REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION NO 145 OF 2019

IN THE MATTER OF ARTICLES 22(1) 23(1) 25 163(3) (6) (7) 159(2) (a) (b) (d) 47 48 50(2) (q)

(7) 258 (1) (2) & 259 OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES

IN THE MATTER OF S. 8(2) OF THE SEXUAL OFFENCES ACT NO 3 OF 2006

AND

IN THE MATTER OF CRIMINAL CASE NO 40 OF 2010 NAKURU

AND

IN THE MATTER OF HCCRA NO. 269 OF 2010 AT NAKURU

AND

IN THE MATTER OF COURT OF APPEAL NO OF AT NAKURU

BETWEEN

DAVID IHAJI ALUKONYA...APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS...RESPONDENT

RULING

The applicant **David Ihaji Alukonya** was charged, tried and convicted of **Defilement c/s 8(1) as Read with 8(2) of the Sexual Offences Act.** He was sentenced to life imprisonment in ***Nakuru CMCR no 40 of 2010***. It is his position that he filed ***HCCRA No. 296 of 2010***, but was not successful. That he also filed an appeal in the Court of Appeal which was also not successful. He now brings a notice of motion seeking a sentence review/ sentence rehearing under the auspices of the **Muruatetu** Case.

In the supporting affidavit sworn on the 5th March 2020, he deponed that he had not exhausted all his appeals, something he claimed in his orals submissions was a typing error. He also deponed that the reason for his application was that the life sentence was too harsh and excessive and went against the holding in the **Muruatetu** case where the Supreme Court held that the mandatory nature of the death sentence was unconstitutional.

At the hearing of the application he relied on his written submissions and mitigation. He submitted that he was sentenced to life imprisonment on 7th September 2010. That he was now seeking a second chance. That he was remorseful and had reformed during his

incarceration in prison. He had undertaken various courses as evidenced by his certificates and testimonials, was now armed with useful skills should he be released, he would be able to earn a living. That he had dependants, a wife and three children at home though his mother had passed away while he was in prison.

The application was opposed by the state through the Prosecuting Counsel Ms. Wambui on the ground that the applicant had a pending application which not been determined. Further that in **Muruatetu**, the Supreme Court determined that the appropriate forum for a sentence rehearing was the court that first heard the case and sentenced the applicant. That the only available option for him was his appeal(s).

I have carefully considered the application, the appellant's submissions and authorities cited **Guyo Jarso Guyo vs R Petition no 6 of 2018 at Maralal, [2018] eKLR:** In that case, the applicant had exhausted all his appeals. The Judge stated:

> "*The mandatory nature of life imprisonment under section 8(2) of the Sexual Offences Act draws back judicial authority. It even waters down the unlimited original jurisdiction of the High Court in Criminal matters* ***especially when an appeal is filed****. The unlimited original jurisdiction in criminal matters of the High Court should not be limited by statutory provisions which calls upon the Judge to impose a specific sentence. In that case, the unlimited jurisdiction becomes a limited one in relation to sentencing. The jurisdiction of the High Court under Article 165 (3) (a) in relation to criminal matters includes the power to pass a sentence which the Court deem as appropriate given the circumstance of the case."*

In **Francis Karioko Muruatetu & Anor [2017]eKLR** it was stated:

> "*[111]. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners*."

I have also considered the submissions by the State.

The applicant claims that he has exhausted all his appeals: ***Nakuru HCRA 269 of 2010, and Court of Appeal 150 of 2011***. These files had not been traced by the time of the hearing of the application. I searched his name in Kenya Law Reports and nothing came up. I searched the case numbers as well but nothing showed up. I cannot state with certainty that he has actually exhausted his appeals without evidence of the same.

Be that as it may, it is my humble view that the applicable authority to Sexual Offences is the **Dismas Wafula Kilwake vs R [2018] eKLR** in which the Court of Appeal stated:

> "*Here at home in a judgment rendered on 14th December 2017 in* ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015,*** *the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the Sexual Offences Act, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences. The Court expressed itself thus:*
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> ***Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right." (Emphasis added)***
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> *In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing. Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement.* ***In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand.*** *On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."*

In **Paul Mwangi Macharia Vs R Nakuru Criminal Miscellaneous Application Number 60 OF 2020.** I held the view that in sexual offences the application of **Muruatetu** would come at the sentencing stage and no provision was made by the Court of Appeal for sentence rehearing. I still hold that view that I can only interfere with a sentence while dealing with an appeal on sentence.

On the other hand the Supreme Court did state in **Muruatetu** that the appropriate forum for sentence rehearing was the court that first heard the case and sentenced the applicant. Clearly this is not the forum for this application.

I find that the applicant still has a chance on appeal and the rest of the application is therefore not merited and is disallowed.

Dated this 9th January 2021

Mumbua T Matheka

Judge

DELIVERED VIRTUALLY THIS 4TH DAY OF MARCH 2021

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Edna

The Applicant

Court Prosecutor: Ms. Murunga