

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E019 OF 2021

EUGINE AMANYA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This matter was placed before me for the purpose of giving directions, in view of the recent decision by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae [2021])* (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), with respect to mandatory sentences, where it was clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases.

2. The Motion herein, undated, but filed herein on 5th March 2021, principally rides on the decision, in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), for the petitioner seeks review of his sentence, where he had been convicted of gang defilement, under section 9 of the Sexual Offences Act, No. 3 of 2006, in Kakamega CMCCRC No. 85 of 2016, and was sentenced to serve five years in prison. He does not appear to have filed an appeal.

3. The offence, the subject of the instant proceedings, is not murder, but defilement, as defined in section 8(1)(3) of the Sexual Offences Act, the decision in *Francis Karioko Muruatetu & another vs. Republic [2017]* eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), therefore, does not apply to it. As a consequence, the High Court has no jurisdiction to review the sentence that was imposed by the trial court, based on the decision in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae [2021])* (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ). In any case, the issues raised with regard to sentence could and should have been raised in an appeal against sentence. The applicant did not take advantage of his right to appeal, and the issues raised are being raised too late in the day. The application is incompetent. The file herein to be closed.

4. The Deputy Registrar to cause copies of this ruling to be availed to the petitioner and the office of the Director of Public Prosecutions.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF NOVEMBER 2021

W MUSYOKA

JUDGE