



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 20 OF 2020**

**KAZUNGU KALAMA JEFWA.....PETITIONER**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**Coram: Hon. Justice Nyakundi**

**Mr Alenga for Respondent**

**Petitioner in person for Petitioner**

**RULING**

The Petitioner herein was initially charged, convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act. He was aggrieved by the decision of the lower court and subsequently appealed to both appellate courts where the same was dismissed. The instant petition for re-sentencing has been necessitated by the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic (2017) eKLR** whereby the mandatory death sentence for the offence of murder was declared unconstitutional. In the case of **Dismas Wafula Kilwake vs. Republic [2018] eKLR**, the Court of Appeal applied the **Muruatetu decision Mutatis Mutandis** to the provisions of the Sexual Offences Act which imposes a mandatory minimum sentence for defilements.

The Petitioner is seeking that the 20 years imprisonment meted out on him be set aside and for the court to impose an appropriate sentence. The facts of the case against the Petitioner was that on diverse dates between November 2014 and January 2015 he defiled AKN a child aged 15 years six times.

I have considered the petition herein, the supporting affidavit and the judgement of the Court of Appeal. In its judgement, the Court of Appeal stated thus:

***“Following conviction, the trial court sentenced the Appellant to 20 years’ imprisonment. In our view and having regard to the circumstances of the case, and notwithstanding the Supreme Court’s decision in Muruatetu (supra) we consider the sentence to befitting the offence herein and we so no reason to interfere with it.”***

It is evident that the Court of Appeal being fully aware of the Supreme Court’s decision in the Muruatetu case felt that the sentence of 20 years was appropriate in the circumstances of the case. This court cannot therefore set aside the Court of Appeal as it would be tantamount to acting in an appellate jurisdiction to the court of appeal. A petition brought for resentencing under the holding of the Muruatetu case can only be considered the court in sentencing did not take into consideration the direction of the Supreme Court. Where it is apparent that the court passed the sentence in light of the Muruatetu case, this court has not right to interfere with the court’s discretion.

For the reasons aforementioned, I find compelling reasons or new evidence to interfere with the sentence of the trial Magistrate thereafter confirmed by the court of appeal. The appeal is hereby dismissed in its entirety.

**Judgment delivered, dated and signed at Malindi this 21<sup>st</sup> day of December, 2020.**

.....

**R. NYAKUNDI**

**JUDGE**