



REPUBLIC OF KENYA



KENYA LAW
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**Abdirahman v Republic (Criminal Revision E158 of 2022)
[2023] KEHC 24715 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL REVISION E158 OF 2022
JN ONYIEGO, J
OCTOBER 31, 2023**

BETWEEN

HASSAN ABDIRAHMAN APPLICANT

AND

REPUBLIC RESPONDENT

(Cr. Appeal No. 41/2014 Garissa High Court)

RULING

1. The applicant was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act*. Particulars were that on the 7th day of January, 2014 at around 1800 hours in Mandera Central district of Mandera County intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ of SA namely vagina a girl aged nine (9) years.
2. He was also charged with the alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006. Particulars were that on the 15th day of January, 2014 at around 1800 hours in Mandera central district of Mandera County intentionally touched the vagina of SA a child aged nine (9) years with his penis.
3. Having returned a plea of not guilty, the matter proceeded to full trial. He was finally found guilty and sentenced to life imprisonment. Dissatisfied with the conviction and sentence he preferred an appeal vide Cr. Appeal No. 41/2014 Garissa High Court. Upon canvassing the same, the Hon. Justice Dulu dismissed the appeal and upheld both the conviction and sentence. The court stated that the trial court had no discretion in imposing the sentence it did.
4. Subsequently, the applicant filed the instant notice of motion on 23-8-2023 seeking revision on sentence. In what he referred to as mitigating submissions, the applicant submitted that life imprisonment as a mandatory sentence is unconstitutional hence a trial court can interfere with it.



5. To support his submission, he quoted the case of: *Phillip Mueke Maingi & 3 others -vs- Republic* in Petition No. E017 of 2021 Machakos and Edwin Wachira and 9 others in Petition number 97 of 2021 Mombasa where both courts held that mandatory sentences cannot take away the discretionary powers of a court in sentencing. In response, the state did oppose the application stating that the court is functus officio and that the appeal should be dismissed.
6. I have considered the application herein and response thereof. The crux of the application is review of sentence on grounds that the mandatory nature of life imprisonment is unconstitutional.
7. I am alive to the holding in the Court of Appeal decision in Julius Kitsao Manyesho Malindi Cr. Appeal No. 12 of 2021 where it was held that imposition of a sentence of life imprisonment was unconstitutional as it contravened article 27 and 28 of *the Constitution* on the right to integrity in so far as it leads to one to have an indeterminate life.
8. However, under section 364 (5) of *Criminal Procedure code* any person dissatisfied with an order on sentence, his recourse is to appeal unless proved that there was an illegality or impropriety committed by either the imposition of excessive sentence or consideration of wrong legal principles. In my view, the only recourse the applicant has is to appeal against Judge Dulu's Judgment. The court is in the circumstances functus officio.
9. Accordingly, the appeal is dismissed for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 31ST DAY OF OCTOBER, 2023

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J. N. ONYIEGO
JUDGE

