REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

MISC. APPLICACATION NO. 70 OF 2019

HASSAN ABDIRAHMAN.......APPLICANT

VERSUS

REPUBLIC...........................RESPONDENT

RULING

1. The applicant **Hassan Abdirahman** moved the court seeking to have the principles set out in the case of **Francis Karioko Muruatetu & Wilson Thirimbo Mwangi in Petition No. 15 & 16 of 2015** (as consolidated) be applied to his case.

2. He also seeks to have the court declare a violation of Section 216 and 329 of the Criminal Procedure Code.

3. Thirdly upon the application of the principles in the Muruatetu case, he seeks to have the court consider Section 333(2) of the Criminal Procedure Code while re-sentencing him

4. Hassan Abdirahman was charged in Criminal Case No. 27 of 2014 in the Principal Magistrate’s Court in Wajir, with the offence of defilement contrary to Section 8(1)(2) of the Sexual Offences Act. He was accused of having defiled a minor girl aged 9 years.

5. The applicant pleaded not guilty to the offence and the matter proceeded to full trial, he was found guilty, convicted and sentenced to serve life imprisonment.

6. Dissatisfied with the decision of the trial court the applicant appealed to this court in High Court Criminal Appeal Case No. 211 of 2014. **Dulu J** sitting on appeal found the same lacking in merit and dismissed it.

7. In his submission and in the mistaken belief that the **Muruatetu case** brought relief to convicts such as himself, the applicant urged that he was a first offender, no one lost life in the instant case; further that as held in the **Muruatetu case**, mandatory sentences deny the court the discretion in arriving at a decision. He also urged that Section 216 and 329 were violated and therefore there is need to revise the life sentence and re-sentence him.

8. The State opposed the application arguing that the **Muruatetu** principle on all other matters other than murder was not to apply retroactively and therefore this matter cannot be subject to re-sentencing.

9. As for the issue of Section 333(2)Criminal Procedure Code, the state submitted that since the applicant was sentenced to life imprisonment the Section was not applicable.

10. It cannot be denied that since the decision of Muruatetu 1 by the Supreme Court, courts have had a barrage of application in murder, sexual offences and robbery with violence cases for purposes of re-sentencing.

In some jurisdictions like ours majority of applications pending are from litigants seeking similar orders.

11. The High Court in a number of notable decisions such as **Dismas Wafula Kilwake v R [2018] eKLR & John Kamau Gachiha v R [2019] eKLR** attempted to deal with the menace being created by the understanding majority had on the **Muruatetu** principle as relates to minimum and maximum sentences provided by various statutes.

12. In the recent directions issued the Supreme Court, the said court explained itself further on the **Muruatetu** Principle (Case) inter alia as follows:

“(7) In the meantime, and taking Judicial notice, we do agree with Mr. Hassan and Mr. Ochieng, that while the report of the Task Force appointed by the Attorney General was awaited, courts below have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the Sexual Offences Act; presumably assuming that the decision by this court on this particular matter was equally applicable to others statutes prescribing mandatory or minimum sentenses. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision (emphasize added).

(10) It has been argued in justifying this state of affairs, that by paragraph 48 of the judgement in this matter, or indeed the spirit of the judgement as a whole the court has outlawed all mandatory and minimum sentense provisions; and that although Muruatetu specifically dealt with the mandatory death sentense in respect of murder, the decision’s expansive reasoning can be applied to other offences,

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Reading this paragraph and the judgement as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgement is only made to section 204 of the Penal Code and it is the mandatory nature of death under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentense in appropriate cases.”

(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentenses are inconsistent with the Constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.”

13. I have quoted the directions by the Supreme Court at length deliberately being a new authority touching on this thought-provoking subject.

The directions clearly indicate that the **Muruatetu** decision does not touch on sentences against offences covered by the Sexual Offences Act. The Supreme Court clarifies that the decision was confined to the death penalty as relates to murder cases and the court did not declare sections of the law providing for maximum and minimum sentences in other offences to be inconsistent with the Constitution.

14. In other words, the provisions of the Sexual Offences Act were not declared unconstitutional and therefore the sentence meted out to the applicant remains to be within the confines of the law.

15. As submitted by the State the life sentence meted out is not affected by the provisions of Section 333(2) of the Criminal Procedure Code and therefore it cannot be a basis for re-sentencing.

16. For the reasons set above the application must fail.

DATED AND DELIVERED AT GARISSA THIS 15th DAY OF JULY, 2021

ALI-ARONI

JUDGE