REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 45 OF 2020

LAWRENCE KARIUKI NJERU............PETITIONER

VERSUS

REPUBLIC..RESPONDENT

RULING

1. This ruling is in relation to the petition filed on 3.06.2020. The petitioner's case is that he was convicted of the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006 in Embu Criminal Case No. 1520 of 2014 and sentenced to thirty five (35) years imprisonment. He appealed the said sentence to the High Court at Embu (this court) vide Embu High Court Criminal Appeal No. 71 of 2015 and whereby the appeal was dismissed and sentence upheld. That he appealed to the Court of Appeal at Nyeri vide Criminal Appeal No. 175 of 2017 and which appeal is still pending. He now seeks a myriad of declarations. However, from a clear scrutiny of the said petition, the petitioner seeks resentencing pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu –vs- Republic Petition No. 15 of 2015** as was applied by the Court of Appeal in **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR.**

2. The petitioner proceeded to file written submissions in support of the petition and wherein he basically mitigated for a lenient sentence.

3. At the hearing of the petition, the petitioner relied on the written submissions in support of the petition. Ms. Mati for the respondent opposed the petition on the grounds that there were exceptional circumstances as were recognized by the judges in **Muruatetu's case** as the minor was only two years old. Further that the sentence was lenient.

4. I have considered the petition and the oral submissions made by the parties and further the petitioner's written submissions. It is my considered view that the main issue for determination is whether the petition is merited.

5. However, the petitioner clearly pointed out that he appealed to this court and wherein the sentence was upheld. The petitioner further averred that he appealed to the Court of Appeal in Nyeri and the appeal is still pending. I have perused the court record and indeed noted that the judgment on appeal was delivered by this court on 2.10.2017. It therefore means that what the petitioner seeks is that this court reviews its judgment which it delivered on appeal and in so doing apply the dictum in the above authorities.

6. As a general rule, High Court can only review the judgment of a subordinate court under the jurisdiction provided by sections 362 to 366 of the **Criminal Procedure Code**. This court does not have jurisdiction to review its own decision.

7. Further, as I have already noted, the petitioner seeks review of the sentence meted by the trial court pursuant to the decision in **Muruatetu's case (supra).** In this 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. The dictum in the said case has been applied in offences under the Sexual Offences Act wherein the Act provides for mandatory minimum sentence. (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).** It is the dictum in these authorities which the petitioner prays that it be applied in the instant petition.

8. However, I note that the trial court's judgment was delivered on 24.08.2015 and the judgment on appeal delivered on 2.10.2017 and before the Supreme Court's decision in **Muruatetu's case** and pursuant to which decision the 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). In applying the dictum in **Muruatetu's case** to offences under the Sexual Offences Act, the Court of Appeal did not order for resentencing of persons previously sentenced under the mandatory provisions of the Sexual Offences Act.

9. The sentence having been meted upon the petitioner prior to the above decisions, it means that the petitioner seeks this court to apply the said decisions retrospectively. As a matter of law, laws do not act retrospectively. Further judicial decisions do not apply retrospectively save for cases already finally determined. (See **Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR** and **Republic –vs-**

Karisa Chengo & 2 others [2017] eKLR).

10. The Court of Appeal's decision having not been ordered to apply retrospectively as opposed to the Supreme Court's decision in **Muruatetu**, it is my view that the petitioner herein cannot benefit from the principles set out in the said decisions. I am guided by the persuasive decision by Justice Joel Ngugi (Prof) in **John Kagunda Kariuki –vs- Republic [2019] eKLR** where the Learned Judge 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 in 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....".***

11. 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......***
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> ***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.***
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> ***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........"***

12. It is my considered view that this court cannot review its earlier decision 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.

13. The petitioner ought to ventilate the issue on the resentencing and/or excessive sentence at the Court of Appeal where an appeal is pending. Otherwise the petitioner is just but doing forum shopping. Let him concentrate on his appeal and have the issues adjudged therein.

14. For the reason that this court does not have jurisdiction to review its own judgment and further that the dicta as to the legality of mandatory minimum sentences in sexual offences cannot apply retrospectively, I find that the petition herein lacks merits and the same is hereby dismissed.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JUNE 2021.

L. NJUGUNA

JUDGE

…………………………………......………………for the Petitioner

………………………………………………………for the Respondent