



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**PETITION NO.E008 OF 2021**

**ERICK MAINA MBULELE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

[1] The original trial file was not availed for ease of reference. This court was therefore compelled to rely on the typed proceedings and judgment annexed to the petition as amended on 5<sup>th</sup> May, 2021.

Other than the petition, the applicant also filed notices of motion in July and August 2020, seeking the relief already sought in the main petition. Nonetheless, the hearing of the petition had the effect of invariably consuming the notices of motion and rendering them obsolete.

In essence, the applicant alleges that his constitutional rights under **Article 50 (2) (q)** of the Constitution were violated by dint of the fact that a mandatory life imprisonment sentence was imposed upon him by the trial court and upheld by the appellate court, thereby denying him the opportunity to contest the sentence. He therefore beseeches this court to afford him an opportunity to be heard on sentencing and to consider review the arrest sentence to the least possible.

[2] The state/respondent opposed the application and contended that this court lacks the necessary jurisdiction to hear and determine the petition and that the case of Francis **Karioko Muruvatetu & Another Vs. Re. (2017)** eKLR, on the basis of which the applicant seeks a re-hearing on sentence and review of the sentence is in-applicable in the present circumstances.

The respondent therefore prays for the dismissal of the petition.

[3] All considered, it is this court's view that the petition is essentially brought under the provisions of the Constitution which confers this court with the jurisdiction to hear and determine it. Such jurisdiction is not taken away by the fact that the applicant has exhausted all the mechanisms to appeal his conviction and sentence by the trial court and fully cemented by relevant Constitutional provisions including **Article 23 (1)** which grants the High Court jurisdiction in accordance with **Article 165** to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

**Article 165 (3) (b)**, confers jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

[4] And, **Article 50** of the Constitution generally provides for fair hearing which is a Constitutional principle in the Bill of Rights i.e. **Chapter four (4)** of the Constitution. Clearly, the jurisdiction of this court to deal with this petition is guaranteed and remain intact by dint of the foregoing provisions of the Constitution.

Indeed, the applicant's complaint is grounded in **Article 50 (2) (q)** of the Constitution which provides that every accused person has the right to a fair trial which includes the right if convicted to appeal to, or apply for review by, a higher court as prescribed by law.

It was therefore incumbent upon the applicant to establish that indeed his right under the afore-mentioned provision was breached and/or violated during his trial in the trial court and indeed, the appellate courts.

From the proceedings and judgments in all the courts, the applicant did not at any point raise any issue pertaining to violation of his Constitutional rights to a fair hearing. He was properly and lawfully convicted and sentenced by the trial court. His appeal to this court on conviction and sentence was considered and dismissed. A further appeal to the Court of Appeal was also dismissed both on conviction and sentence.

[5] Having exhausted all available channel of appeal, the applicant cannot now be heard to move this court for a re-trial on both conviction

and sentence as he has not provided new and compelling evidence for a re-hearing. Neither, has the applicant provided any evidence of violation of his Constitutional right to a fair hearing. In fact, the appellant does not raise any substantial dispute with regard to the contention that he was actually accorded a fair hearing and proper due process right from the trial stage to the appeal stages. It would not therefore be farfetched to opine that this petition was as an afterthought if not a clear abuse of the court process.

The sentence of life imprisonment imposed on the applicant by the trial court confirmed on appeal was lawful. The offence for which the sentence was imposed was Defilement, contrary to **s.8 (1)** as read with **s.8 (2)** of the Sexual Offences Act. This was not a capital offence for which the case of **Muruvatetu & Another Vs. Rep (2017) eKLR**, applied and primarily dealt with the mandatory death sentence imposed under s.204 of the Penal Code. Most importantly, the court did not abolish the death sentence but only its mandatory nature.

**[6]** In sum, this petition is lacking in merit and as observed hereinabove a clear abuse of the criminal justice process. The petition must therefore be and is hereby dismissed.

**J.R. KARANJAH**

**J U D G E**

[Read and signed this 24<sup>TH</sup> day of JUNE 2021]