

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 36 OF 2020

MAXWELL MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein was convicted in Vihiga PMCCRC No.512 of 2012 (S. Mwangi SRM) of defilement, contrary to section 8(1)(2) of the Sexual Offences Act, No. 3 of 2006, and was sentenced to life imprisonment. He filed an appeal in Kakamega HCCRA No. 49 of 2013 (Sitati J), where the conviction was affirmed and the sentence was confirmed. He moved on to the Court of Appeal, in Kisumu CACRA No. 139 of 2015 (Makhandia, Kiage & Otieno-Odek JJA), where, again, the conviction was affirmed and upheld, but the sentence was reduced to fifteen years' imprisonment on the basis of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ).

2. The matter before me is a Motion, undated, but filed herein on 23rd July 2020, which he has brought after the outcome of his second appeal was pronounced on 31st October 2019. He seeks review of his sentence of imprisonment so that the same is substituted with probation. He claims to have served a considerable duration of the sentence.

3. When the matter was placed before me for directions it was directed that the probation office assesses his circumstances, and files a report. That was done, and a re-sentencing report was prepared, and placed on record, dated 17th February 2021, and filed herein on 9th March 2021. The probation officer recommended that the applicant be placed on probation for one year. When the matter came up in court after the filing of the report, Ms. Omondi for the State, submitted that the applicant had been re-sentenced by the Court of Appeal, and that there was no jurisdiction for the High Court to revise the sentence again. On his part, the applicant urged me to reckon his sentence from the day he was arrested.

4. There is a new development with respect mandatory sentences other than those relating to murder. The Supreme Court recently stated 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), 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, and not in other cases, such as defilement.

5. The Motion herein was obviously filed with *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) in mind. The applicant seeks review of his sentence, where he had been convicted of defilement of a girl. 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). Since there is no jurisdiction on my part to entertain the application, I shall strike it out, for it is incompetent. The instant file shall be closed.

6. In any case, the applicant benefitted from *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), before the decision of *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) clarified the position. Ideally, the life sentence for defilement would have remained intact had *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) come earlier.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER 2021

W MUSYOKA

JUDGE