

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL MISC. APPLICATION NO. 42 OF 2019

JOSHUA KATHOKA MALUKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant was convicted and sentenced to life imprisonment for defiling a girl aged 8 years in Principal Magistrate's Court at Kyuso.
2. He lodged HCCRA No. 133 of 2013 at Garissa which was also dismissed on 30/6/2015 upholding mandatory life sentence.
3. The matter proceeded to Court of Appeal which also dismissed the appeal.
4. He now moves this court under the principles of **Muruatetu** case which held that mandatory aspect of a 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 but proposes the matter to be taken to trial court for sentence.
7. Thus, this court makes the following orders:

(i) The life sentence is set aside.

(ii) The matter is referred to Kysuso Principal Magistrate's Court for sentence after mitigations.

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

.....

C. KARIUKI

JUDGE