

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 121 OF 2020

PATRICK WASICHE ODHIAMBO.....APPLICANT

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 application herein, dated 17th November 2020, and filed herein on even date, 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 defilement, under sections 8(1)(2) of the Sexual Offences Act, No. 3 of 2006, in Mumias CMCCRC No. 329 of 2012, and was sentenced to serve life in prison. He filed appeals in Kakamega HCCRA No. 222 of 2012 and Kisumu CACRA No. 96 of 2016, where the appellate courts affirmed the conviction in Kakamega CMCCRC No. 17 of 2010, but the Court of Appeal reduced the sentence to twenty-five years' imprisonment.

3. The offence, the subject of the instant proceedings, is not murder, but defilement, as defined in section 8(1)(2) 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 event, the review that the applicant seeks, for reckoning of the period spent in custody, was something he should have argued on appeal, and if the appellate courts had seen any merit in it they would have addressed if in their judgments. Since there is no jurisdiction on my part to entertain the petition, I shall strike it out, for it is incompetent. The said file shall be closed.

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

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

W MUSYOKA

JUDGE