



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL PETITION NO. 16 OF 2019**

**PATRICK GEMBE MAGANGA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Patrick Gembe Maganga, the petitioner herein, were convicted for the offence of defilement contrary to 8(3) of the Sexual Offences Act and sentenced to serve twenty years imprisonment. He appealed to the High Court and to the Court of Appeal where both appeals were dismissed.
2. The petitioner was in person. His petition is premised on the ground that following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR**, the mandatory sentence is unconstitutional. He is therefore praying for an order for resentencing.
3. The petitioner premised their petition on Articles 25 (c) 27(1) & (2), 28 and 50 (2) (p) of the Constitution of Kenya.
4. The **Muruatetu** case is the most misapplied and at times I am tempted to believe that it is deliberate. At paragraph 112 the Supreme Court summarized its orders which captured their decision as follows:

*[112]Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:*

*a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.*

*b) This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment.*

*c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this Judgment and Order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted twelve (12) months from the date of this Judgment to give a progress report to this Court on the same.*

*d) We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought constitute life imprisonment.*

5. The decision addressed itself to murder cases and not any other mandatory sentence. It is therefore inapplicable in this case.
6. This court (differently constituted) became *functus officio* the moment it pronounced itself on appeal. I therefore lack jurisdiction to entertain the petition. I accordingly dismiss it.

**DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF APRIL, 2021.**

**KIARIE WAWERU KIARIE**

**JUDGE**