REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 25 OF 2020

BENSON NJERU NYAGA.....APPLICANT

VERSUS

REPUBLIC...........................RESPONDENT

RULING

1. The petitioner herein moved the court vide a petition dated 14/02/2020 wherein he prayed for myriad of orders and/ or declarations. However, it is apparent from perusal of the petition that the petitioner substantively prayed for resentencing pursuant to the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and was applied by the Court of Appeal in **Evans Wanjala Wanyonyi –vs- Republic (2018) eKLR**.

2. The petitioner's case is that he was convicted of the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 in Siakago PM Criminal Case No. 1 of 2018 and sentenced to life imprisonment. He subsequently appealed to the High Court at Embu vide HC CRA No. 6 of 2019 but the said appeal was dismissed and sentence upheld. That however, he did not appeal against the High Court's decision. He has hence filed the instant petition.

3. At the hearing of the petition, the petitioner erected to rely on his written submissions and prayed for leniency stating that he had learned a lot while in custody. Ms. Mate, the Learned state counsel made her oral submissions wherein she submitted that she was not opposed to the review of the sentence. However, she invited the court to consider the age of the minor (victim) and the circumstances under which the offence was committed.

4. I have considered the petition herein and the submissions by the parties in relation to the same. The issue which I have picked out as warranting determination is whether this petition is merited.

5. As I have pointed out, the main relief sought by the petitioner is resentencing pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & Another –vs- Republic (supra)**. In the said case, the Supreme Court held at (paragraph 69) that Section 204 of the Penal Code was inconsistent with the Constitution and invalid to the extent that it provided for the mandatory death sentence for murder and the court proceeded to remit the matter to the High Court (trial court) for re- hearing on sentence only (re-sentencing)**.** It was the court's opinion (at paragraph 111 therein) that it was prudent that the trial court takes into consideration and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.

6. The Court of Appeal in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** extended the reasoning of the Supreme Court in the **Muruatetu's decision** to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. **Pursuant to this jurisprudence,** mandatory minimum sentence is unconstitutional and an appellate court is bound to interfere with

it. {See also **B W v Republic [2019] eKLR**, **Christopher Ochieng v Republic [2018] eKLR** and **Evans Wanjala Wanyonyi v Republic (supra)**}. As such, it is my opinion that this court has jurisdiction to resentence someone who approaches the court and wherein such person was convicted and compulsory minimum sentence meted out.

7. However, in the instant case, as the petitioner indicated in the petition, upon conviction, he appealed to this court vide HC CRA No. 6 of 2019 but the said appeal was dismissed (by Justice F. Muchemi). In dismissing the appeal, the Judge extensively directed her mind and considered the application of **Muruatetu's decision** to the appeal, and the principles of the application of the said decision and found the sentence meted on the petitioner herein not fit to be interfered with. It is the same issue which the petitioner has brought before this court for determination. The question therefore is whether this court can entertain the instant application.

8. Under the doctrine of res judicata, once a court of competent jurisdiction has heard and determined an issue, such a court cannot subsequently entertain and/ or determine a similar issue between the same parties. As a principle, the finality of decisions in a criminal process heard on the merits is fundamental in any legal system as it ensures fairness, integrity, accountability, certainty, equity, governance, predictability in the dispute resolution under Article 10 of the Constitution. The issue having been determined by a court of concurrent jurisdiction with this court, then this means that pursuant to the doctrine of *res judicata*, the petitioner is estopped from bringing a similar issue. (See the persuasive authority in **Jackson Juma Kenga –vs- Republic [2019] eKLR).**

9. A party aggrieved by a decision of a court ought to appeal to the higher court in the hierarchy of courts and not to bring back the same issues in the same court but camouflaged in other forms. In the instant case, the petitioner's recourse was to appeal to the Court of Appeal which has the jurisdiction to hear appeals from the High Court under article 164(3) of the Constitution and section 379(1) of the Criminal Procedure Code.

10. Where an issue is res judicata (just like herein) the court is bereft of jurisdiction over the same. As it is settled law, a ccourt of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. (See **the owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR).** It is my opinion that this court ought to lay down its tools. As such the application herein ought to be dismissed. The same is hereby dismissed.

11. It is so ordered.

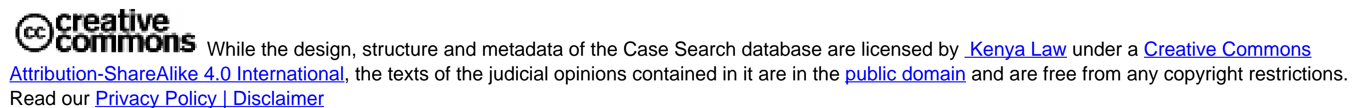
Delivered, dated and **signed** at **Embu** this **16th** day of **December, 2020.**

L. NJUGUNA

JUDGE

……………………………………..for the Appellant

……………………………………..for the Respondent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