



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISC CRIM. APPL. NO. 179 OF 2019

MORRIS NZIOKA MBITHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The prayer that remains for the determination of this court in the application is the request by the applicant that in line with the decision in **Francis Karioko Muruatetu & Anor v R (2017) eKLR** the sentence that was meted on him be reviewed.

2. The Application is supported by an annexed affidavit of the applicant on the following grounds:-

(a) That the applicant was sentenced to life imprisonment for defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act.

(b) That the well laid principles regarding a convict being a first time offender be followed.

3. The Application was opposed by the Respondent vide replying affidavit deponed on 6.7.2020 by Martin Mwongera who averred that the doctrine of functus officio bars the court from entertaining the instant matter.

4. The applicant prayed that the application be allowed vide submissions filed on 17.7.2020. I have considered the Application and the submissions presented and find that the issue for determination is what orders this court may make.

5. The application follows a number of several applications that the applicant has presented before the court in the past.

6. The applicant had been convicted of an offence of defilement by the trial court and sentenced to life imprisonment. His appeal to this court was dismissed. He again filed an application for review and an order for the case to start afresh before the lower court and which application was dismissed. He has now filed the present application seeking for review of sentence under the principles laid down in the case of **Francis Karioko Muruatetu & Anor v R (2017) eKLR**.

7. As appreciated by the Supreme Court in Muruatetu Case (supra):

“Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing....

In the said case, it was ordered thus;

a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

8. In this regard, the cited case has no bearing to the facts before me as the case was in relation to a mandatory death sentence for murder convicts and yet the appellants are facing a life sentence for defilement. Further, this court has already handled the appellants' appeal as well as

a review application. In the review application the applicant was advised to move to the Court of Appeal. This court is already functus officio and the only recourse for the applicant is to approach the appellate court.

9. The upshot is that the applicant's application filed on 14.11.2019 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 12th day of October, 2020.

D. K. Kemei

Judge