



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL MISC. APPL. NO. 35 OF 2019

FRANCIS KILUMBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before the court is predicated on the Judgement of **Francis Karioko Muruatetu & Another vs Republic, Supreme Court Petition No. 15 & 16 (consolidated) of 2015**.

2. The applicant herein, **Francis Kilumba** moved the court by way of an application seeking for re-sentencing.

3. The applicant was initially charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on the 13th of July 2012 at Ngongoni Trading Centre in Migwani District within Kitui County, he defiled a child MK aged 14 years.

4. The case having proceeded to full hearing, he was convicted and sentenced to 20 years imprisonment. He appealed to this court in Criminal Appeal Case No. 75 of 2013 where his appeal was dismissed.

5. In his written submissions he argued that the application has the backing of the Constitution and the **Muruatetu** decision. Further his incarceration had taught him a lesson. He has been in prison for 6 years and has been rehabilitated.

6. The State opposed the application on grounds that the sentence meted out was within the law and the application ought to be dismissed.

7. As stated by the Republic, the offence the appellant is facing attracts imprisonment of 20 years and therefore the sentence meted out was within the law.

8. In its directions on the **Muruatetu** decision, the Supreme Court on 6th of July 2021 stated that the **Muruatetu** decision was not to apply to any other statute or provision of the law dealing with mandatory or minimum sentence as the **Muruatetu** case only dealt with Section 204 of the Penal Code.

1. The Supreme Court faulted applications such as the one before court which follow the earlier judgement of the said court which appears to have created confusion or in other hands was misunderstood and misrepresented by many. To clarify and correct the situation the supreme court stated;

“(8) there can be no justification for courts below us, to take the course that has now resulted in the pitiable state of incertitude and incoherence on the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. Appellants whose sentences were confirmed by the High Court and the Court of Appeal have returned to the Magistrate’s Courts, where without reference to the decision of the two superior courts have had those sentences revised.....

Likewise, some Appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that are pending hearing and determination, either in the High Court or Court of Appeal, have also had the sentences revised.....

10. It has been argued in justifying this state of affairs, that by paragraph 48 of the judgement in this matter, or indeed the spirit of the judgement as a whole, the court has outlawed all mandatory and minimum sentence provisions, and that although Muruatetu specifically dealt with the mandatory sentence in respect of murder, the decision’s expansive reasoning can be applied

to other offences that prescribe mandatory or minimum sentences. Far from it, in that paragraph we stated categorically that;

“(48) Section 204 of the Penal Code deprives the court of the use of Judicial discretion in a matter of life and death.....”

Reading this paragraph and the judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgement is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases.”

9. As the case does not fall within the purview of Section 204 of the Penal Code it cannot succeed.

10. The same is dismissed.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 30TH DAY OF SEPTEMBER, 2021.

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ALI-ARONI

JUDGE