



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPL. NO. 119 OF 2019**

**KIOKO BONIFACE MUTULI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RESENTENSING**

1. Kioko Boniface Muli, 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 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 25.1.2016 and 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 [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.
5. The cited case has necessitated resentencing of all persons previously sentenced to the mandatory death sentence and in the present case the applicant was not sentenced to death but to life imprisonment.
6. Further this is an inappropriate application as the court is functus officio having determined an appeal lodged by the applicant where the appeal on conviction and sentence were dismissed. Such an application can only be entertained by a higher Court – the Court of Appeal. The applicant's appeal having been determined I find that the applicant's remedy lies in lodging an appeal to the Court of Appeal. There is no evidence presented by the applicant to the effect that the Court of Appeal has referred him to this court for purposes of review of the sentence.
7. In the result it is my finding that the applicant's application filed on 31.7.2019 lacks merit. The same is ordered dismissed.

It is so ordered.

**Dated and delivered at Machakos this 28<sup>th</sup> day of April 2020.**

**D.K.Kemei**

**Judge**