



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL MISC. APPLICATION NO. 64 OF 2019**

**JAMES MWANGANGI SYENGO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant was convicted and sentenced to serve life sentence in Kyuso Resident Magistrate's Court for defilement of a girl aged 6 years.
2. He lodged HCCRA No. 62 of 2013 Garissa which was dismissed.
3. He later filed Court of Appeal Case No. 218 of 2014 which he withdrew on 20/5/2020.
4. He has now lodged instant application for resentencing relying on principles of **Muruatetu case** which stated that mandatory aspect of sentence is unconstitutional. 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.”*

5. 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.”*

6. The prosecution does not oppose the application though proposes same to be referred to Kyuso Magistrate's Court for sentence.
7. Thus court makes the following orders:-

*(i) The life sentence is set aside.*

*(ii) The matter is remitted to Kyuso Magistrate's Court for sentence after mitigations.*

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 23<sup>RD</sup> DAY OF JUNE, 2020.**

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**C. KARIUKI**

**JUDGE**