



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC CRIM APPL. NO. 103 OF 2019

FAPPYTON MUTUKU NGUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The prayer that remains for the determination of this court in the application is the request by the applicant for a declaration that the decision in **Francis Karioko Muruatetu & Anor v R (2017) eKLR** is applicable in respect of resentencing.
2. The Application is supported by an annexed affidavit of the applicant on the following grounds:-
 - (a) **That the applicant was sentenced to life imprisonment**
 - (b) **That this court make a declaration that the applicant does not deserve a life sentence.**
3. The Application was not opposed by the state which has filed no response.
4. The applicant prayed that the application be allowed and the respondent have not indicated that they opposed the same. I have considered the application and the brief oral submissions and find that the issue for determination is what orders can this court make?
5. The application is part of a series of chequered applications that the applicant has mounted before the courts in a bid to disentangle himself from the consequences of this case that kicked off in earnest on the 20.10.2009 and since then he has been indefatigable as he has relentlessly lodged appeals and several applications.
6. The applicant was convicted of defilement that was said to have been committed in Kangode Location in Masinga District and he appears to have challenged the decision of the trial court before this court which appeal was dismissed. Similarly his appeal to the court of appeal was dismissed. He has now sought remedy under the Supreme Court decision in **Francis Karioko Muruatetu & Anor v R (2017) eKLR**.
7. As appreciated by the Supreme Court in Muruatetu Case (supra):

“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing”.

Following the decision in the Muruatetu case (supra) several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result. For instance in **Jared Koita v, R (2017) eKLR** the Court of Appeal in Kisumu reduced a sentence of life imprisonment for an offence of defilement to thirty (30) years. The applicant herein is serving a similar sentence for a similar offence and should not be discriminated but be allowed to ventilate his grievances via a resentencing hearing before the trial court.

8. In this regard, Section 71 of the Criminal procedure Code provides that:

Subject to the provisions of section 69, and to the powers of transfer conferred by sections 79 and 81, every offence shall ordinarily be tried by a court within the local limits of whose jurisdiction it was committed, or within the local limits of whose jurisdiction the accused was apprehended, or is in custody on a charge for the offence, or has appeared in answer to a summons lawfully issued charging the offence.

9. The same Act also vests the High Court with general supervisory and revisionary jurisdiction over all subordinate courts. In this regard, the High Court may if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof and may remove the same into the High Court or may give to such subordinate court such directions as to the further conduct of the same as justice may require.

10. Jurisdiction to determine the offence of defilement at first instance lies with the magistrate's court. On the basis of the foregoing considerations and in exercise of this court's general supervisory and revisionary jurisdiction over subordinate courts, as well as consideration of the application I find that it would be in the interest of justice that the lower court should conduct a sentence rehearing in this matter.

11. In view of the foregoing observations the applicant's application dated 1.7.2019 has merit and is allowed. This matter is now remitted to the SPM's Court at Kithimani for the purpose of resentencing. The same be mentioned on the 3.12.2019 before the Hon. Senior principal Magistrate for the purpose of conducting a resentencing hearing.

It is so ordered.

Dated and delivered at Machakos this 28th day of November, 2019.

D. K. Kemei

Judge