



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 69 OF 2019

KILONZI KIVALU MAAKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted and sentenced to life imprisonment for offence of defiling a 3 years and 9 months 27 days girl.
2. He appealed to High Court in Garissa HCCRA No. 19 of 2015 which was dismissed. He never appealed again.
3. He now approaches this court for resentencing as the trial court and High Court held that life imprisonment was by law mandatory sentence thus mitigations were not considered.
4. The High Court verdict was on 15/6/2016 before the **Muruatetu** case decision of 17/12/2017 which outlawed mandatory aspect of a sentence.
5. The opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”**

6. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

7. The prosecution does not oppose sentence but proposes the same matter be referred to the trial court for sentence.
8. Thus, the court makes the following orders:

- i. **Life sentence is set aside.**
- ii. **Matter referred back to lower court at Mwingi for sentencing.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 23RD DAY OF JUNE, 2020.

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C. KARIUKI

JUDGE