



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 60 OF 2020

NICKSON AMBEI ASHIUNDU.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The petition herein, dated 17<sup>th</sup> November 2020, filed herein on even date, is principally founded on the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the petitioner seeks review of his sentence, where he had been convicted of defilement, contrary to section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006, in Kakamega CMCCRC No. 2753 of 2008, and was sentenced to serve life in prison. He filed an appeal in Kakamega HCCRA No. 56 of 2008, which was dismissed.

3. The offence, the subject of the instant proceedings, is not murder, but gang rape or defilement, as defined in section 8(1)(3) of the Sexual Offences Act, the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, does not apply to it. As a consequence, the High Court has no jurisdiction to review the sentence that was imposed by the trial court, in view of the directions given in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ). The application is incompetent. The file herein is to be closed. The review that he would like this court to consider ought to be sought administratively, within the legislative framework that governs the prison service in Kenya and imprisonment as a mode of punishment.

4. The Deputy Registrar shall cause copies of this ruling to be availed to the applicant and the office of Director of Public Prosecutions, Kakamega.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER 2021**

**W MUSYOKA**

**JUDGE**