



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.470 OF 2019**

**LESIT, J.**

**GEORGE BOKE KISIAWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an application for review of sentence from the decision of this court in High Court Criminal Appeal No.132 of 2018 delivered by Kimaru J. on 15<sup>th</sup> December 2020)*

**RULING ON APPLICATION FOR REVIEW.**

1. The Applicant, George Boke Kisiawa, was charged before the Chief Magistrate's Court at Kibera with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Penal Code**. The Applicant was found guilty as charged and sentenced to serve twenty (20) years imprisonment on 13<sup>th</sup> July, 2018.
2. The Applicant filed an appeal before this court (Nairobi High Court Criminal Appeal No.132 of 2018) on 27<sup>th</sup> July 2018. The appeal was heard by Kimaru J. who upheld the conviction, in a judgment dated 15<sup>th</sup> December 2020. His sentence was however reduced from 20 years to 15 years imprisonment.
3. The Applicant is now back to this court with an application filed on 7<sup>th</sup> October 2019 seeking to allow his appeal to be heard out of time. The application is supported by an affidavit sworn by the Applicant on 4<sup>th</sup> October 2019. In the affidavit, the Applicant contended that he was convicted of the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** before the trial magistrate court. After his conviction by the lower court, he stated that he was unable to appeal the decision of the lower court in time, because his relatives were unable to procure legal representation for him. He urged this court to allow his appeal to be heard out of time in the interest of justice. The Applicant attached a memorandum of appeal dated 19<sup>th</sup> September 2019.
4. In his oral submissions before this court, it transpired that the Applicant had already appealed the decision of the lower court [Kibera Criminal Case No.35 of 2017], before this court in High Court Criminal Appeal Case No.132 of 2018. The Applicant seems to acknowledge that fact when he argues that this court (Kimaru, J.) reduced the sentence imposed on him by the lower court from 20 years imprisonment to 15 years imprisonment. He urges that this court, while making its determination, did not take into account the period of time he spent in custody prior to his conviction by the lower court.
5. Learned Prosecution Counsel, Ms. Kimani, opposed the Applicant's application. She stated that the application was incompetent in law under the circumstances, as it did not fall within the ambit of the Supreme Court decision in **Francis Karioko Muruatetu & another vs Republic [2017] eKLR**. She submitted that it was not supported by any law and urged this court to strike it out.
6. I have considered the application and the submissions by the Applicant and the State.
7. The Supreme Court in the **Muruatetu case** (supra) outlawed the mandatory nature of the death sentence in murder cases as unconstitutional for the reason it prescribed a mandatory death sentence for persons convicted of the offence of murder.
8. The reasoning in the **Muruatetu case** was extended to mandatory death sentence in robbery with violence cases by the Court of Appeal in **William Okungu Kittiny vs Republic [2018] eKLR**.
9. It was also extended to mandatory sentences imposed under the **Sexual Offences Act** by the Court of Appeal in **Dismas Wafula Kilwake**

vs Republic [2018] eKLR. The Court of Appeal in that case held thus:

**“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], 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.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”

10. However, unlike in the Muruatetu case, the decision in Dismas Wafula Kilwake (supra) was specifically stated to operate non-retroactively. This means that the principles in the Dismas Wafula Kilwake case are applicable in respect of future cases. Therefore, accused persons whose appeals have already been heard by the High Court cannot file fresh applications for Re-sentencing in accordance with decision in Dismas Wafula Kilwake. Only accused persons sentenced to death pursuant to mandatory provisions of the law are entitled to fresh sentence re-hearings.

11. The application before court is actually not seeking re-sentencing. If I understood the Applicant well, he is seeking a review of the order on sentence made by this court pursuant to the Applicant’s appeal heard and determined by this court. The issue is whether the Applicant has a right of review from an order in sentence made pursuant to his appeal before the same court.

12. The Applicant was heard on first appeal by this court. If he was aggrieved by the decision made, he ought to have filed a second appeal to the Court of Appeal. He cannot purport to return to this court for a second consideration of his sentence. No such right accrues to the Applicant, neither is there such power donated to the high court as a first appellate court in the law.

13. A court of law can only exercise jurisdiction conferred upon it by the Constitution or other written law. The Supreme Court in the case of Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & another [2012] eKLR held thus;

***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”***

14. I therefore find that this court has no jurisdiction to entertain the present application. In the circumstances, I find that the Applicant’s application is bad in law and is accordingly struck out.

15. Those are my orders.

DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY 2021

LESIIT, J.

JUDGE

DATED SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF JUNE, 2021

BY

OGEMBO, D.O.

JUDGE

Court:

Ruling read out in court (on-line) in the presence of the applicant (Kamiti) and Mr. Chebii for the state.

**OGEMBO, D.O.**

**JUDGE**