

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

MISCELLANEOUS CRIMINAL APPL. NO. 123 OF 2019

JOSEPHAT MACHIWA OKOKO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON RESENTENCING

1. **Josephat Machiwa Okoko**, the Applicant herein was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.

2. The Applicant pleaded not guilty and the case proceeded to full hearing. He was convicted of the count he was charged with and though the trial court record is not available, it can be gleaned from the pleadings on record that the **Chief Magistrate at Makindu law courts** sentenced him to serve 20 years' imprisonment.

3. The Applicant was aggrieved by that decision of the trial court and filed an appeal to the High Court vide **Machakos HCCRA No.59 of 2010** against both the conviction and sentence. The appeal was duly heard. As can be gleaned from the notice of withdrawal of appeal in the court of Appeal, judgment was delivered on 4.4.2017 in which the appeal was dismissed. The judgment confirmed the conviction and sentence. The applicant did appeal against the decision of this court to the Court of Appeal and that the record indicates that the appeal was withdrawn on 20.5.2020. He then opted to file the present application in which he seeks a resentencing pursuant to the Supreme Court decision in **Francis Kariuki Muruatetu & Another v Republic & 5 Others [2017] eKLR** declaring the mandatory death sentence unconstitutional.

4. 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. From the import of Article 50(2) (p) of the constitution, the applicant is not entitled to re-sentencing.

5. The cited case has necessitated resentencing of all persons previously sentenced to the mandatory death sentence. The applicant herein was not sentenced to death but to 20 years' imprisonment. That particular sentence was not unconstitutional in any way as it was provided by statute namely the Sexual Offences Act No.3 of 2006.

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 court already heard and determined the applicant's first appeal and thereafter became functus officio. The next frontier for the applicant should be the Court of Appeal. Even though the applicant has withdrawn his appeal, he still has the right to bring it up as the same had not been fully determined on merit.

7. In the result it is my finding that the Applicant's application filed on 31.7.2019 lacks merit. The same is dismissed.

It is so ordered.

Dated and delivered at Machakos this 9th day of December, 2020.

D. K. Kemei

Judge