



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CRIMINAL APPL. NO. 134 OF 2019**

**DANIEL MUTINDA MUNYILU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON RESENTENCING**

1. Daniel Mutinda Munyilu, the Applicant herein was charged with an offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act.
2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted of the count with which he was charged and that the trial court sentenced him to serve 20 years imprisonment.
3. The Applicant was aggrieved by that decision and filed an appeal to the High Court against both the conviction and sentence. The appeal was duly heard. A judgment was delivered on 30.11.2016 by Lady Justice P. Nyamweya. The judgment confirmed the conviction and sentence and thus his appeal was dismissed.
4. The Applicant did not appeal against the decision of the High Court and opted to file a new application before the High Court in which he seeks resentencing. Pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR** declaring the mandatory death sentence unconstitutional, several applications for resentencing have been lodged before the courts. Article 50(2)(p) of the constitution provides that an accused person has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. In **S v. Ndlovu 2012 (1) ZLR 393** the Zambian High Court observed that sentencing must utilise an engendered approach and a constitutional and human rights perspective and from the import of Article 50(2) (p) of the constitution, the applicant is not entitled to resentencing.
5. The cited case has necessitated resentencing of all persons previously sentenced to the mandatory death sentence and the applicant was not sentenced to death but to 20 years imprisonment. I find that he is not a beneficiary of the Muruatetu case (supra).
6. Further as pointed out by the state, this is an inappropriate application as the court is functus officio. Such an application can only be entertained by a higher Court – the Court of Appeal. This application lacks merit and is dismissed.

Orders accordingly.

**Dated and delivered at Machakos this 16<sup>th</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**