

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CRIMINAL APPL. NO. 133 OF 2019

MUTUA MULI KILONZI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RESENTENCING

1. Mutua Muli Kilonzi, 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 of the count with which he had been charged and the trial Court sentenced him to serve life imprisonment.
3. The Applicant was aggrieved by that 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 19.2.2014 where the appeal was dismissed. The judgment confirmed the conviction and sentence.
4. The Applicant did not appeal against the decision of the High Court and opted to file a new application before the High Court in which he seeks resentencing pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR** declaring the mandatory death sentence unconstitutional. 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.
5. 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.
6. Further as pointed out by the state, this is an inappropriate application as the court is functus officio. Such an application can only be entertained by a higher Court – the Court of Appeal. This application lacks merit and is dismissed.

It is so ordered.

Dated and delivered at Machakos this 27th day of January,2020.

D. K. Kemei

Judge