



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: D. K. Kemei – J

**MISCELLANEOUS CRIMINAL APPL. NO. 145 OF 2019**

**STEPHEN MUSYOKA KISULE..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING ON RESENTENSING**

1. Stephen Musyoka Kisule, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.
2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced by the trial court to serve 20 years 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 2.11.2016 by Justice E. Ogola. 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 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, as well as the functus officio doctrine 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 20 years imprisonment.
6. Further as pointed out by the state, the applicant exhausted his appeal meaning that this court is functus officio. Such an application can only be entertained by a higher Court – the Court of Appeal. Handling the application when the court is already functus officio will amount to sitting in appeal on its own decision. The appropriate way is for the applicant to approach the Court of Appeal which has the jurisdiction to make a determination on both conviction and sentence.
7. In the result it is my finding that the Applicant’s application filed on 9.10.2019 lacks merit. The same is dismissed.

Orders accordingly.

Dated and delivered at **Machakos** this **26<sup>th</sup>** day of **May, 2020**.

**D. K. Kemei**

**Judge**