal in the Court of Appeal. Even if he was to withdraw his appeal, this court will still not have the jurisdiction to entertain and determine his application in respect of a re-hearing of his sentence.

16. The decision in *Francis Muaruatetu & Another v. Republic, supra*, is only applicable when the appeal is being by the High Court. That decision does not apply where the High Court has already heard and dismissed an appeal.

17. In the premises, the applicant's application fails and is hereby dismissed in its entirety.

Ruling signed, dated and delivered at Kabarnet this 24th day of March, 2021 in the presence of the applicant and Mr. Mong'are for the Republic.

J M BWONWONG'A

JUDGE