

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CRIMINAL APPL. NO. 150 OF 2019

JACKSON WAMBUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RE-SENTENSING

1. Jackson Wambua Kasina, the Applicant herein was charged with defilement contrary to section 8(1) as read with Section 8(2) of the sexual offences Act.
2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to serve life imprisonment.
3. The Applicant was aggrieved by the decision of the trial court and filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard. A judgment was delivered on 18.2.2014 and the appeal was dismissed. The judgment confirmed the conviction and sentence. The applicant proceeded to the court of appeal and the judgement delivered on 18.2.2019 wherein the appeal was dismissed by a 3-judge bench of Honorable Justices W. Ouko, S. Gatembu Kairu and Lady Justice A.K. Murgor.
4. The Applicant did not appeal against the decision of the Court of Appeal and opted to file a new application before the High Court in which he seeks a retrial for sentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic & 5 Others [2017] eKLR** declaring the mandatory death sentence unconstitutional.
5. Article 50(2)(p) of the constitution provides that an accused person has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. In **S v. Ndlovu 2012 (1) ZLR 393** the Zambian High Court observed that sentencing must utilize an engendered approach and a constitutional and human rights perspective and from the import of Article 50(2) (p) of the constitution, the applicant is not entitled to resentencing.
6. The cited case has necessitated resentencing of all persons previously sentenced to the mandatory death sentence and the applicant was not sentenced to death but to life imprisonment.
7. Further as pointed out by the state, this is an inappropriate application and the court is functus officio. Such an application can only be entertained by a higher Court – the Supreme Court. In any case the Court of Appeal that heard his latest appeal was the right forum for him to agitate his request. He could still have approached the said court for review of their orders but not to come back to the High Court. This application lacks merit and is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **29th** day of **January, 2020**.

D. K. Kemei

Judge