REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 151 OF 2019

WILSON WAKHUNGU...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(**Being an appeal from the judgement and sentence of Hon. I. G. RUHU, RM., dated 20th September, 2019 in the SPM'S Court at Kimilili, in S. O. A. Criminal Case No. 36 of 2019, Republic vs Wilson Wakhungu)**

JUDGEMENT

The appellant has appealed against his sentence of 15 years' imprisonment in respect of the offence of defilement in respect of the offence of defilement contrary to section 8(i) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

In this court the appellant has raised 7 grounds of appeal in his amended petition. All those grounds of appeal are in relation to his appeal against sentence.

In ground 1 and 2 in a coalesced form the appellant has faulted the trial court for imposing a harsh and degrading punishment in view of the circumstances of the case. In grounds 3 and 4 in a coalesced form the appellant has urged this court to reduce the 15 years' imprisonment to a lesser lenient sentence in view of the fact that he has been incarcerated for almost 2 years.

Ms. Nyakibia, counsel for the Respondent has opposed the appeal. She has submitted that in view of the first decision of the Supreme Court in Francis Muruatetu and another vs Republic (2017) eKLR the sentence is not excessive. She has further submitted that case was in relation of cases of murder and therefore is inapplicable in the instant appeal.

I have considered the submissions of the appellant and those of counsel for the respondent.

I find merit in the submissions of counsel for the respondent. In her submission she pointed out that the decision of the Supreme Court in the case of Francis Muruatetu and another vs Rep; supra is not applicable in the instant case. The Supreme Court in its 2nd decision in Francis Karioko Muruatetu and another vs Republic; Katiba Institute and 5 others (Amicus Curiae (No. 2) (2021) eKLR restated the legal position that that decision was confined to cases of murder. In that regard the Supreme Court pronounced as follows:

> **"** *To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 295(2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."*

In view of the foregoing, it is clear that the principle in Muruatetu No. 1 and No. 2 in respect of the court's sentencing discretion in capital cases is only confined to murder cases. In Muruatetu No. 2, the Supreme Court went further and stated that:

> *"that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution…………………."*

In the circumstances the appellant's reliance on the Muruatetu case is unhelpful. It therefore follows that this court does not have discretion to interfere with the prescribed minimum sentence that was imposed by the trial court. I therefore decline to do so.

In the premises the appellant's appeal fails and it is hereby dismissed.

JUDGMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THIS DAY OF THE 10TH SEPTEMBER, 2021.

J. M. BWONWONG'A

JUDGE

In the presence of

C/A – Kizito

The appellant in person

Ms. Nyakibia for the Respondent