REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL PETITION NO. EOO2 OF 2020

(CORAM: F.M. GIKONYO J.)

(From the original conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 42 of 2016

on 3/11/ 2017, judgment delivered by J.M. Bwonwonga in Narok HCCRA no. 136 of 2017

on 1/8/2018 and ruling delivered by J.M. Bwonwonga Narok HCCRA No. 3 of 2019 on 20/7/2020)

JOHN MAINA KARANJA.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

Re-sentencing

[1] The Petitioner was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2016. He was convicted of the charge and sentenced to life imprisonment. Consequently, he appealed to this Court. His appeal was dismissed and his conviction upheld. He further filed a miscellaneous application in this court. Again, his application was dismissed for lack of jurisdiction.

[2] Now he has approached the court through a petition dated 18.11.2020 and wherein the petitioner seeks resentencing and/or the substitution the life sentence. The petition is based on the dictum in ***Francis Karioko Muruatetu & another–vs- Republic & others ,Petition No. 15 & 16 of 2016(consolidated)*** as applied in ***Christopher Ochieng Vs Republic Criminal Appeal No. 202 of 2011 in Jared Koita Injiri Vs Republic, Kisumu Criminal Appeal No. 93 of 2014 and in Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR*** by the Court of Appeal.

[3] **Ms. Karia** submitted that the petitioner applied for re sentencing in **HCCRA NO. 3 OF 2019.** The judge recused himself for he had heard the appeal, and, therefore, *functus officio.* Counsel supported the appropriateness of this petition by stating that it is the particular judge who is *functus officio* and not the court.

[4] **Ms. Torosi** submitted that the petition is a non-starter as court declared itself in the appeal in **HCCRA NO. 3 OF 2019.** She argued that the judge was clear he should go to the Court of Appeal.

ANALYSIS AND DETERMINATION

[5] This Petition is premised on the dictum in the case of ***Francis Karioko Muruatetu & Another –vs- Republic (supra)*** as was applied in ***Evans Wanjala Wanyonyi –vs- Republic (supra).*** He argued that, 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 which 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).***

Issue

[6] In this Petition, the court should determine:

i. ***Whether this petition is competent to the extent that it is solely founded on the Muruatetu decision.***

Evolution of *Muruatetu* case: latest developments

[7] Since December 2017, when the Supreme Court made the landmark judgment in the ***Muruatetu*** case, many convicts have approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being, that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. But on 6/7/2021, the Supreme Court hemmed application of Muruatetu case to sentences in murder cases only.

[8] From the onset, the Supreme Court, mindful of the proper regulation of Muruatetu decision, directed the Attorney-General to give a progress report on the setting up of a framework to deal with sentences and re-hearing of cases similar to that of the two petitioners.

[9] The report was to be filed within 12 months but the task force appointed by the Attorney-General delayed and filed it in October 2019.

[10] Meanwhile, courts were faced with huge numbers of applications for re-sentencing on the basis of the principle laid in ***Muruatetu case*** inter alia on the Sexual Offences Act, Penal code- murder and robbery with violence cases.

[11] In the latest directions, the Supreme Court lamented these unintended happenings: -

> ***"We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision. While it is regrettable that the report was not filed timeously and these directions not issued immediately, there can be no justification for courts below us to take the course that has now resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing,"***

[12] Of particular relevance to these proceedings is that the Supreme Court has reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, thus: -

> ***"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 sentences are inconsistent with the Constitution,"***

Doctrine of precedent

[13] By the command of article 163(7) of the Constitution: -

> ***(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.***

[14] Accordingly, in so far as this petition is founded on Muruatetu decision, and this court dealt with his appeal, thus, *functus officio*, it is tinctured with incompetence. In the circumstances, the court cannot assume jurisdiction on this application for re-sentencing. For those reasons, the petition is dismissed. However, this is not a foreclosure of the applicant's right to seek appropriate remedy or reduced sentence through the appellate process or on the basis of the Constitution. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15TH DAY OF JULY, 2021

.....

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent

2. Mrs. Karia for Petitioners

3. Mr. Kasaso – CA

.....

F. M. GIKONYO

JUDGE