

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. CRIMINAL APPLICATION NUMBER 44 OF 2020

BETWEEN

KIIO NDUNGI NDOLO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant herein, **Kiio Ndungi Ndolo**, in his application filed on 13th May, 2020 sought orders that he be allowed to appeal out of time and for further orders that this court may deem fit.

2. From the record, the applicant was charged before the Machakos CM's Criminal Case No. 144 of 2008 with Incest contrary to section 20(1) of the **Sexual Offences Act** with an alternative charge of Indecent Act. He was found guilty and convicted in the main charge and was sentenced to life imprisonment. However, based on the decision of the Supreme Court in Petition Nos. 14 and 16 of 2015- **Muruatetu & Others vs. Republic**, this Court set aside the death sentence imposed on the applicant and directed that a sentence re-hearing be undertaken. Upon the same being undertaken the trial court re-affirmed the same sentence.

3. Although this matter was treated as if it was a revision, in actual fact it is not a revision. Life sentences in respect of such offences is not inherently unconstitutional. What is unconstitutional is their prima facie mandatory nature. Accordingly, whereas the trial courts are still at liberty to impose the life sentence, it cannot be imposed simply because the legislative language is couched in mandatory terms.

4. As indicated, what the applicant is seeking herein, and rightly so in my view, is leave to appeal out of time. As the same is not opposed, time is hereby extended to the applicant to file an appeal out of time against the decision on resentencing and made on 13th March, 2020. The applicant is granted leave to amend his grounds of appeal should he deem fit so to do. Let the registry open an appeal file and let the proceedings be typed.

5. This ruling has been delivered online through skype due to the prevailing restrictions occasioned by COVID 19 pandemic.

6. It is so ordered.

Read, signed and delivered online at Machakos this 26th day of May, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngetich for the Respondent

The Applicant in attendance via Skype

CA Geoffrey