



**REPUBLIC OF KENYA**

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

**PETITION NO. E012 OF 2021**

*(From Original case No.174 of 2013 in Kilifi Hon. L.N.Wasige – SRM)*

**IN THE MATTER OF REVIEW OF SENTENCE**

**IN THE MATTER OF ARTICLE 22 (1), 23(1), 25(C), 27, 48, 50 (2) (P), 165 (3), 258 (1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 216 AND 239 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF SECTION 8 (3) OF THE SEXUAL OFFENCES ACT**

**MBOGO RAPHAEL CHENGO.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Mbogo Raphael Chengo – Petitioner**

**Mr. Mwangi for the state**

**RULING**

The convict/petitioner has moved the Court in terms of Article 22 (1), 23 (1), 25 ( c ) 27, 48, 50 (2) (P), (2) of the Constitution, Article 165 (3), 258 (1) of the Constitution, Section 216, 329 of the Criminal Procedure Code seeking review of sentence. The petition is supported by an affidavit and on the grounds premised on the face of the Petition.

**Background**

The convict was charged, tried and convicted by the Principal Magistrate at Kilifi for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. At the conclusion of the trial, he was convicted and sentenced to serve twenty years imprisonment. Being aggrieved with the order on conviction and sentence he lodged an appeal to the High Court and thereafter to the Court of Appeal. The Superior Courts heard the appeals and expressly affirmed the judgement of the primary court and also the first appeals court.

**Determination**

The High Court is not a Court of limited jurisdiction and its Constitutional role includes review of Judgments pursuant to Article 50 (6) (a) (8) (b) of the Constitution. In this cases mistakes of Law, errors apparent on the face of the record, which is of a compelling nature can only be corrected by the High Court by means of review as its in the instant case.

There is no dispute that the drafters of the Constitution under Article 50 (2), (P), and Q (6) (a) and (b) of the Constitution demand some special jurisdiction to review an order of sentence underpinned on new and compelling evidence which has become available. In the same vein it is also tenable to the high court to review the sentence of the punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

In the instant case its difficult to consider the petition for reasons that he was convicted under the Sexual Offences Act for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Act. Fundamentally, I take cognizance of the fact that the convict has exhausted the process of appeal to the highest Court of Appeal on such matters. In both situations, the conventional principles of statutory mandatory sentences yielded the sentence of twenty years imprisonment. That mandatory sentence cannot be challenged based on the initial dicta in Francis **Karioko Muruatetu V R [2017] eKLR** on mandatory sentence of death as prescribed in section 203 for the offence of murder as read with section 204 of the Penal Code.

More recent decision from the same Court dated 6<sup>th</sup> July, 2021 as a clarification set new guidelines on the original **Francis K. Muruatetu V R [2017] eKLR**. It was emphatically stated that the predominant principle which gave strong interpretation of section 204 on mandatory death sentence is not applicable to other penalties under the Sexual Offences Act or mandatory sentences in terms of section 296(2) and 297 of the Penal Code.

In that regard, the petition cannot even be remedied under section 382 of the Criminal Procedure Code to vary or review the sentence imposed by the trial court and thereafter in both appeals was affirmed as of right in the process of appeal.

The guidelines given by the Supreme Court in **Francis Muruatetu V R** on 6<sup>th</sup> July, 2021 took away the jurisdiction initially exercisable to superintend over re-sentencing proceedings of convicted offenders pursuant to the statutory mandatory sentences. In so far as this petition is concerned, no errors which go to the jurisdiction in the traditional sense to warrant this Court to exercise its power underpinned in Article 50 (2) (p), (Q) or 6 (a) (b) of the Constitution. The petition stands dismissed for want of jurisdiction for there is no jurisdictional error of law for the sentence to be reviewed. As I see it I echo the words in **Veen v Queen [1987] CLR 465**

*“sentencing is not a purely logical exercise and the triable some nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal presentence are various protection of society, deterrence of the offender, and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others; with determining what is an appropriate sentence in a particular case. They are guide posts to the appropriate sentence but sometimes they point in different directions.”*

On this approach, no substantial and compelling circumstances exist to review the earlier sentence imposed by the Court. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JULY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

Edward Katana Safari Petitioner

Mr. Mwangi for the state