REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 7 OF 2020

ISAIAH MWENDA RARU .....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Isaiah Mwenda Raru ("the petitioner"),** was charged with the offence of defilement contrary to ***section 8 (1)*** as read with ***section 8 (2) of the Sexual Offences Act.*** He was found guilty of the offence by the trial Court and sentenced to life imprisonment.

2. He appealed against the said decision in **Criminal Appeal No. 72 of 2009** in which the Court found that the age of the complainant had not been established. In this regard, the charge of defilement was substituted with one for rape contrary to ***section 3 of the Sexual Offences Act*** and the petitioner was sentenced to 20 years imprisonment.

3. Vide his petition filed on 10/2/2020, the petitioner prays that this court do commute the sentence and take into account the time he had previously spent in custody. He relied on **Abdul Oduor & Another vs Republic Criminal Appeal No. 18 & 102 of 2018** in support of his said contention.

4. The Respondent opposed the application and submitted that the petitioner has not exhausted his appellate rights.

5. Resentencing petitions were pre-empted by the Supreme Court's decision in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** where the court held: -

> ***"Here in Kenya, in the case of Mutiso, the Court of Appeal stated [para 38]:***
>
> ***"In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."***
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> ***We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.***
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> ***It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein".***

6. The resentencing application have to abide by the provisions of the Criminal Procedure Code. The **Francis Muruatetu's case (supra)** as read with ***section 364 (5) of the Criminal Procedure Code*** limits the jurisdiction of this court to instances of resentencing only to a party who has exhausted his rights of appeal. Only then that a petitioner can seek re-sentencing in instances set out in the Muruatetu case. That is not the case in this petition.

7. To the extent that the petitioner has not exhausted his appellate rights, the petition is premature and is therefore dismissed. Leave to appeal to the Court of Appeal 14 days granted.

DATED and **DELIVERED** at Meru this 16th day of July, 2020.

A. MABEYA

JUDGE