



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPL. NO. 118 OF 2019**

**PATRICK MUTISO KIMUYU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RESENTENCING**

1. Patrick Mutiso Kimuyu, 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 life imprisonment.
3. The Applicant was aggrieved by that decision and filed an appeal, criminal appeal No. 167 of 2008 to the High Court against both the conviction and sentence. The appeal was duly heard. A judgment was delivered on 26.3.2014 wherein the appeal was dismissed and that the conviction and sentence of the trial court was upheld.
4. Still aggrieved by that decision of the High Court the applicant filed a 2<sup>nd</sup> appeal, Criminal Appeal 33 of 2016 to the court of appeal against both the conviction and sentence. The appeal was duly heard. Vide a judgment delivered on 18.11.2016 the three judge bench of M.K. Koome, F. Sichale and J. Mohammed found the appeal as lacking merit and the same was dismissed.
5. The state in support of the application urged the court to remit the instant file to the trial court for resentencing and cited the cases of **Jared Koita Injiri v R (2019) eKLR** and **Christopher Ochieng v R (2018) eKLR**.
6. The issue for determination is whether the application has merit.
7. 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 resentence hearing pursuant to the Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2017] 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.
8. 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.
9. Further this is an inappropriate application since the court is functus officio. It would also be disrespectful of this court to purport to descend into the arena to what amounts to a review of the decision of the Court of Appeal that found the applicant's appeal as lacking in merit. Such an application can only be entertained by a higher Court – the Supreme Court or the Court of Appeal. The applicant could as well have moved to the Court of Appeal for review of its order but not to come to this forum as that amounts to muddling the hierarchy of the courts. There is no evidence that the applicant has moved the Court of Appeal and got directions regarding the need for a resentencing either before this court or the Magistrate's court.
10. In the result it is my finding that the applicant's application filed on 31.7.2019 lacks merit and is hereby dismissed.

It is so ordered.

Dated and delivered at **Machakos** this 29<sup>th</sup> day of **April, 2020**.

**D. K. Kemei**

**Judge**