



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL MISC. APPL. NO. 35 OF 2020**

**KYALO MWINZI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. In the application before court the Applicant seeks to have this court consider the constitutionality of the mandatory nature of the sentence imposed on him in Criminal Case No. 670 of 2014. He cited several cases which took into account the case of Francis Karioko Muruatetu & Others vs Republic Petition No. 15 & 16 (Consolidated) of 2015 a Supreme Court decision.
2. Initially the State objected to the application in their written submissions urging that the decision of Muruatetu cannot apply retroactively. Secondly the Applicant had appealed to this court and a Judgement delivered.
3. At the hearing of the application the State conceded to application.
4. The application was argued before the Supreme Court issued further directions on the 6<sup>th</sup> of July 2021 which clarified and explained its Judgement in the Muruatetu case.
5. The Applicant herein was originally charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006, convicted and sentenced to life imprisonment.
6. Being aggrieved by the Judgement he appealed to this court in Criminal Appeal No. 50 of 2015. The court found no merit in the appeal, upheld both conviction and sentence.
7. For starters this court having upheld the conviction and sentence on appeal, it cannot sit on appeal against its own Judgement.
8. The only recourse left after the first appeal was to prefer a second appeal to the Court of Appeal
9. Thirdly the directive of the Supreme Court in the Muruatetu case clarified that the case did not give reprieve for those charged under the Sexual Offences Act, or any other statute or section of the law. The Supreme Court made it clear that it only dealt with Section 204 of the Penal Code in the said case. So that the said decision does not in anyway support the current application.
10. For the above reasons this application must fail.

It is dismissed.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021.**

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**ALI-ARONI**

**JUDGE**