REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CRIMINAL APPL. NO. 122 OF 2019

JOHN WAMBUA KIOKO…..……..……..…….....APPLICANT

VERSUS

REPUBLIC ……...……..RESPONDENT

RULING ON RESENTENCING

1. **John Wambua Kioko**, the Applicant herein was charged with Incest contrary to section 20(1) of the Sexual Offences Act No.3 of 2006.He pleaded not guilty and the case proceeded to full hearing. He was convicted and sentenced to serve life imprisonment by *Hon. C. Obulutsa (PM)* at ***Kangundo Principal Magistrate's court* in *Criminal case No.4 of 2010.***

2. The Applicant was aggrieved by the decision of the trial court and filed an appeal in the **High Court at Machakos vide Criminal Appeal No.278 of 2010** against both the conviction and sentence. The appeal was duly heard. A judgement was delivered on 27.1.2014 wherein it dismissed the appeal and that the conviction and sentence was upheld. The Applicant did not appeal against the decision of this court to the Court of Appeal but has opted to file the present application in which he seeks a resentencing pursuant to the Supreme Court's decision in ***Petition NO.15 of 2015 Francis Karioko Muruatetu & Another vs Republic & 5 Others [2017] eKLR***, ***Evans Wanjala Wanyonyi v R (2019) eKLR*** and ***Jared Koita Injiri vs Republic (2019) eKLR.***

3. Aggrieved by the High court decision, the Applicant filed on 31st July 2019 an application before this court seeking a retrial for sentencing pursuant to the Supreme Court decision in ***Petition NO.15 of 2015 Francis Karioko Muruatetu & Another vs Republic & 5 Others (Supra)*** (***'Muruatetu case')*** declaring the mandatory death sentence unconstitutional.

4. The Applicant filed written submissions on 8.2.2021. He has submitted inter alia; that he is remorseful; that he is a first offender who has been rehabilitated; that he has spent time in custody hence the court should hand him a more lenient sentence other than life sentence. The Applicant has placed reliance on several court decisions in his written submissions which I have considered.

5. It is urged by the applicant that the Supreme Court decision of *Muruatetu case* applies to sexual offences where a mandatory sentence is provided for denying the court discretion in sentencing.

6. On the part of the respondent, it has been submitted that the applicant should first exhaust his right of appeal to the Court of Appeal pursuant to Article 50 (2) of the Constitution. Further that this court is *functus officio* since it will be a second appeal to the High Court.

7. I have considered the submissions by respective parties as well as the authorities cited. The issue for determination is whether the application has merit.

8. Article 50(2)(p) of the constitution provides that an accused person has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

9. Section 20(1) of the Sexual Offences Act provides that:-

> ***"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:.."***

10. The trial court sentenced the Applicant to a maximum of life imprisonment. The section states the minimum to be 10 years. A reading of

section 20(1) reveals that is clear that the finding of the trial court with regard to sentence and this court on appeal is within the law. Hence, i find no reason to interfere with the sentence of the trial court. The trial court gave the Applicant an opportunity to mitigate which was duly considered. This court heard and determined the applicant's appeal and dismissed it. The applicant ought to approach the Court of Appeal for redress if need be.

11. It has been submitted for the respondent that the application amounts to a second appeal before this court yet the High Court became *functus officio* after delivery of its judgement on 27.1.2014.

12. The Supreme Court in ***Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR*** stated that:

> ***"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."***

13. It follows therefore that the court will not be *functus officio* only when it's called upon to correct clerical errors in the judgement. The Applicant has not demonstrated that there are clerical errors that warrant the court's intervention. This court having made its final determination cannot sit on appeal and rehear this matter. It is *functus officio.* The applicant should proceed to the Court of Appeal for redress as that is where his recourse lies. The application is an abuse of the court process.

14. In the upshot, I find the Applicant's application filed on 31/7/2019 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at **Machakos** this **8th** day of **July, 2021**.

D. K. Kemei

Judge