

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CRIMINAL APPL. NO. 120 OF 2019

PATRICK MWENDWA MAKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RESENTENCING

1. Patrick Mwendwa Makau, 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 by the trial court to serve 20 years' imprisonment.
3. The Applicant was aggrieved by that decision and he filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard. A judgement was delivered on 6.2.2017 by Lady Justice P. Nyamweya. The judgment confirmed the conviction and enhanced the 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, 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. The applicant was not sentenced to death but to life imprisonment which was the minimum sentence provided by the Act.
6. Further this court is functus officio. Such an application can only be entertained by a higher Court – the Court of Appeal. The applicant is advised to move to the said court which will address both issues of conviction and sentence. By entertaining the matter then it will tantamount to this court sitting on appeal in a matter that it is already functus officio.
7. In the result it is my finding that the application lodged by the applicant and filed on 31.07.2019 lacks merit. The same is dismissed.

Orders accordingly.

Dated and delivered at Machakos this 26th day of May, 2020.

D. K. Kemei

Judge