

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. E004 OF 2021

PETER WAFULA WANGAPETITIONER

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 5TH January 2021, 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 gang rape, under section 10 of the Sexual Offences Act, No. 3 of 2006, in Mumias PMCCRC No. 14 of 2016, and was sentenced to serve fifteen years in prison. He filed appeals in Kakamega HCCRA No. 51 and 52 of 2018, but the appellate court affirmed the conviction, and confirmed the sentence.

3. The offence, the subject of the instant proceedings, is not murder, but gang rape, as defined in section 10 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 within the appeal for consideration by the appellate court. Since there is no jurisdiction on my part to entertain the application, I shall strike it out, for it is incompetent. The said file shall 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