REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 49 OF 2020

STEPHEN MUGENDI NDWIGA .....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Before me is a petition dated 29.05.2020 and wherein the petitioner seeks resentencing and/or the substitution of his 20 years' sentence meted upon by this court on appeal from the judgment and sentence of the trial court pursuant to the decision in **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR** where the Court of Appeal applied the dictum in **Francis Karioko Muruatetu –vs- Republic Petition No. 15 of 2015.**

2. The petitioner's case is that he was convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2006 in Embu Criminal Case No. 1614 of 2014 and sentenced to forty (40) years imprisonment. He appealed the said sentence to the High Court at Embu (this court) vide Embu High Court Criminal Appeal No. 87 of 2015 and the 40 years' sentence was reduced to a 20 years' imprisonment. It is this sentence that he seeks revision invoking the dictum in Muruatetu's case as applied by the Court of Appeal in sexual offences in **Evans Wanjala Wanyonyi –vs- Republic (supra).**

3. At the hearing of the petition, Mr. Robert Mutitu appeared for the petitioner and wherein he submitted that the petitioner's sentence was reduced to 20 years and that the petitioner had served over seven years. Further that by the time the sentence was meted the **Muruatetu's case** had not been determined and as such, this court has jurisdiction to hear the petition. Further that the time the petitioner had spent in custody was not taken into account.

4. The petitioner further filed his written submissions in support of his petition.

5. Ms. Mati for the respondent submitted that she is not opposed to the prayer that the period spent in custody (2 days) be taken into account but the court do take into account the circumstances under which the offence was committed and the age of the minor.

6. I have considered the petition and the oral submissions made by the parties and further the petitioner's written submissions.

7. As I have stated hereinabove, the instant application is premised on the Supreme Court's decision in **Francis Karioko Muruatetu & Another –vs- Republic (supra)** as was applied in **Evans Wanjala Wanyonyi –vs- Republic (supra).** In the former case, the Supreme Court held that (paragraph 69) that section 204 of the Penal Code was inconsistent with the Constitution and invalid to the extent that it provided for the mandatory death sentence for murder. In the latter case, the said dictum was applied in offences under the Sexual Offences Act wherein the Act provides for mandatory minimum sentence. (See **Dismas Wafula Kilwake –vs- Republic [2018] eKLR), B W –vs- Republic [2019] eKLR** and **Christopher Ochieng –vs- Republic [2018] eKLR).**

8. In the instant case, the petitioner's sentence was reviewed by Hon. S. Chitembwe J on appeal and substituted with 20 years' imprisonment. As the petitioner rightfully submitted, at the time of the imposition of the said sentence by Hon. S Chitembwe J, the jurisprudence in Muruatetu's case had not developed yet. The Learned Judge held that: -

> ***"….On the issue of sentencing, I do find that it is excessive. I do set the 40 years sentence and replace it with the minimum sentence of twenty (20) years imprisonment…..****(emphasis mine)"*.

9. It therefore means that the Learned Judge in review of the sentence sentenced the petitioner herein to the minimum mandatory sentence as was provided by the law at the time and both the trial court and the first appellate court did not benefit from the exercise of the discretion in sentencing as the law did not allow the same at that time**.** As such, the subsisting judgment is that of the High Court and which is a court of concurrent jurisdiction.

10. However, the law on such mandatory minimum sentences has now changed pursuant to the new jurisprudence developed in **Muruatetu's case (supra)** and which is now applicable in Sexual Offences Act. It is this shift in the legal position that indeed necessitated this application. But as I have already pointed out, the subsisting judgment is that of concurrent court. It is the one which the applicant prays that it be revised in applying the dictum in **Muruatetu's case**. The question in my view which ought to be answered is whether this court can resentence the applicant and in doing so review a decision of court of concurrent jurisdiction.

11. As a general rule, High Court can only review the judgment of a subordinate court under the jurisdiction donated to it by Sections 362 to 366 of the Criminal Procedure Code. As such, the judgment subject to the instant application being that of the High Court, this court cannot exercise revisionary jurisdiction over the same.

12. However, with the new jurisprudence as developed by the Supreme Court in **Muruatetu's case,** High Court (being the trial court in murder cases) now has jurisdiction to re-sentence in cases where an accused person was sentenced under the mandatory section 204 of the Penal Code. (See paragraphs 110 and 111 of the said decision). The court in ordering resentence hearing found that section 204 of the Penal code was unconstitutional as it provided for mandatory minimum sentence.

13. It is this holding (legality of the mandatory minimum death sentence) which was applied by the Court of Appeal to the offences under the Sexual Offences Act and where it was held that the provisions therein providing for the mandatory minimum sentences were unconstitutional. {See **Evans Wanjala Wanyonyi –vs- Republic (supra)**, **Dismas Wafula Kilwake –vs- Republic [2018] eKLR), B W – vs- Republic [2019] eKLR** and **Christopher Ochieng –vs- Republic [2018] eKLR)}.**

14. However, unlike in **Muruatetu's case** where the court directed that the pending cases be taken for resentencing, the Court of Appeal in the above cases never gave such a direction but only applied the new jurisprudence to the cases it was handling at the instant time since that was the law then.

15. In the instant case, this court is not handling the matter as the first appellate court. It has already handled that. But due to change of law, pursuant to the application of Muruatetu's decision in offences under the Sexual Offences Act, the applicant now comes to the court seeking benefit of the said principle.

16. As a matter of law, laws do not act retrospectively. The Supreme Court in **Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR** in setting out exemption to this general rule cited with approval the case of **A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88** where it was held that: -

> **"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position".**

(See also **Republic –vs- Karisa Chengo & 2 others [2017] eKLR** paragraph 102 -104**).**

17. The Court of Appeal's decision was not ordered to apply retrospectively as opposed to the Supreme Court's decision in **Muruatetu**. In my view, there is no legal basis of resentencing in sexual offences so as to apply the principles in **Muruatetu decision.** The decisions by the Court of Appeal where they applied the reasoning in **Muruatetu** to Sexual Offences Act were decisions made by the Court in rendering a decision on appeal and since at that time (of rendering the appeal) the law had changed, they had no alternative other than to apply the said reasoning as it was binding on them. The same cannot apply retrospectively and thus enabling those who had been sentenced before the same was rendered to apply for revision of their sentence and in doing so basing their argument on the pronouncements made in the said decision.

18. In **John Kagunda Kariuki v Republic [2019] eKLR** and which decision I find persuasive, Justice Joel Ngugi (Prof) when faced with a similar situation and after appreciating the application of **Muruatetu's case** in sexual offences and its implications on the court's powers to exercise discretion in sentencing, proceeded to hold that: -

> ***"8. However, unlike the decision in Muruatetu and other cases where the death penalty was imposed, the decision Dismas Wafula Kilwake does not operate retroactively. This was a decision given the ordinary common law mode which does not entitle all other people who could have benefitted from the new development in decisional law to approach the High Court afresh for review of the sentences imposed. Instead, the principles announced in the case will apply to future cases. In other words, persons whose appeals have already been heard by the High Court are not entitled to file fresh applications for re-sentencing in accordance with the new decisional law. To reach a different conclusion would lead to an ungovernable situation where all previously sentenced prisoners would seek review of their sentences.....***
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> ***10. In the present case, the Applicant's appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal....".***

19. Further the Court (Aburili J) in **Daniel Otieno Oracha –vs- Republic [2019] eKLR** in a case where the petitioner had applied for review of a sentence imposed by a court of concurrent jurisdiction and while holding that the court did not have jurisdiction to review the said judgment observed that: -

"14. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise.....

16. The judgment of Abida Ali-Aroni J made in accordance with the law has not been challenged. This court cannot sit on appeal of its own judgment or of court of concurrent competent jurisdiction when the Petitioner had an opportunity to ventilate his grievance before the Court of Appeal even if it was to challenge sentence alone.

17. Good governance demands that cases be handled procedurally in the right forum. This is because the rule of the thumb that superior courts cannot sit in review/appeal over decisions of their peers of equal and competent jurisdiction much less those courts higher than themselves and that matters falling under the exclusive jurisdiction of Supreme Court under Article 163(3) cannot be dealt with by the High Court....."

20. It is my considered view that this court cannot review a judgment of Hon. S. Chitembwe J and in doing so resentence the petitioner herein while invoking the dictum in **Muruatetu's case** despite the change in law. Doing so would be tantamount to reopening the matter and applying the judicial decision retrospectively. Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors.

21. In the same breath, this court cannot review the said judgment and in doing so take into account the time the petitioner had spent in custody. The same ought to have been dealt by Hon. Chitembwe J as the first appellate court. Failure by the said first appellate court to consider the said period cannot be rectified by this court as the same shall be akin to reviewing the decision of a court of concurrent jurisdiction.

22. In the circumstances, the application herein is unmerited and the same is hereby dismissed.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MAY, 2021.

L. NJUGUNA

JUDGE

…….Petitioner

…….for the Respondent